The Labour Relations Board
Saskatchewan

I.L., Applicant v. UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 248-P and MITCHELL'S GOURMET FOODS INC., Respondents

LRB File No. 141-03; June 23, 2004
Vice-Chairperson, Wally Matkowski; Members: Duane Siemens and Clare Gitzel

For the Applicant:	Michael Krawchuk and Shawn Blackman
For the Respondent Union:	Gary Bainbridge
For the Respondent Employer:	Kevin Wilson

Duty of fair representation – Contract administration – Union not required to convince or encourage applicant to file grievance against employer – Where applicant did not advise union that he wished to rescind resignation and have grievance filed, Board declines to find breach of duty of fair representation.

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

REASONS FOR DECISION

Background:

[1] I.L. (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 keep him informed about a grievance relating to a suspension that the Applicant had received from his Employer, Mitchell's Gourmet Foods Inc. (the "Employer") and by not asking the Applicant if he "wanted his job back" given that he had resigned from his employment with the Employer.

[2] This matter was heard in Saskatoon on June 16, 2004. At the hearing, counsel for the Applicant abandoned any allegations that the Union had breached s. 25.1 of the *Act* in relation to the suspension grievance. Counsel indicated that the Applicant's case would center around the Union's failure to file a grievance on behalf of the Applicant to rescind the Applicant's resignation.

[3] Following the hearing, the Board dismissed the Applicant's application and advised that written Reasons would be provided.

Facts:

[4] Both the Applicant and Douglas McKay, a former shop steward in the maintenance department, testified on behalf of the Applicant. Albert Belfour, the former president of the Union and Mike Kosteniuk, the former chief steward of the Union, testified on behalf of the Union. Rick McConnell, the Applicant's supervisor on April 29, 2003, testified on behalf of the Employer.

[5] The Applicant commenced employment with the Employer in 2000 as a "maintenance pipefitter." He received no discipline from the Employer until April 29, 2003 when he received an indefinite suspension from the Employer for insubordination.

[6] On April 8, 2003, while the Applicant was receiving Workers' Compensation benefits, he attended at the Employer's workplace to obtain his tools. He knew that the Employer had a policy relating to an employee's removal of tools from the workplace. He knowingly disobeyed the Employer directive relating to how and when he could remove his tools. He knew the policy existed to prevent theft from occurring at the workplace. He admitted his mistake to the Board and acknowledged that he was advised that, upon his return to work, he would be disciplined for his conduct.

[7] The only discrepancy in the testimony relating to the insubordination incident was whether or not the Applicant used profanity when dealing with his supervisors. The Applicant did not recall using profanity, while the Union's investigation into the insubordination incident revealed that the Employer and Union witnesses to the incident all stated that the Applicant had used profanity toward his supervisors.

[8] Both prior and subsequent to the insubordination incident, the Applicant had been looking for alternate employment. On April 24, 2003 the Applicant attended at a prospective employer's work location and performed some tests. On April 25, 2003 the Applicant received a written job offer from this employer, Centennial Plumbing and Heating ("Centennial").

[9] The Applicant returned to work on April 29, 2003. His evidence was that he met with his acting supervisor, Mr. McConnell, and mentioned that he may be accepting a new job and he wanted to know the procedure for giving his notice to the Employer.

[10] Mr. McConnell's evidence was that the Applicant attended at his office on April 29, 2003 and advised him that he was resigning to take a new job with Centennial. The Applicant further advised Mr. McConnell that the Applicant's last day working for the Employer would be May 2, 2003, that the Applicant wanted to then take one week off and start with Centennial on May 12, 2003.

[11] Mr. McConnell testified that the Applicant phoned him on April 30, 2003 and inquired about taking his resignation back. Mr. McConnell advised the Applicant to call his shop steward and the maintenance superintendent if that was his intent. Mr. McConnell then made notes of both conversations he had with the Applicant.

[12] The Applicant testified that he called Mr. McConnell on April 30, 2003 and asked about rescinding his resignation, if indeed he had given one on April 29, 2003. The Applicant testified that Mr. McConnell advised him that he could not rescind his resignation.

[13] The Applicant conceded that he may have told some co-workers that he was thinking of giving his notice. Mr. McKay testified that the Applicant may have told him that he was resigning.

[14] The Union filed a grievance on behalf of the Applicant relating to the suspension incident. Mr. Kosteniuk, as chief steward, dealt extensively with the Applicant's grievance. The Employer suspended the Applicant for the two weeks prior to the Applicant starting with Centennial. The Applicant advised Mr. Kosteniuk that he wanted those two weeks paid for, a letter of reference and the insubordination incident removed from his record.

[15] Given that the Union's investigation into the insubordination incident confirmed the acts of insubordination, Mr. Kosteniuk advised the Applicant that he did not think that the Applicant's first two requests were attainable, but that he believed the third request was.

[16] The Union took the suspension grievance to the fourth step and resolved it by having the Employer agree that it would not divulge the insubordination incident to any potential employers.

[17] Both Mr. Kosteniuk and Mr. Belfour testified that, in their dealings with the Applicant after April 29, 2003, the Applicant did not advise the Union that he wanted his job back, or that he wanted to rescind his resignation. Mr. Kosteniuk testified that the Applicant informed him on numerous occasions that the Applicant "wanted to get out of this hole." Both Mr. Belfour and Mr. Kosteniuk testified that, if the Applicant had advised the Union that he wanted to rescind his resignation, the Union would have been happy to assist the Applicant in whatever way it could. Mr. Belfour testified that, on one previous occasion when an Employee had quit and come back to the Union and the Employer and attempted to get his job back, the Union had assisted that employee to get his job back because the resignation had been given under duress.

[18] The Applicant testified that he continually advised Mr. Kosteniuk that he wanted his job back and that Mr. Kosteniuk's response was that he had "resigned."

[19] The Applicant started with Centennial on May 12, 2003. Approximately two and a half weeks later, while playing baseball, the Applicant injured his knee. The injury required surgery and, ultimately, the Applicant resigned from his employment at Centennial on July 16, 2003.

[20] On July 9, 2003 the Applicant's solicitor sent a letter to the Union which stated in part:

> *We have been contacted by Ian Lundgren, a former member of United Food and Commercial Workers, Local 248-P ("UFCW"), with respect to his past employment with Mitchell's Gourmet Foods Inc. ("Mitchell's") …. Please advise as to the status of Ian Lundgren's grievance regarding his suspension.*

[21] On August 5, 2003 the Applicant filed this application before the Board.

Relevant statutory provision:

[22] Section 25.1 of the *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:

[23] Counsel for the Applicant argued that this was a simple case that centered around the Union's failure to file a grievance on behalf of the Applicant given the Applicant's request to rescind his resignation (the "rescinding grievance"). Counsel for the Applicant argued that the Union was grossly negligent in this case because it did not file the rescinding grievance. Counsel also argued that the Board should order the Union to file and proceed with the rescinding grievance and to pay the Applicant's legal fees for this application.

Union's arguments:

[24] Counsel for the Union argued that the Union fought hard for the Applicant and advanced the suspension grievance as far as it could possibly go. Counsel argued that there was no evidence of Union conduct that could be classified as arbitrary, discriminatory or constituting bad faith. Counsel argued that the facts indicated that the Applicant never asked the Union to proceed with the rescinding grievance. If the Applicant had made this request, the Union would have attempted to assist the Applicant on that issue.

Analysis:

[25] In this case, as counsel for the Union correctly points out, the Board must determine if the Applicant asked the Union to file the rescinding grievance. If the Board finds that the Applicant did make this request of the Union, it must then decide if the Union's conduct in not filing the rescinding grievance amounted to a breach of s. 25.1 of the *Act*.

[26] Based on the evidence presented, the Board finds that the Applicant did not advise the Union that he wished to rescind his resignation and that a grievance should therefore be filed on his behalf.

[27] In arriving at this determination, the Board accepts the evidence of Mr. Kosteniuk and Mr. Belfour over the evidence of the Applicant. One need only look at the contents of the July 9, 2003 letter sent by the Applicant's solicitor to the Union to arrive at this determination as there is no mention in this letter of the Applicant seeking to rescind his resignation. In the Applicant's own application before the Board, the Applicant does not allege that he asked the Union to attempt to rescind his resignation. Rather, the Applicant states that the Union did not ask him if he wanted his job back.

[28] Given our determination that the Applicant did not ask the Union to file a rescission grievance, the Board must determine if the Union should have convinced or encouraged the Applicant to file a rescinding grievance. In that regard, the Board adopts the reasoning in *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 and finds that the Union was not required to suggest, convince or encourage the Applicant to rescind his resignation and thereafter file a grievance against the Employer on that basis.

[29] For the foregoing reasons, we do not find that the Union violated the duty of fair representation in s. 25.1 of the *Act*. As such, this application is dismissed.

DATED at Regina, Saskatchewan, this **23rd** day of **June, 2004.**

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson