The Labour Relations Board
Saskatchewan

WYNNE LEEDAHL, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 248-P, Respondent

LRB File No. 030-03; May 10, 2004
Vice-Chairperson, Wally Matkowski; Members: Gerry Caudle and Clare Gitzel

For the Applicant: Richard Gabruch
For the Respondent: Gary Bainbridge

Duty of fair representation – Scope of duty – Union not required to convince or encourage applicant to file grievance against employer – Even if union erred by not advising applicant of possibility of accommodation grievance, error does not amount to gross negligence – Board declines to find breach of duty of fair representation.

Duty of fair representation – Contract administration – Union retained counsel who was present in settlement negotiations relating to grievances – Union considered strengths and weaknesses of grievances and was aware that applicant did not want to return to work for employer – Union did not violate duty of fair representation by negotiating and agreeing to monetary settlement of grievances.

***The Trade Union Act*, s. 25.1.**

REASONS FOR DECISION

Background:

[1] Wynne Leedahl, (the "Applicant") filed an application alleging that United Food and Commercial Workers International Union, Local 248-P (the "Union") violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") by failing to file, in a timely fashion, a grievance relating to the failure of Ms. Leedahl's employer, Mitchell's Gourmet Foods Inc. (the "Employer"), to accommodate her following an injury which she allegedly suffered at the workplace in December, 1997. The Applicant alleges that, once the Union did file a grievance, it negotiated a settlement to that grievance in bad faith, contrary to s. 25.1 of the *Act*. This matter was heard in Saskatoon on March 17 and 18, 2004.

Facts:

[2] The Applicant testified on her own behalf while Maurice Werezak and Albert Belfour, former presidents of the Union, testified on behalf of the Union.

[3] The Applicant started working with the Employer in 1986 as a ”cut grader.” Her posting listed several duties, many of which required a certain degree of physical exertion as well as work on the “line.” While a member of the Union, she held the position of shop steward for a brief period of time.

[4] In both 1996 and 1997, the Applicant suffered injuries as a result of duties she performed at the workplace. During a graduated return to work program, the Applicant again injured herself at the workplace while lifting a 25 kilogram box. The Applicant received medical treatment for this latest injury, aptitude testing and compensation from Saskatchewan Workers' Compensation Board (“WCB”).

[5] In August, 1998 the Applicant returned to work but had difficulties working in an assembly line situation because she was required to perform lifting duties. The Applicant testified that when she lifted items above her shoulder level she experienced pain. She was forced to take frequent breaks which caused problems on the line and some difficulties with co-workers. The Applicant testified that in 1998 (presumably during the graduated return to work program) she performed some light duty work which included making boxes and mopping ceilings. These duties caused her pain and discomfort.

[6] On September 18, 1998, the Employer placed the Applicant on weekly indemnity benefits. Pursuant to the terms of the collective agreement between the Union and the Employer, the Applicant was entitled to receive 52 weeks of benefits. The Applicant testified that a foreman told her not to return to work on September 18, 1998 because she was unable to perform her workplace functions.

[7] On September 18, 1998, the Applicant received a medical assessment which provided that she was able to work. WCB refused to pay any further benefits to the Applicant. The Applicant attempted to have WCB reverse its decision by providing more medical information to WCB.

[8] In October, 1999, the Applicant and Mr. Werezak met with representatives of the Employer with regard to the Applicant's status, given that her weekly indemnity benefits were coming to an end. Nothing had been resolved with WCB but the Applicant was scheduled to see a specialist in December. Both the Applicant and Mr. Werezak offered to the Employer that the Applicant could return to work and perform non-physical types of duties. The Employer rejected this request. It was the Employer's position, given the numerous injuries which the Applicant had suffered, that it did not want to see the Applicant get re-injured and that it wanted to see the specialist's report prior to re-examining what duties the Applicant could safely perform.

[9] Mr. Werezak asked the Employer if it would extend the indemnity payments which the Applicant was receiving, as these benefits were set to expire. The Employer refused this request, relying on the provisions of the collective agreement. The Applicant and the Employer eventually agreed to review the Applicant's situation again once the specialist's report was received. The Applicant was aware that there would be at least a three month period, from October, 1999 to December, 1999, when she would receive no indemnity payments from the Employer and no WCB payments, but she agreed to "suck it up." The Applicant was hopeful that, once WCB received an updated medical report from the specialist, it would make the decision to compensate her.

[10] The Applicant saw the specialist in December, 1999. According to the Applicant (no medical reports were filed), the specialist identified her medical problem, said that it could not be fixed and wrote a letter to WCB to that effect. The specialist recommended that the Applicant be re-trained as she could not perform any heavy lifting duties. The Applicant was certain that WCB would now process her claim and compensate her.

[11] The Applicant received a letter from WCB dated January 13, 2000 denying her claim.

[12] Mr. Belfour, who replaced Mr. Werezak as the Union's president, helped the Applicant (at her request) with her initial WCB appeal. He gave the Applicant liberal access to the Union's office and received her input into how the initial WCB appeal should be written and handled. In a letter to the WCB Appeals Committee dated March 14, 2000, Mr. Belfour stated:

> *She was asked by WCB to get a specific diagnosis of her injury which she did from Dr. Begg. He does not say she can never work again, but that her injury cannot be fixed and it would be inappropriate for her to continue at her employment with the Employer on such a gruelling job.*

The initial WCB appeal was unsuccessful.

[13] Mr. Belfour assisted the Applicant on a second WCB appeal. The Applicant received a letter from WCB dated March 6, 2001 which provided:

> *The members of the Board conclude that Ms. Leedahl's minor injury on December 17, 1997 was not sufficient to have caused sternoclavicular instability and therefore could not be contributing to her present problems. The appeal is denied.*

[14] In December, 2000, the Applicant filed a grievance alleging that the Employer had failed to accommodate her at the workplace given her injuries. Mr. Belfour acknowledged that the grievance was filed as a result of what transpired at the second WCB appeal. At this appeal, WCB members asked Mr. Belfour about whether or not the Employer had accommodated, or was prepared to accommodate, the Applicant at the workplace given her injuries. Mr. Belfour testified that this was the first that he had heard of the possibility of the Employer accommodating the Applicant and he advised the Applicant that someone might have made a mistake. Up to this point in time, the Applicant had never asked the Union to file a grievance on her behalf in regard to the Employer's failure to accommodate her at the workplace. Both the Applicant and the Union, at the October, 1999 meeting with the Employer, had suggested that the Applicant be given some light duty work, but eventually, the result of the meeting was that the Applicant would wait until she received the specialist's medical report prior to making any decisions in regard to her future.

[15] The Employer denied the Applicant's accommodation grievance at the third step of the grievance procedure and provided in a letter to the Union:

> *It is my understanding that Ms. Leedahl has not indicated which job function she would be able to perform at Mitchell's Gourmet Foods Inc. since her injury. Nor has she expressed an interest in finding a task within her medical restrictions.*

[16] In December, 2000, the Applicant obtained other employment and, once the Employer discovered this, she was fired in January, 2001 pursuant to a clause in the collective

agreement. The clause provides that "…should the employee find other employment, seniority will cease immediately." The Union filed a grievance on behalf of the Applicant challenging her termination.

[17] The Union and its solicitor held a meeting with the Employer and its solicitor to attempt to resolve the two grievances relating to the Applicant. Prior to holding this meeting, the Applicant advised the Union that she did not want to return to work at the Employer's workplace.

[18] Prior to the proposed settlement meeting, the Employer had offered the Union $2,500.00 to settle both grievances. This offer was rejected. Following the settlement meeting, the parties resolved the two grievances and drafted an agreement. The Employer agreed to pay the Applicant the sum of $7,500.00, which sum of money is still available to the Applicant.

[19] Mr. Belfour testified that the Applicant never told him that she wanted to return to work or be accommodated at the workplace by the Employer prior to the second WCB appeal in December, 2000. Mr. Belfour was unaware of what transpired at the October, 1999 meeting held between the Union and the Employer and that the Union and the Applicant had initially asked the Employer to allow the Applicant to return to work, but on light duty only.

[20] Mr. Belfour testified that the settlement agreement was entered into in good faith by the Union and the Employer and only after the Union thoroughly reviewed the case with its solicitor.

Relevant statutory provision:

[21] Section 25.1 of *The Trade Union Act* reads as follows:

> *25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*

Applicant's arguments:

[22] Counsel for the Applicant argued that, from October, 1999 onward, the Union knew that the Applicant would do light duty work and that the Union should have filed a grievance against the Employer earlier than it did. Counsel argued that the Union made a

mistake in not filing the accommodation grievance from at least 1999 and that the Union accepted $7,500.00 in haste, to cover up its mistake. Counsel for the Applicant argued that the Union was grossly negligent in this case and that it should pay damages in favour of the Applicant in the amount of $60,000.00, which would pay for the Applicant's lost wages.

Union's arguments:

[23] Counsel for the Union argued that the Union fought hard for the Applicant and that there was no evidence of conduct which could be classified as arbitrary, discriminatory or constituting bad faith. Counsel argued that, if the Applicant's WCB claim had been successful, the Applicant herself admitted that she would not have brought the application against the Union. With respect to settling the grievances relating to the Applicant, counsel argued that the Union acted reasonably after obtaining legal advice and that one of the problems that the Union would have faced at an accommodation arbitration was that the Applicant had never clearly set out what her limitations were in regard to performing functions at the workplace.

Analysis:

[24] In this case, the Board must determine whether the Union breached its duty of fair representation to the Applicant by not filing an accommodation grievance in a timely fashion. In doing so, the Board must determine if the Union acted in an arbitrary manner.

[25] In addition, the Board must determine if the Union hastily settled the two grievances relating to the Applicant for less than fair value simply to cover up the issue of its failure to file a grievance on behalf of the Applicant in a more timely fashion. If this were in fact the case, the Union's actions would amount to bad faith conduct.

[26] The Board in the recent decision *Hargrave et al. v. Canadian Union of Public Employees*, *Local 3833 and Prince Albert Health District*, [2003] Sask. L.R.B.R. 511, LRB File No. 223-02, provides a thorough review of recent case law as to what constitutes arbitrariness on the part of a union so as to cause the Board to determine that a union breached its duty of fair representation. In *Hargrave, supra*, the Board states at 520 and 521:

> *There have been many pronouncements in the case law with respect to negligent action or omission by a trade Union as it relates to the concept of arbitrariness in cases of alleged violation of the duty of fair representation. While most of the cases involve a refusal to accept or to*

> *progress a grievance after it is filed, in general, the cases establish that to constitute arbitrariness, mistakes, errors in judgment and "mere negligence" will not suffice, but rather, "gross negligence" is the benchmark.*

[27] In *Hargrave, supra*, the Board continues at 526 and 527:

> *Certainly a union is not generally required to ferret out potential grievors and attempt to convince them that they ought to request that a grievance be filed… In any event, even were we to find that the Union was lax, or even negligent, in its failure to confirm whether the Applicants or any of them wished to have a grievance progressed on their behalf, we could not say that, in the circumstances, it was so serious as to constitute gross negligence or arbitrary conduct.*

[28] In this case, the Board must determine whether the Union breached its duty of fair representation to the Applicant by not filing an accommodation grievance approximately one year earlier than it did. In doing so, the Board must determine if the Union acted in a manner which would constitute gross negligence.

[29] This Board adopts the reasoning in *Hargrave, supra*, in that the Union was not required to convince or encourage the Applicant to file a grievance against the Employer in October, 1999. That being said, even if the Union made a mistake in not advising the Applicant of the possibility that she could file an accommodation grievance, this does not amount to gross negligence. The most that could be argued by the Applicant was that the Union made a mistake. However, given the facts of our case, the Union was not lax or negligent in not advising the Applicant to file an accommodation grievance in October, 1999.

[30] It is evident that the Applicant had encountered some levels of pain and discomfort at the workplace and that the primary concern of both the Employer and the Union at the October, 1999 meeting was the well being of the Applicant. The Applicant herself testified that prior to this meeting she had performed some light duty work and had experienced pain and discomfort as a result of performing these duties. It was agreed at the October, 1999 meeting that the Applicant would see a specialist and it was understood that the Applicant would seek to have WCB reverse its decision and allow her claim. Following this meeting, the Applicant never advised either the Employer or the Union what duties she could perform and, after the October meeting, the Applicant never returned to work at the workplace of the Employer. It is logical to

conclude, given that she was unable to perform light duty functions without encountering pain and discomfort, that the Applicant had no intention of returning to work for the Employer until her medical problems were resolved.

[31] Counsel for the Applicant acknowledged that the grievances could be settled by the Union but argued that, in this case, the Union settled the grievances in a hasty manner, so as to cover up the mistake it made in not filing the accommodation grievance in a more timely fashion. With respect, this argument is also rejected. The Union retained legal counsel and its legal counsel was present while the Union attempted to negotiate a settlement of the grievances with the Employer. The Union considered the strengths and weaknesses of the grievances. The Union was certainly cognizant of the fact that the Applicant had never clearly set out what her limitations were with respect to performing functions at the workplace and it was aware of the unfavourable WCB rulings. The Union was aware that the Applicant did not want to return to work for the Employer. There was no indication that the Union settled the two grievances for the sum of $7,500.00 to simply make the Applicant's files go away, or to cover up for not encouraging the Applicant to file a grievance earlier.

[32] For the foregoing reasons, we do not find that the Union violated the duty of fair representation in s. 25.1 of the *Act*. Prior to the Board dismissing this application, the Union is directed to assist the Applicant to ensure that she receives the agreed upon $7,500.00 settlement. The Board reserves its jurisdiction with respect to this issue. When counsel for the Union provides correspondence to the Board Registrar that the settlement funds have been tendered to the Applicant, the Applicant's application will be dismissed.

DATED at Regina, Saskatchewan, this 10th day of May, 2004.

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson