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; April 2, 2004
Vice-Chairperson, Wally Matkowski; Members: Ray Malinowski and Bruce McDonald

The Applicant: Bill Oranchuk
For the Respondent: Peter Barnacle

Practice and procedure – Non-suit – In non-suit motion, neither weight nor acceptability of evidence in issue - Applicant presented some evidence which could support duty of fair representation application – Application for non-suit dismissed.

***The Trade Union Act,* ss. 18, 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 (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 by failing to represent him in good faith both prior and subsequent to the suspension. The Employer, following an investigation, changed the suspension to a termination. It took three years for the dismissal arbitration to be heard and the Applicant testified in his own defense at the arbitration.

[2] A majority of the arbitration board hearing the Applicant's case refused to reinstate the Applicant. The majority of the board ordered the Employer to pay the Applicant one year's 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 which indicated 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 his own and at his own 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 also lost his membership in the Union and his ability to participate in 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] A union official 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 proceed. 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 in support of the Employer's position is 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 as 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 conceded that he would not be before the Board if he had been successful before the arbitration board. His complaints all stem from the incidents that occurred immediately prior and subsequent to his dismissal.

[8] At the close of the Applicant's case, the Union made a non-suit motion.

Relevant statutory provision:

[9] The relevant sections of the *Act* provide:

> *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.*

Union's arguments:

[10] Counsel for the Union argued that the Applicant's evidence was so unsatisfactory or unbelievable that a *prima facie* case had not been established in law and that, therefore, the application should be dismissed.

Applicant's arguments:

[11] 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 by s. 25.1 and s. 36.1(1).

Analysis:

Non-Suit Test

[12] In *Saskatchewan Government and General Employees' Union v. Mitchell's Gourmet Foods Inc. et al.*, [1999] Sask. L.R.B.R. 577, LRB File Nos. 115-98 & 151-98 the Board states at 583:

> *In the present situation, the test applied is whether, accepting the applicant's evidence at face value, a prima facie case has been established in law or that the evidence is so unsatisfactory or*

> *unbelievable that the burden of proof has not been satisfied. The motion for non-suit cannot succeed if there is some evidence upon which the Board could return a finding that successorship and a transfer of bargaining obligations has occurred. The weight of the evidence is not in issue.*

[13] Without reviewing the evidence in great detail, the Applicant has adduced some evidence to support his application. The evidence of Dave Taylor, the former local president of the Union, was sufficient to establish a *prima facie* case. Mr. Taylor's evidence dealt with how the grievance was handled and how the Applicant was treated by the Union during the lengthy process both prior and subsequent to the Applicant's arbitration hearing. Mr. Taylor testified that the Union made a mistake in how it proceeded with the Applicant's case. Mr. Taylor also testified that a motion was passed authorizing the Union to proceed with judicial review of the arbitration award and that, at a later date, a motion was passed authorizing the Union not to proceed with judicial review. Mr. Taylor testified that rules of order were not followed by the Union in changing its position.

[14] As set out in *Mitchell's Gourmet Foods, supra*, the weight of the evidence is not in issue. The Board does not decide whether it accepts the Applicant's evidence. Rather, the Board decides, accepting the Applicant's evidence at face value, whether a *prima facie* case has been established in law.

[15] In the recent Board 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, the Board states at 525:

> *Thus, there is a line of cases that suggest that where "critical job interests" are involved (e.g., discharge from employment), depending upon the circumstances of the individual case, a union dealing with a grievance may well be held to a higher standard than in cases of lesser importance to the individual in determining whether the union has acted arbitrarily (including whether it has been negligent to a degree that constitutes arbitrariness). The Board has taken a generally favourable view of this position as demonstrated in Johnson and Chrispen, supra.*

[16] As set out in *Hargrave*, *supra*, when dealing with a discharge case, a Union may well be held to a higher standard. In the case at hand, both the Applicant and Mr. Taylor challenged the Union's handling of the Applicant's case. Given the test set out in *Mitchell's*

Gourmet Foods, supra, there has been some evidence presented which could support the Applicant's argument that the Union has breached s. 25.1 and/or s. 36.1(1) of the *Act*. Based on the evidence presented, the Applicant is able to argue, at a minimum, as set out in *Hargrave*, *supra*, that the Union has been negligent to a degree which constitutes arbitrariness.

[17] As such, the Board dismisses the Union's motion for non-suit. The Board Registrar will contact the parties to set further dates to complete the hearing of this matter.

DATED at Regina, Saskatchewan, this 2nd day of April, 2004.

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson