The Labour Relations Board
Saskatchewan

ROGER JOHNSTON, Applicant v. SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 333, Respondent

LRB File No. 157-02; January 8, 2003
Chairperson, Gwen Gray, Q.C.; Members: Leo Lancaster and Maurice Werezak

For the Applicant: Ted Koskie
For the Respondent: Rod Gillies

Duty of fair representation – Contract negotiation – Board reviews requirements of duty and finds that they apply to collective bargaining.

Duty of fair representation – Scope of duty – Board reviews requirements of duty and finds that they apply to collective bargaining.

Duty of fair representation – Scope of duty – Board reviews requirements of duty and finds that they apply to collective bargaining – Board finds that while union was negligent in its failure to consider applicant's issue in collective bargaining, negligence was not serious or major and thus not a breach of duty – Board dismisses application.

***The Trade Union Act,* ss. 5(d) and 25.1.**

REASONS FOR DECISION

Background:

[1] Roger Johnston (the "Applicant") filed an unfair labour practice application on August 21, 2002 alleging that Service Employees' International Union, Local 333 (the "Union") had failed in its duty to fairly represent him by failing to negotiate any increase in his wages over the course of two collective agreements. The application was brought under s. 25.1 and s. 42 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). The Union denied that it had committed an unfair labour practice in relation to the bargaining of the two collective agreements. A hearing of this matter was held in Saskatoon on November 19, 2002.

Facts:

[2] The Applicant is the head cook at the Primrose Chateau Retirement Home in Saskatoon. He helped organize the Union at his work place and was a member of the first bargaining committee for the Union. During the first round of collective bargaining, the Applicant agreed that his wage rate of $13.25/hour could be red-circled in order to get the first agreement settled. The agreement covered the period from January 25, 1999 to January 31, 2002. The head cook rate of pay was set at $11.50/hour and moved up over the course of the term of the collective agreement to $12.30/hour.

[3] When he agreed to be red-circled, the Applicant understood that the Union would negotiate an increase in his pay in the second round of collective bargaining. The Union did obtain a small increase for the Applicant in the second round of bargaining but the increase does not come into effect until the third year of a four-year agreement.

[4] The Union and the Employer entered into the renewal agreement on July 3, 2002. It is effective from February 1, 2002 to January 31, 2006, a four-year period. The parties agreed to the following wage increases: 3.25% increase effective February 1, 2002; 2.50% increase effective February 1, 2003; 2.50% increase effective February 1, 2004; 2.25% increase effective February 1, 2005. The hourly rate for the head cook position moves from $12.70/hour to 13.64/hour over the life of this agreement. The Applicant remains red-circled at $13.25/hour and does not see an increase in his hourly rate until February 1, 2004 when his rate moves to $13.34/hour (a $.09/hour increase).

[5] The Applicant was understandably upset to learn that his wages will remain frozen for a further two years and then will only change marginally. The Applicant was initially a member of the bargaining team for the 2002 round of collective bargaining but resigned his position in March 2002 for reasons unrelated to this case. He claims that he informed the Union representative, Mr. Laurie, that he expected to receive a wage increase in the 2002 round of bargaining. The Applicant learned of the meager increase in his rate of pay just prior to the ratification meeting on July 10, 2002

and he expressed his displeasure to the Union. The Union membership, however, ratified the agreement.

[6] Mr. Grabowski is a work colleague of the Applicant's and he took over the Applicant's position on the bargaining committee in March 2002. Mr. Grabowski stated that he was aware that the Applicant wanted a wage increase in the second round of bargaining but this issue was not raised by the Union representative at the bargaining table in the 2002 round of negotiations. Mr. Grabowski said that the Union focused on bringing the Saskatoon rates of pay up to the rates that the Employer was paying at its facility in Regina, which was not unionized. According to Mr. Grabowski, the highest paid cook at the Regina facility received $12.00/hour. The Applicant, however, understood that the head cook in Regina was considered to be a manager and was paid a salary in excess of $30,000.

[7] Mr. Grabowski also said that the Applicant raised the issue of his red circling with him at work. Mr. Grabowski did not understand what the term "red-circling" meant so he did not relay this request to the Union representatives responsible for the Union's negotiations.

[8] Robert Laurie, Union representative, stated that in January 2002 the Union selected a bargaining committee consisting of the Applicant and his wife, Judy. Mr. Greg Trew, international representative of the Union, was responsible for negotiating the first collective agreement with Mr. Laurie assisting him. Mr. Laurie took over responsibility for negotiations in 2002. Mr. Laurie was aware that the Applicant's wage rate was "red-circled" in the first collective agreement.

[9] At the January meeting, the bargaining committee asked members of the Union to complete a bargaining questionnaire. The Applicant completed his questionnaire and raised the issue of obtaining wages comparable to those paid by the Employer at its Regina operations. He did not specifically raise the issue of his own wage and his desire to obtain a wage increase. Mr. Laurie indicated that he did not ask the Applicant if he wanted his wages dealt with in the second round of bargaining.

[10] At a second meeting to discuss bargaining proposals in February 2002, the members adopted a list of bargaining proposals. Mr. Laurie does not recall any discussion relating to the red circling of the Applicant, nor to his desire to obtain a wage increase.

[11] In March, a new bargaining committee took over from the Johnstons. In addition, a new Union representative, Mr. Don Kitchen, was appointed to assist in the collective bargaining. Mr. Laurie introduced Mr. Kitchen to the Applicant at the workplace in May 2002. At that time, the Applicant did not raise the issue of his desire for a wage increase.

[12] The new bargaining committee members and Mr. Laurie and Mr. Kitchen put the final bargaining package together in May 2002. The bargaining package dealt with the Union's desire to obtain the same pay rates as Regina, to improve communication in the workplace, with the head housekeeper issue, and a request for shoes and other benefits. Mr. Laurie indicated that the bargaining proposals included all of the issues members raised in their questionnaires. The red circling of the Applicant's position was not included in the proposals.

[13] The Union and the Employer engaged in negotiations on July 2 and 3, 2002, and, as indicated above, arrived at the memorandum of agreement on July 3, 2002. Mr. Laurie said that a couple of days prior to the ratification meeting, the Applicant phoned Mr. Laurie to ask if the Union had been able to negotiate a wage increase for him. Mr. Laurie indicated that this was the first time he had been asked about the matter and he encouraged the Applicant to attend the ratification meeting. The Applicant did attend the ratification meeting and raised the issue, but the majority of members voted by secret ballot to ratify the tentative collective agreement.

[14] Mr. Laurie did acknowledge that he had had extensive discussions with the Applicant about his job duties and the fact that the Applicant felt overworked by the assignment of additional duties to his position. However, he did not equate these discussions with a concern about the Applicant's rate of pay.

[15] Mr. Laurie felt that the head cook rate in the collective agreement fell generally within the range established in the industry for head cooks. However, we were not presented with any comparable collective agreements setting out the rates for similar positions.

Arguments:

[16] Mr. Koskie, counsel for the Applicant, referred the Board to its decisions in *Banga v. Saskatchewan Government Employees' Union,* [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-99; *United Steelworkers of America v. Six Seasons Catering Ltd.,* [1994] 3rd Quarter Sask. Labour Rep. 311, LRB File No. 118-94, and *Staniec v. United Steelworkers of America, Local 5917,* [2001] Sask. L.R.B.R. 405, LRB File No. 205-00, for the proposition that the duty of fair representation applies to the negotiation of collective agreements, as well as to the administration of the collective agreement through the grievance and arbitration provisions.

[17] In this case, the Applicant argues that he made it clear in the first round of collective bargaining that he would accept a wage freeze for the term of the first collective agreement, but that he would expect the Union to obtain a wage increase for him in the next round of bargaining. The Union did not do so, nor did it consider his situation when it bargained the second agreement. The Applicant pointed out that the Union did not balance the interests of employees in the bargaining unit in arriving at the collective agreement – it simply failed to address his wage concerns in any manner. When the Union fails to even consider the position of a member, then it has failed in its basic duty of fair representation.

[18] Mr. Gillies, counsel for the Union, argued that the evidence demonstrated that the Applicant did not raise any concerns with Mr. Laurie regarding his rate of pay and did not, in particular, raise the issue in the questionnaire that was designed to elicit employee concerns. The Union relied on the Board's decision in *Kozak v. United Food and Commercial Workers Union, Local 1400,* [1994] 4th Quarter Sask. Labour Rep. 213, LRB File No. 170-94, for the proposition that the duty of fair representation requires the union to act without "serious or major negligence," not simple negligence. In this case, the Union was unaware of the Applicant's desire to have his wage rate changed.

Analysis:

[19] The common law duty imposed on trade unions to fairly represent employees in collective bargaining arises out of the granting of exclusive representational status to the trade union when it is certified to represent employees in a bargaining unit. As the Board explained in the *Banga* case, *supra,* at 97:

> *As we have pointed out before, the duty of fair representation arose as the quid pro quo for the exclusive status as bargaining agent which was granted to trade unions under North American collective bargaining legislation. Once a certification order is granted on the basis of majority support, members of the bargaining unit have no choice as to who will represent them, whether or not they were among those who supported the union. This exclusive status gave trade unions security and influence; it was, however, viewed as imposing upon them an obligation to represent all of those they represented in a way which was not arbitrary, discriminatory or in bad faith.*
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> *The concept of the duty of fair representation was originally formulated in the context of admission to union membership. In the jurisprudence of the courts and labour relations boards which have considered this issue, however, it has been applied as well to both the negotiation and the administration of collective agreements. Section 25.1 of The Trade Union Act, indeed, refers specifically to the context of arbitration proceedings. This Board has not interpreted the section in a way which limits the duty to that instance, but has taken the view that the duty at "common law" was more extensive, and that Section 25.1 does not have the effect of eliminating that duty of fair representation in the context of union membership, collective bargaining, or the grievance procedure.*

[20] The duty of fair representation requires the Union to act in a manner that does not demonstrate bad faith, arbitrary treatment or discrimination. The general requirements were set out by the Supreme Court of Canada in *Canadian Merchant Services Guild v. Gagnon*, [1984] 1 S.C.R. 509. In particular, the Court held that "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 towards the employees."

[21] In *Radke v. Canadian Union of Paperworkers,* [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, the Board expanded on the requirement to avoid "arbitrary" treatment as follows:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favourtism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*

[22] In the *Six Seasons Catering Ltd.* decision, *supra,* the Board examined the application of the duty to bargain in good faith in relation to the negotiation of a collective agreement and commented as follows at 318:

> *In the case of the negotiation of provisions for a collective agreement, however, there are obvious difficulties of determining what constitutes a breach of the duty of fair representation. Unlike the situation which obtains in the case of decisions made in relation to grievances, the range of considerations of policy, practicality, strategy and resources which are legitimately taken into account are virtually limitless. Although labour relations tribunals and courts have acknowledged that this aspect of the duty exists, they have shown themselves reluctant to contemplate the chastisement of trade unions for a breach of the duty to negotiate fairly.*
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> *The difficulty of determining how the principles of the duty of fair representation would apply where the issue arises in the context of the bargaining process is particularly acute in the case of an allegation that the conduct of the union is "discriminatory," which is the sort of charge the Union fears here. Collective bargaining is by nature a discriminatory process, in which the interests of one group may be traded off against those of other groups for various reasons - to redress historic imbalances, for example, or to reach agreement within a reasonable time, or to compensate for the achievement of some other pressing bargaining objective. The role of the union is to think carefully about the implications of the choices which are made, and no employee or group of employees can be assured that their interests will never be sacrificed in favour of legitimate bargaining goals or strategies.*

[23] In the present case, there was no evidence that suggested the Union considered the position of the Applicant when engaged in collective bargaining with the Employer. The Union did not fail to negotiate a wage increase for him as a result of some balancing of interests – it simply failed to consider his position.

[24] In its defense, the Union claims that the Applicant ought to have raised the issue with the bargaining committee. We find that he did raise the issue both to Mr. Grabowksi, a member of the bargaining committee and at the ratification meeting. The Applicant also spoke to Mr. Laurie on several occasions about his workload. Mr. Laurie was aware that the Applicant's wages had been red-circled for a three-year period under the first collective agreement, yet he did not appear to take any notice of that fact, nor did he prepare any research or undertake any analysis of the issue in terms of assessing whether the Applicant's wage rate fell within a normal range for a head cook. It seemed as though the fact that the Applicant would go without a wage increase for some six years escaped Mr. Laurie's attention until the Applicant raised the matter after the Union had entered into the tentative agreement. As required by the *Radke* case, *supra,* Mr. Laurie was not "alert to the significance for those employees of the interests which may be at stake."

[25] In our view, Mr. Laurie was negligent in his approach to the negotiation of the collective agreement with respect to the Applicant's wage increase. However, the test that we must apply on duty of fair representation cases requires that the Union be guilty of serious or major negligence in undertaking its duties as the exclusive representative of the employee. The Union in this instance did obtain general wage increases that are consistent with the pattern of settlement in Saskatchewan during the period in question. The wage increases were applied to the head cook position, although they did not result in any significant increases for the Applicant during the life of the collective agreement.

[26] In this case, while we find that the Union was lax in its approach to the negotiation of the Applicant's wages, we cannot say that it was guilty of serious or major negligence.

[27] Although the Union signed an agreement for a four-year period, under s. 33(3) of *The Trade Union Act,* it may serve notice on the Employer to bargain at the conclusion of the third year of the agreement. Section 33(3) of the *Act* provides as follows:

> *33(3) Where a collective bargaining agreement hereafter entered into provides for a term of operation in excess of three years from its effective date, its expiry date for the purpose of subsection (4) shall be deemed to be three years from its effective date.*

[28] In circumstances where the Union did not fully consider the effect of the red-circling on the Applicant, the Union may wish to conduct an analysis of the Applicant's job duties and his pay and consider whether it would be worthwhile serving notice to bargain on the Employer as permitted under s. 33(3).

[29] The Board dismisses the application having found that the Union was not seriously negligent in relation to negotiating the collective agreement.

DATED at Regina, Saskatchewan this **8th** day of **January, 2003.**

LABOUR RELATIONS BOARD

Gwen Gray, Q.C.
Chairperson