Labour Relations Board
Saskatchewan

E. A., Applicant v. NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) and HOTEL SASKATCHEWAN, Respondents

LRB File No. 076-04; September 19, 2006
Chairperson, James Seibel; Members: Maurice Werezak and Ken Ahl

The Applicant: E. A.
For the Union: Doug Olshewski
For the Employer: No one appearing

Duty of fair representation – Contract administration – Union conducted reasonably detailed investigation and made reasonably thoughtful assessment of situation, including review of legal authorities, in timely fashion – Board's role not to determine whether union did everything possible to assist applicant or whether union reached correct conclusion in law but rather to determine whether union fairly and reasonably investigated and assessed facts of situation, interests at stake and effect on applicant and membership as whole, without arbitrariness, discrimination or bad faith – Board finds no violation of duty of fair representation.

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

REASONS FOR DECISION

Background:

[1] National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (the "Union"), is designated as the bargaining agent of a group of employees of the Hotel Saskatchewan (the "Employer"). The Applicant, E. A., was at all material times a member of the bargaining unit until her employment was terminated by the Employer. The Applicant filed an application with the Board alleging that the Union had violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the *"Act"*) in failing to fairly represent her in respect of grievance or rights arbitration proceedings with respect the termination of her employment in March 2004.

[2] Section 25.1 of the *Act* provides as follows:

> *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*

[3] In its reply to the application, the Union denied the allegation that it had failed to fairly represent the Applicant. The Union stated that the Applicant had been earlier disciplined on several occasions and dismissed from her employment for alleged harassment of fellow employees. The Union secured the Applicant's reinstatement pursuant to a "last chance" agreement. Approximately 7 months later, further complaints of harassment were once again made against the Applicant by certain of her co-workers. The Union's investigation confirmed the allegations in the complaints, as did the investigation conducted by the Employer. The Union determined that it could not be successful in maintaining a grievance at arbitration and declined to file a grievance on the Applicant's behalf.

[4] The Applicant represented herself at the hearing by the Board. She was afforded the full opportunity to call witnesses to testify and to adduce evidence, cross-examine the Union's witnesses and present argument.

Evidence:

[5] The Applicant testified on her own behalf and called two of her co-workers as witnesses. The Union called two witnesses to testify -- the two local co-vice-presidents of the Union, Jason Pelzer and Aaron McPeak. The Applicant declined the opportunity to cross-examine the Union's national servicing representative, Doug Olshewski, who had declared the reply filed on behalf of the Union.

[6] We do not propose to recite a detailed account of the testimony adduced at the hearing before the Board. The facts of this case are relatively straightforward. Following is a brief summary of the facts we have determined to be relevant.

[7] In January 2001 the Applicant was advised by the Employer that certain of her co-workers had reported that she had engaged in behaviour contrary to the Employer's harassment policy. Certain specific incidents were outlined. At that time, the Applicant was "reminded" of the policy, but was not officially warned.

[8] In December 2002 complaints of harassment were once again made against the Applicant by a co-worker. The Employer conducted an investigation and terminated the Applicant's employment on January 3, 2003. The Union grieved the dismissal and the matter was scheduled for arbitration. The matter was settled prior to the hearing resulting in a 3-month suspension and the Applicant's reinstatement.

[9] In July 2003 a complaint of harassment was made against the Applicant by another co-worker. The Union represented the Applicant in negotiations with the Employer, resulting in a 1-week suspension and the Applicant's reinstatement pursuant to a "last chance" agreement signed by the Applicant and the Union. The Applicant admitted in the document that the Employer had just cause for dismissal. The agreement provided that, if the Applicant committed another workplace infraction within a period of one year, it would be considered as a culminating incident and would result in her dismissal for cause.

[10] In March 2004 another co-worker filed a harassment complaint against the Applicant. The Employer conducted an investigation into the allegations. During the week of March 9, 2004 two representatives of the Union (then shop steward Jason Pelzer and a co-vice-president) were present at the Employer's interviews of all employees working in the same department as the Applicant and including the Applicant, in connection with the investigation. On March 12, 2004 the Union's national servicing representative, Mr. Olshewski, and Mr. Pelzer met with the Employer's human resources manager, Ms. Harten, to review the employee interviews and to discuss the investigation. On March 31, 2004 Mr. Olshewski had a conference call with the local president of the Union, a co-vice-president and the shop steward. The Union's representatives were satisfied that the allegations of complaint against the Applicant were well founded and confirmed by a number of the Applicant's co-workers. The Employer terminated the Applicant's employment in March 2004.

[11] By letter dated April 1, 2004 Mr. Olshewski advised the Applicant that the Union would not be filing a grievance of the Applicant's dismissal. The letter provided in part as follows:

> *It is with deep regret that I must inform you that the aforementioned Union Representatives were unanimous in*

> *concluding that the Union could not be successful with your case at arbitration. Given that both you and the Union signed a last chance agreement some 9 months ago, we cannot see that an arbitrator would overturn that agreement between the parties. Arbitrators have been consistent in not overturning these types of agreements, and I am attaching jurisprudence for your perusal.*
>
> *Accordingly, the Union will not be progressing a grievance on your behalf.*

[12] In her *viva voce* evidence, the Applicant directed most of her testimony to attempting to cast aspersions upon certain of her co-workers and, in effect, to seek to have the Board review their evidence against her in the investigation into the complaints of harassment. The testimony of the two witnesses she called was either not helpful to her case (that is, it tended to support allegations of harassment or at least mean behaviour) or was irrelevant and not helpful at all.

Arguments:

[13] In a rather rambling address, during which the Applicant blamed her co-workers for her woes, the Applicant submitted that she had not been fairly represented by the Union.

[14] Mr. Olshewski, on behalf of the Union, submitted that the Union had represented the Applicant fairly in connection with her dismissal from employment. He pointed out that the Union had researched the applicable arbitration jurisprudence and concluded, after considering it in light of the facts, that an arbitration of the issue would be highly unlikely to succeed. Mr. Olshewski further submitted that, in the Union's opinion, the evidence against the Applicant was of a level of seriousness such that an arbitration would not likely be successful even in the absence of the "last chance" agreement. Finally, Mr. Olshewski asserted that, in keeping with the Union's duty to consider the welfare of all of its members, it also had to consider the ramifications for the Applicant's co-workers if she was returned to work in arriving at its decision not to progress a grievance on her behalf.

Analysis and Decision:

[15] The Board's general approach to applications alleging a violation of s. 25.1 of the *Act* was summarized as follows in *Lawrence Berry v. Saskatchewan*

Government Employees' Union, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, at 71-72:

> *This Board has discussed on a number of occasions the obligation which rests on a trade union to represent fairly those employees for whom it enjoys exclusive status as a bargaining representative. As a general description of the elements of the duty, the Board has indicated that it can do no better than to quote the principles outlined by the Supreme Court of Canada in the case of Canadian Merchant Services Guild v. Gagnon, [1984] 84 CLLC 12,181:*
>
> > *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted:*
> >
> > *1. The exclusive power conferred on a union to act as a spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
> >
> > *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
> >
> > *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
> >
> > *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
> >
> > *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employees.*
>
> *The terms "arbitrary," "discriminatory," and "in bad faith," which are used in the legislative description of the kind of conduct on the part of a trade union which is to be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada*

(B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:

> *... The union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favoritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*

This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:

> *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favoritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*

[16] In the present case, we are satisfied that the Union conducted a reasonably detailed investigation of the allegations made against the Applicant in March 2004 as the basis for the Employer's action in terminating her employment. We are also satisfied that, in the circumstances, the Union took reasonable steps to protect the interests of the Applicant by having its representatives present at the interviews conducted by the Employer in its investigation of the matter. Furthermore, the local president of the Union and shop stewards and a national servicing representative of the Union reviewed the statements of employees and the actual interview notes made

during the Employer's interviews of such employees and concluded without reservation that the complaint of harassment was well-founded and constituted a breach by the Applicant of the "last chance" agreement.

[17] The Union's representatives made a reasonably thoughtful assessment of the situation, including a review of what they believed to be the relevant legal authorities, and concluded that the Union could not succeed at an arbitration of the Applicant's dismissal. They undertook this review and assessment in a timely fashion.

[18] As has been stated in numerous decisions of the Board, for example, in *Hidlebaugh v. Saskatchewan Government and General Employees' Union and Saskatchewan Institute of Applied Science and Technology*, [2003] Sask. L.R.B.R. 272, LRB File No. 097-02, it is not for the Board to minutely assess and second guess the actions of a union in its conduct of the grievance procedure. Nor is it the function of the Board in this hearing to determine whether the statements made by the Applicant's co-workers in the investigation into the complaints of harassment were fair, reasonable or true.

[19] Accordingly, it is not for the Board to determine whether the Union did everything possible, or indeed properly, to assist the Applicant or whether it reached a correct conclusion in law about the effect of the "last chance" agreement, but rather to determine whether the Union put its mind fairly and reasonably to an investigation and assessment of the facts of the situation, the interests at stake and the effect upon the Applicant and its membership as a whole, without arbitrariness, discrimination or bad faith. We find that the Union did so and did not breach its duty of fair representation under s. 25.1 of the *Act*.

[20] The application is dismissed.

DATED at Regina, Saskatchewan, this **19th** day of **September, 2006.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson