The Labour Relations Board
Saskatchewan

GERALD BAUMAN, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 859, Respondents

LRB File No. 080-04; November 10, 2004
Vice-Chairperson, Walter Matkowski; Members: Clare Gitzel and Duane Siemens

The Applicant: Gerald Bauman with Bill Oranchuk
For the Respondent: Peter Barnacle

Duty of fair representation – Scope of duty – Union retained legal counsel and was aware of potential legal problems that it could encounter at arbitration – Union then entered into mediated settlement subsequently fully discussed and approved by membership – Applicant given opportunity to ask questions about mediated settlement prior to membership vote to approve settlement – Union showed good faith and wisdom throughout process – Board dismisses duty of fair representation application.

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

REASONS FOR DECISION

Background:

[1] Gerald Bauman (the "Applicant") filed an application alleging that Canadian Union of Public Employees and Canadian Union of Public Employees, Local 859 (the "Local" and collectively the "Union") violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") by failing to properly settle a policy grievance dealing with pension rights of employees employed by the City of Saskatoon (the "Employer").

[2] The Applicant also complained that the Union failed to ensure that he received "equal pay for equal work" and that the Union should not have allowed the Employer to deal directly with employees in the 1970's and 1980's when employees opted out of the General Superannuation Pension Plan (the "Plan"). The Applicant asked the Board to order that the Union and the Employer make his pension whole.

[3] The Board heard this matter in Saskatoon on November 1, 2004.

Facts:

[4] The facts are not in dispute. The Applicant was a member of the Union and was employed by the Employer. In 1976, he became eligible to join the Plan and, based on Employer records, attended a meeting so that the Plan could be explained to him. Following this process, the Applicant elected not to enter the Plan and, on a form signed by him dated April 22, 1976, the Applicant acknowledged that he would not be able to change his mind and join the Plan at a later date.

[5] In 1984, the Applicant was again given the option of joining the Plan and again signed a waiver dated November 27, 1984 stating that he did not wish to join the Plan. The waiver stated that the Applicant could not change his mind and join the Plan later. Informational meetings were held with employees not enrolled in the Plan prior to them making their election in 1984 so that the Plan could be explained to them. Approximately two thirds of the employees not yet registered in the Plan (74 employees) refused to join the Plan.

[6] In 1988, new full-time employees had to join the Plan. In 1994, 38 members of the Local (who still did not belong to the Plan) were allowed to join the Plan, with no provision to allow them to "buy back" previous years toward their pensions.

[7] In 1999 and 2000, the Applicant became involved with the Union as its pensions and benefits negotiator. It was through this process that the Applicant became "educated" and realized what a poor decision he had made in not joining the Plan earlier. He blamed the Union for not properly educating him prior to making his decisions in 1976 and 1984 not to join the Plan.

[8] In 2000, the Union filed three "policy grievances" dealing with perceived inequities in the Plan and its application to Union members. One of the grievances dealt with the Applicants' situation, where employees were not enrolled in the Plan until 1994, and sought to have the Employer make the Plan whole for these employees, subject to these employees paying back the Employer what would have amounted to their contributions to the Plan.

[9] The Union had retained Neil McLeod to represent it and present its case at the arbitration. Mr. McLeod is an experienced labour lawyer. Prior to the arbitration, the Union became aware of a recent arbitration award (*Canadian Union of Public Employees, Local 1481*

and Carmen Cobbe v. South Country District Health, Chair, Bob Pelton, Q.C., October 29, 2002) dealing with a pension case very similar to the Applicant's case. In the *South Country* decision, *supra*, the arbitration board dismissed the grievance on the basis of delay and the prejudice that the Employer had suffered as a result of the delay.

[10] The grievances proceeded to arbitration. At the arbitration hearing, the Employer raised two preliminary issues, one alleging delay and one challenging whether the pension issues were arbitrable. At the arbitration hearing, the chair of the arbitration board had some questions about the Union's case. Prior to any evidence being presented, the parties agreed to attempt to mediate the dispute, utilizing the chair of the arbitration board as mediator. In the event the mediation proved unsuccessful, the parties would proceed to arbitration utilizing a different arbitration board.

[11] The parties were able to agree to a mediated settlement, subject to ratification by the Union's membership, city council and the board of trustees of the Plan. All three of these entities agreed to the terms of the mediated settlement agreement.

[12] With respect to the Union's ratification process, the Union held a general membership meeting on January 21, 2003, wherein the Union's executive, together with Mr. McLeod, made a presentation relating to the proposed settlement. The Applicant was present at this meeting and participated vigorously, criticizing the executive and Mr. McLeod for their positions endorsing the tentative agreement. A majority of the membership voted to accept the mediated settlement and resolve all grievances dealing with the pension issues.

[13] Pursuant to the terms of the mediated settlement agreement, individuals such as the Applicant were then able to buy back years in the Plan. They could buy back years in the Plan in small increments or all at once. The Employer would then match the respective employee contributions into the Plan. The Applicant complained that he and a number of other members could not afford to buy back years in the Plan.

Relevant statutory provision:

[14] Section 25.1 of the Act provides 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.*

Union's arguments:

[15] Counsel for the Union argued that there was no evidence that the Union acted in a manner that could be described as arbitrary, discriminatory or amounting to bad faith. Counsel argued that this was simply a case where the Applicant disagreed with the Union's actions in settling the grievances dealing with the pension issue.

Applicant's arguments:

[16] The Applicant argued that he presented sufficient evidence to lead the Board to conclude that the Union failed to represent him as required by s. 25.1 of the *Act*. He further argued that the Union filed a weak grievance, was negligent in pursuing the grievance and should not have agreed to the mediated settlement. He complained that the chair of the arbitration board should not have been allowed to mediate the grievance but ultimately his complaint revolved around the fact that the Union and the Employer did not make his pension whole.

Analysis:

[17] The Board was sympathetic to the plight of the Applicant and other members of the Union who chose not to join the Plan in a timely fashion. As a result of that decision, those individuals now face the daunting task of obtaining or raising a significant sum of money to buy back years in the Plan. However, that being said, there was no credible evidence to substantiate the allegation that the Union had acted arbitrarily, discriminatorily, or in a manner that would amount to bad faith, in the way in which the Union handled the three pension policy grievances. The Union retained experienced legal counsel and was aware of potential legal problems that the Union could encounter at the arbitration hearing. The Union chose to attempt to mediate a solution to the grievances, which is a decision that the Board, in theory, supports. The Board continually encourages parties to utilize the mediation process over the litigation process when attempting to resolve disputes.

[18] Once the Union reached a mediated settlement, the membership then fully discussed the consequences of the mediated settlement. The Applicant was given the

opportunity to ask questions and to challenge the logic of the Union's mediated settlement prior to the members voting on the issue.

[19] Based on the evidence, there was nothing but good faith and wisdom shown by the Union and its legal counsel throughout the entire arbitration, mediation and ratification process and, as such, the Applicant's application must be dismissed.

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

LABOUR RELATIONS BOARD

Walter Matkowski,
Vice-Chairperson