The Labour Relations Board
Saskatchewan

BILL ORANCHUK, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 59, Respondents

LRB File No.156-03; November 19, 2004
Vice-Chairperson, Walter Matkowski; Members: Ray Malinowski and Bruce McDonald

The Applicant: Bill Oranchuk with Dave Taylor
For the Respondents: Peter Barnacle

Duty of fair representation – Contract administration – Union arrived at decision not to pursue judicial review on basis of legal opinions not as result of division within union – Board finds no arbitrary, discriminatory or bad faith conduct on part of union in not proceeding with judicial review.

Union – Constitution – Applicant entitled to application of principles of natural justice in dispute relating to membership in union – Union's national president interpreted constitution and concluded that applicant no longer union member – Applicant did not appeal national president's decision – Board finds no credible evidence to substantiate claim that union breached s. 36.1(1) of *The Trade Union Act*.

***The Trade Union Act,* ss. 25.1 and 36.1**

REASONS FOR DECISION

Background:

[1] Bill Oranchuk (the "Applicant") filed an application alleging that Canadian Union of Public Employees and Canadian Union of Public Employees, Local 59 (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 carry forward a grievance regarding a suspension he received from the City of Saskatoon (the "Employer") in 1996 and also by failing to represent him in good faith both prior and subsequent to the suspension. Following an investigation the Employer changed the suspension to a termination. The Applicant's grievance was heard by an arbitration board in 1999 and the Applicant testified on his own behalf at that arbitration hearing.

[2] A majority of the arbitration board refused to reinstate the Applicant and ordered the Employer to pay the Applicant one year of salary. The Applicant complained that the

arbitration board was not properly constituted in that two of the members of the board were potentially biased. The Applicant also complained about the Union's strategy, or lack thereof, at the arbitration hearing.

[3] Initially, the Union was prepared to proceed to attempt to overturn the majority arbitration award. However, it received a number of legal opinions indicating that there was little hope that the majority arbitration decision would be overturned. Eventually, the Union authorized the Applicant to proceed to judicial review on the Applicant's own time and at the Applicant's expense. The Applicant complained that the Union acted arbitrarily in making this decision. In addition, the Applicant alleged that the process followed by the Union in changing its position on judicial review was arbitrary. As a result of the Union's decision not to proceed to judicial review, the Applicant no longer had membership in the Union and was not allowed to participate at union meetings.

[4] The Applicant was unsuccessful with his challenge of the majority arbitration award in the Court of Queen's Bench (see *Canadian Union of Public Employees, Local 59 v. Saskatoon (City)* (2000), 200 Sask. R. 79 (Sask. Q.B.)). He then attempted to challenge the Court of Queen's Bench decision at the Saskatchewan Court of Appeal and was also unsuccessful (see *Canadian Union of Public Employees, Local 59 v. Saskatoon (City)* (2001), 207 Sask. R. 222 (Sask. C.A.)).

[5] An official of the Union filed an affidavit in the Court of Appeal proceedings stating that the Applicant had not obtained the Union's authorization to proceed with the appeal. In its decision, the Court of Appeal dismissed the appeal on the basis that the Applicant had not obtained the Union's permission to bring forward the appeal. The Court also addressed the Applicant's appeal on the merits and found that the Applicant had no case. The Applicant argued that the affidavit from the Union filed at the Court of Appeal was another sign of the Union's arbitrary and bad faith conduct.

[6] The Applicant alleged in his application that the Union violated a number of other sections of the *Act*. None of these sections have any relevance to the Applicant's application. At the start of the hearing, counsel for the Union conceded that the Applicant may have an argument against the Union pursuant to s. 36.1(1) of the *Act* and agreed to allow the Applicant to amend his application to include this section of the *Act*.

[7] The Applicant's complaint pursuant to s. 36.1(1) of the *Act* stems from the fact that the Union passed a motion authorizing the Union to proceed to challenge the majority arbitration award by way of judicial review and then subsequently passed a motion that the Union would not do so. The Applicant also complained that he was denied membership rights in the Union that included access to union meetings.

[8] Dave Taylor testified on behalf of the Applicant and later assisted the Applicant by asking questions of the Applicant when the Applicant took the stand to testify. It is for that reason that Mr. Taylor is listed as appearing with the Applicant even though Mr. Taylor did not argue on behalf of the Applicant. At the close of the Applicant's case, the Union made a non-suit motion. The Board, in *Oranchuk v. Canadian Union of Public Employees and Canadian Union of Public Employees, Local 59*, [2004] Sask. L.R.B.R. 32, LRB File No. 156-03, dismissed the Union's non-suit motion.

[9] On the final day of the hearing in Saskatoon on October 14, 2004, counsel for the Union offered that the Union would pay the Applicant's legal bill for judicial review in the amount of $1,000.00, so long as the Applicant provided to the Union the statement of account submitted by his solicitor. Counsel for the Union stated that, by agreeing to this payment, the Union was not admitting guilt or liability, but rather was acknowledging that the motion passed by the Union on March 21, 2000 relating to the judicial review process and the payment of legal fees was confusing.

Relevant statutory provisions:

[10] The relevant sections of the *Act* provide 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.*
>
> *. . .*
>
> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*

Facts:

[11] Certain basic facts are set out in the Board's non-suit motion Reasons for Decision, *supra*, and in the background of these Reasons for Decision and need not be repeated. Following the unsuccessful arbitration result, the following motion was passed under the heading Money Matters at the Union's general membership meeting held on March 21, 2000:

> *Dave Taylor/Bill Oranchuk*
>
> *That CUPE, Local 59 instruct CUPE National to obtain legal counsel to file judicial review concerning the Oranchuk arbitration. That legal counsel take any steps legally necessary to have the Minister of Labour, or any other appropriate agency and legal body, assign a new board of arbitration in the matter of the dismissal grievance of Bill Oranchuk. Should National not render written response within one calendar week, then Local 59 will authorize Larry Kowalchuk to a sum of up to $3,000.00 to undertake the judicial review and any steps legally necessary to obtain a new board of arbitration to hear the grievance of Bill Oranchuk.*

[12] The Local received a legal opinion from John Elder, the acting director of the Union's legal branch, dated March 28, 2000 which provided in part that:

> *In my opinion an application for judicial review does not stand a reasonable chance of success.*

[13] The Local also received an opinion from the solicitor who conducted the arbitration on behalf of the Union that a judicial review application would be unsuccessful.

[14] On June 20, 2000, the Local held elections with the incumbent President, Dave Taylor being defeated by Lois Lamon. The Applicant viewed himself as belonging to the "Taylor camp."

[15] Ms. Lamon testified that her recollection of the March 21, 2000 motion was that the Union would seek a legal opinion in relation to the chances of success prior to the Union undertaking a judicial review. Mr. Taylor's recollection of the motion was that judicial review would be pursued and that the legal challenge was not restricted to the Court of Queen's Bench level.

[16] Upon taking office, Ms. Lamon attempted to obtain an update relating to the Oranchuk proceedings. She was surprised that the judicial review was proceeding once she became aware of the Elder opinion letter. She contacted Mr. Kowalchuk and obtained an update from him which included a verbal opinion that there was a 20% chance of success on the judicial review application.

[17] On August 1, 2000, the following motion was passed and carried at the Union's executive meeting:

> *A motion was passed at the April (should read March) Membership meeting to send Bill Oranchuks case to Larry Kowalchuk for an opinion on doing a judicial review if we did not receive an opinion from CUPE within one week. We received two CUPE opinions within one week and yet the case was still sent to Larry Kowalchuk. Mr. Kowalchuk advised that he will not give an opinion, however, he would like to file the judicial review. He stated that in his experience, there is probably a 20 percent success rate on doing a judicial review-to date he has spent $400 on reviewing the file*
>
> *MOTION To have Lois Lamon send Bill Oranchuk a registered letter and also phone him to inform him that we have received our legal opinion and that he has until August 8, 2000, to launch an appeal and he can approach the membership at the general membership meeting if he wishes the membership to pay for the judicial review.*

[18] Ms. Lamon testified that she contacted the Applicant and informed him of the August 1, 2000 motion and ensured that he was sent the appropriate letter. On August 3, 2000, Ms. Lamon sent Mr. Kowalchuk a letter instructing him that the Union would not be proceeding with the judicial review application and further advising him that the Union was giving the Applicant permission to proceed with the judicial review application.

[19] A motion was passed at the Union's August general membership meeting confirming that the Union would not proceed with the judicial review application and that the Applicant could approach the membership at the general membership meeting and make the request that the membership pay for the judicial review application.

[20] Pursuant to the terms of the Union's constitution, a copy of which was filed as an exhibit before the Board, the Applicant ceased being a member of the Union upon his employment being terminated. The past practice of the Local had been to allow employees

whose employment had been terminated to participate in union meetings until the arbitration decision had been rendered. The Applicant's case was the first case where the grievor was not reinstated following an arbitration decision. At a union meeting held in September, 2000, the Applicant had the support of the majority of the members present that he be granted union membership status.

[21] Subsequent to the September membership meeting, the Local advised the Applicant that it was seeking a ruling from the national president of the Union in relation to the Applicant's membership status. The Applicant had been copying the national president with correspondence in an attempt to "keep her informed of the developments within Local 59" and, in a letter dated October 18, 2000, provided the national president with information relating to the loss of his union membership. The Applicant asked the national president to conduct an investigation and advise the Applicant of his membership status.

[22] Pursuant to the terms of the Union's constitution, the national president is the individual empowered to interpret the Union's constitution. The national president ruled that the Applicant was no longer a member of the Union and provided the Applicant with a copy of her ruling in a letter dated November 13, 2000. The Applicant did not appeal the national president's decision as he was entitled to do pursuant to the terms of the Union's constitution.

[23] In September, 2000, the Applicant filed an appeal of the Court of Queen's Bench decision dismissing his judicial review application. Also in September, 2000, Ms. Lamon filed an affidavit with the Court of Appeal stating that the Union had not authorized the Applicant to appeal the Court of Queen's Bench decision.

[24] Once the Court of Appeal dismissed the Applicant's appeal, the Union and the Employer reached an agreement on the monies owed to the Applicant pursuant to the terms of the arbitration award.

Applicant's arguments:

[25] The Applicant argued that he had presented sufficient evidence to lead the Board to the conclusion that the Union had failed to represent him as required pursuant to s. 25.1 and that the Union had breached s. 36.1(1). He argued that the Union had been negligent in how it pursued his grievance and how it acted in conducting his arbitration. He complained that the arbitration chair acted fraudulently in rendering a decision that was not in the Applicant's favour. He complained that the solicitor who conducted the arbitration for the Union acted negligently. He complained that the Employer acted inappropriately and breached principles of natural justice. He complained that his solicitor in the judicial review proceedings acted incorrectly and arbitrarily. He complained that the Union should not have filed an affidavit against him at the Court of Appeal level and he complained that the Court of Appeal proceeded wrongly in dismissing his appeal.

[26] The Applicant specifically argued that the Union should have continued with the judicial review process on his behalf and not focused on his membership status. He argued that the Union's decisions which were made against him in relation to the judicial review application and his membership status occurred because there had been a power shift in the Union, from the "Taylor camp" to the "Lamon camp."

Union's arguments:

[27] Counsel for the Union argued that there was no evidence that the Union had acted in a manner which could be described as arbitrary, discriminatory or in bad faith. Counsel argued that the Board has not interpreted s. 25.1 beyond the arbitration stage and into the judicial review process. Counsel argued that, even if the Board interpreted that the Applicant's s. 25.1 rights extended to the judicial review process, the Union acted appropriately. The Union obtained a number of legal opinions and considered the chances of success in arriving at its determination not to proceed to judicial review.

[28] Counsel for the Union also argued that there had been no breach of s. 36.1(1) of the *Act*, in that the Applicant was no longer a member of the Union as a result of the Applicant's employment being terminated. Counsel for the Union argued that the Applicant was entitled to the principles of natural justice, pursuant to s. 36.1(1) of the *Act* and as set out in the recent Saskatchewan Court of Appeal decision *McNairn v. United Association of Journeyman and*

Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 179 (2004), 240 D.L.R. (4th) 358 (Sask. C.A.).

Analysis:

[29] As the Board advised the Applicant on numerous occasions, the role of the Board is not to sit in appeal of the arbitration board, the Court of Queen's Bench or the Court of Appeal. Nor is the Board's role to second guess how a solicitor presented a case before an arbitration board or the Court of Queen's Bench. There may be some exceptions to this general statement, such as if there was evidence presented to support the argument that the solicitor, who was in house counsel for the Union, was attempting to lose the arbitration. However, this was not the case. As such, the Applicant's allegations in relation to improper conduct on the part of the arbitration board, the Courts and the solicitors involved will not be dealt with by the Board. The Board will, however, comment on the Applicant's suspension grievance.

[30] Initially, the Applicant had his employment suspended by the Employer while the Employer conducted an investigation into the Applicant's conduct. Once the investigation was concluded, the Applicant's employment was terminated. In effect, the Applicant's suspension grievance was subsumed by the unjust dismissal grievance. The Union cannot be faulted for not advancing the suspension grievance separate and apart from the unjust dismissal grievance. If the Union had been totally successful at the unjust dismissal arbitration, as stated by the Applicant, he would not have brought this application before the Board.

[31] Counsel for the Union is correct in stating that the Board has never interpreted s. 25.1 of the *Act* as including the judicial review process. Even if the Board were to expand s. 25.1 of the *Act* into the judicial review process, there was no arbitrary, discriminatory or bad faith conduct on the part of the Union in not proceeding further in the judicial review process. The Union arrived at the decision not to go to judicial review based on three legal opinions that stated the Union had very little chance of success.

[32] There was likewise no credible evidence to substantiate the allegation that the Union had acted negligently in any manner and specifically in relation to the judicial review process to a degree that constitutes arbitrariness as described in *Hargrave et al. v. Canadian Union of Public Employees and Prince Albert Health District*, [2003] Sask. L.R.B.R. 511, LRB File No. 223-02, at 525.

[33] The evidence of Mr. Taylor and the Applicant attempted to establish that the decisions made by the Union in relation to the judicial review process and the Applicant's membership status were motivated in large part by a division that had occurred in the Local. While it is true that there had been a change in power within the Local, there was insufficient evidence to establish that the Union's decisions relating to the Applicant's judicial review application and his membership status had anything to do with which camp the Applicant was in. As stated earlier, the Union's decision to no longer seek judicial review was based on three legal opinions and the Union's decision to deny the Applicant's membership status was based on the provisions of the Union's constitution. Likewise, the Union's decision to pass the August 1, 2000 motion, which was subsequently adopted at the Union's August general membership meeting, was not based on any improper motives, but rather was made as a result of the three legal opinions that indicated the judicial review application would not be successful. As it turns out, these opinions were correct.

[34] At a September, 2000 membership meeting, a majority of the Local voted to grant the Applicant membership status. Given these circumstances, the Applicant was entitled to the application of the principles of natural justice to the determination of his membership in the Union pursuant to the provisions of the Union's constitution. As set out by the Court of Appeal in *McNairn*, *supra*, at 370:

> *Thus subsection 36.1(1) imposes a duty upon a union (again correlative to the right thereby conferred upon an employee), to abide by the principles of natural justice in disputes between the union and the employee involving the constitution of the trade union and the employee's membership therein or discipline thereunder. As such, the subsection embraces what may be characterized as "internal disputes" between a union and an employee belonging to the union, but it does not embrace all manner of internal dispute. For the subsection to apply, the dispute must encompass the constitution of the union and employee's membership therein or discipline thereunder. And when it does apply, it requires that the principles of natural justice be brought to bear in the resolution of the dispute.*

[35] The Union's national president interpreted the Union's constitution as she was obligated to do and arrived at the decision that the Applicant was no longer a member of the Union. The Applicant did not appeal this determination. There was no credible evidence to substantiate the Applicant's claim that the Union had breached s. 36.1(1) of the *Act* in any way

and that the Applicant was denied the principles of natural justice in his dispute with the Union in relation to his membership in the Union. The Applicant did not suggest that the Union's constitution should be interpreted in any way other than how it was interpreted by the national president.

[36] For all of the foregoing reasons, the Applicant's application is dismissed.

DATED at Regina, Saskatchewan, this **19th** day of **November, 2004.**

LABOUR RELATIONS BOARD

Walter Matkowski,
Vice-Chairperson