The Labour Relations Board
Saskatchewan

C.A.B., Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent

LRB File No. 073-07; April 18, 2008
Chairperson, Kenneth G. Love, Q.C.; Members: Bruce McDonald and Marshall Hamilton

The Applicant: C.A.B.
For the Respondent: Rick Engel, Q.C and Heather Jensen

Duty of fair representation – Contract administration – Applicant bears onus of proof on duty of fair representation application – Applicant primarily responsible for lack of medical evidence necessary to support return to work – Union active and supportive of applicant – Union continues to pursue grievances for applicant – Applicant provided no evidence of arbitrariness, discrimination or bad faith on part of union – Board dismisses application.

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

REASONS FOR DECISION

Background:

[1] The Applicant, C.A.B., brings this application under s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") on the following grounds:

1. Did the union fail to meet its duty of fair representation by failing to grieve the use of a psychologist who is not qualified as a physician for the purposes of Article 17.4 .4 (C) of the SGEU Collective Agreement?

2. If it is appropriate for a psychologist to be used under that section, did the Union fail to meet its duty of fair representation by consenting to the use of a psychologist in a situation where a person is returning from a leave of absence taken due to a physical injury?

3. Alternatively, it has been alleged that the use of Dr. Ahlijah, a psychiatrist, has cured the initial breach of the duty of fair representation. Therefore, if one takes a leave for medical reasons

> related to a physical injury has the Union failed its duty of fair representation by consenting to use of a psychiatrist to assess whether an individual is fit for work?

[2] By letter decision dated September 27, 2007, the Board dismissed grounds (1) and (2) above. This decision relates only to the remaining ground of the Applicant's complaint.

Facts:

[3] The Applicant's application to the Board referenced the use of Dr. Ahlijah in respect of the Applicant's claim that she was being referred to a psychiatrist in respect of a physical injury which she had suffered in October of 2006. However, the evidence showed that the events which gave rise to the duty of fair representation complaint against the Union had their genesis much earlier than October 25, 2006, which was the date the Applicant broke her clavicle and was taken off work by the physician who attended her at that time.

[4] At the hearing of this matter, the Applicant filed with the Board a note from her family physician and general practitioner, Dr. J.J. Van Heerden, dated January 1, 2005. In that note Dr. Van Heerden notes that the Applicant "has been under my treatment for severe stress & depression since April, 2004. This might have contributed to her being absent from work often."

[5] Again, on March 22, 2005, Dr. Van Heerden provided a letter "To Whom It May Concern," which states:

> *The above patient has been treated by me since the 19th of April 2004 for severe depression and anxiety, which is still ongoing and which was the cause that the patient had to be off work many times. In my opinion, the reason for her condition was her separation and the stressors around that. She is currently on treatment for the same condition.*

[6] On April 1, 2005, another "To Whom It May Concern" letter was issued by Charlie Swift, M.A., Registered Psychologist regarding the Applicant. In his letter he states:

> *This person has been treated by myself since January 27, 2005 for severe depression with anxiety which is still ongoing. [The Applicant] had to be off work many times in the past due to medical reasons due to her depressive episode.*

> *I believe that the primary cause of her stress and subsequent depressive episode has been a particularly stressful separation. [The Applicant] continues with medical care at the present time.*

[7] In her testimony, the Applicant noted that she had recently gone through a divorce from a person she described as being a "sipping alcoholic." She noted that the separation and divorce had been quite stressful and had led to her having to declare personal bankruptcy on July 26, 2005. She provided a copy of her bankruptcy discharge dated October 2, 2006.

[8] On February 20, 2006, the Applicant's employer, then known as Department of Learning, Government of Saskatchewan (the "Employer"), sent a letter to the Applicant outlining her supervisor, Jim Seiferling's, concern about her absenteeism as well as issues concerning tardiness during that same period. A copy of that letter was directed to be placed on the Applicant's personnel file.

[9] Attached to that letter was a list of dates on which the Applicant was late for work or was absent between April 29, 2005 and January 23, 2006. Although the Applicant took some issue with this listing, the substance of the dates and times is not relevant for the purposes of this decision.

[10] A meeting was held between Mr. Seiferling and the Applicant on February 27, 2006 to review the letter of February 20, 2006. Mr. Seiferling provided a memo to the Applicant on March 20, 2006 summarizing the results of that meeting. In that memo, Mr. Seiferling outlined the Employer's expectations concerning the Applicant's attendance and tardiness.

[11] On April 13, 2006 the Union, on behalf of the Applicant, filed a grievance ("Grievance #1") against the letter of February 20, 2006 which had been placed on the Applicant's personnel file. The grievance called for the removal of that letter from her file.

[12] On April 21, 2006 Mr. Seiferling again wrote to the Applicant regarding her tardiness and absenteeism. Attached to that letter was another list detailing the dates and times that the Applicant was absent from her employment or dates on which she had been late during the period March 1, 2006 to April 13, 2006. Prior to writing that letter, Mr. Seiferling had met with the Applicant and her union representative to discuss Grievance #1.

[13] On April 24, 2006, Mr. Seiferling again met with the Applicant and her union representative to discuss the letter of April 21, 2006. Mr. Seiferling wrote to the Applicant on May 5, 2006 following that meeting to summarize the events that transpired at that meeting.

[14] In the meeting, the Employer, with the consent and support of the Union, requested that the Applicant meet with a Dr. Arnold of Saskatoon, a psychologist, for an independent medical examination. According to the evidence of Susan Saunders, an agreement administration advisor with the Union, Dr. Arnold had been used by the Employer and the Union in the past for such evaluations. She says that she consented to the use of Dr. Arnold because he took a "broad, comprehensive approach" in situations where employees were referred to him. She says that she had confidence in Dr. Arnold from previous files she had worked on with him.

[15] Ms. Saunders is engaged by the Union to assist member employees with respect to difficulties in the workplace and, in particular, with respect to issues surrounding the employers duty to accommodate workers in the workplace.

[16] The Applicant refused to participate in the independent analysis by Dr. Arnold. She did, however, agree to participate in a medical examination by her general practitioner, Dr. Van Heerden. Mr. Seiferling, in his letter of May 5, 2006 agreed to write to Dr. Van Heerden to "request medical information regarding your fitness for work, prognosis and what accommodations, if any, are needed."

[17] The independent medical evaluation had been proposed by both the Union and the Employer to determine if the Applicant was fit to work, what the prognosis for her recovery might be and what accommodations, if any, were necessary to accommodate the Applicant in her employment.

[18] Mr. Seiferling did write to Dr. Van Heerden on May 5, 2006 as promised. That letter was provided to the Applicant with a memo dated May 6, 2006 from Mr. Seiferling. No report was forthcoming from Dr. Van Heerden and the parties met again on June 12, 2006 to review the situation. Mr. Pawliw on behalf of the Employer wrote on June 15, 2006 to summarize that meeting. In that letter, he says:

> *As you know, we are awaiting a medical report from your doctor that will indicate to us whether you are in good health, fit for work, and whether*

> *you require any accommodations. You confirmed that your Doctor's appointment is not until June 21, 2006 and hopefully a medical report will be provided to our Human Resources Branch shortly thereafter.*

[19] No report from Dr. Van Heerden was forthcoming after the scheduled appointment on June 21, 2006. Mr. Seiferling wrote to Dr. Van Heerden on July 25, 2006 requesting he provide the comprehensive medical assessment that had been previously requested.

[20] A letter was finally received from Dr. Van Heerden dated September 1, 2006. In that letter, Dr. Van Heerden provided answers to the questions posed by Mr. Seiferling in his letter of May 5, 2006.

[21] According to Ms. Saunders, the Union was disappointed with the report from Dr. Van Heerden as it was nowhere near as comprehensive as reports that it had come to expect from Dr. Arnold. In his letter, Dr. Van Heerden answered only the questions posed and did not take the broad comprehensive approach or look at the workplace to determine if any accommodations were necessary for the Applicant. Effectively, Dr. Van Heerden took the view that he could not comment on the Applicant's absenteeism and that she was fit to work. No accommodations were required other than he felt she may, from time to time, need time to adjust from any major changes in her medication.

[22] On October 4, 2006, a second grievance was filed by the Union with respect to the Applicant. The grievance related to a letter dated September 25, 2006. That letter, from Mr. Seiferling, following the medical report from Dr. Van Heerden, was placed on the Applicant's personnel file and outlined specific job expectations which, if they were not complied with, would result in progressive discipline "up to and including termination."

[23] In her testimony, Ms. Saunders testified that the letter from Dr. Van Heerden was used by the Employer "as evidence of culpable absenteeism." She further testified that the letter "was problematic for the union as the letter did not allow for flexibility in any need to accommodate." She testified that she was looking for something that would justify an accommodation for the Applicant. The letter from Dr. Van Heerden, Ms. Saunders says, "made the grievance process and potential discipline more difficult."

[24] With the assistance of the Union, the Employer agreed to once again try to obtain an assessment from Dr. Arnold. On November 13, 2006, Clarence Yam wrote to Dr. Arnold essentially asking the same questions previously posed to Dr. Van Heerden. While Ms. Saunders did not specifically recall any discussions with the Employer regarding this referral to Dr. Arnold, she testified that she did not object to the request.

[25] Just prior to this letter, the Applicant had broken her clavicle and, on the authority of Dr. Smith her orthopedic surgeon, she was put on medical leave until December 31, 2006. On November 16, 2006, Mr. Seiferling again wrote to the Applicant advising that pursuant to article 17.4.4 C of the collective bargaining agreement between the Employer and the Union "before returning to work, the department will require an assessment from Dr. J. Arnold in Saskatoon and an indication from him that you are fit to return to work."

[26] The Applicant left a note, received on December 1, 2006, for Ms. Saunders of the Union regarding the request that she see Dr. Arnold. Her note says, "[I] already told Jim [Seiferling] no to seeing Dr. Arnold. No travel no trust him. I do not need a personality test. That is what a GP is go ahead file."

[27] The reference to "go ahead file" was a reference to file a third grievance with respect to the letter of November 16, 2006 requesting an assessment from Dr. Arnold. That grievance was also filed by the Union.

[28] At this time, there were three grievances filed by the Union against the Employer in respect of actions taken by the Employer against the Applicant. As at the date of the hearing all three remained valid and subsisting grievances and all were at the second stage of a three stage grievance procedure under the collective bargaining agreement.

[29] Notwithstanding the Union's and the Employer's efforts to get the Applicant to see Dr. Arnold, she steadfastly refused to attend an appointment with him. On December 11, 2006, Mr. Seiferling issued a letter which was to supersede the letter of November 16, 2006. This letter was essentially the same as the letter of November 16, 2006 other than the appointment with Dr. Arnold was now to be on January 24, 2007.

[30] The Applicant then contacted counsel (Mr. Gary Semenchuck Q.C.) who wrote to the Employer on January 16, 2007 advising that, in his opinion, Dr. Arnold did not qualify as a "physician" under the terms of article 17.4.4 C of the collective agreement. He advised that the Applicant "will be keeping the appointment with Dr. Arnold on January 24, 2007 as a sign of good faith but without prejudice to her right to dispute your referral to Dr. Arnold."

[31] Subsequently, however, as a result of a complaint from the Applicant to the Saskatchewan College of Psychologists, Dr. Arnold was forced to cancel his appointment with the Applicant. On January 26, 2007, Mr. Seiferling again wrote to the Applicant advising that the Employer would still require independent medical evidence regarding her medical condition prior to her being permitted to return to work. In the interim, the letter placed her on "definite leave with pay from February 1, 2007 to February 28, 2007." The Employer also agreed to pay reasonable costs associated with a medical assessment.

[32] On February 8, 2007, the Applicant wrote to Ms. Saunders of the Union with respect to arrangements she had made with Dr. Van Heerden for her to see a Dr. Ahlijah instead of Dr. Arnold. In her letter she noted that Dr. Van Heerden had advised that it may take three to five months to get in to see Dr. Ahlijah. In that letter, the Applicant also showed her misunderstanding of the process which the Employer and the Union were attempting to follow with regard to her condition. In that letter she says:

> *Please note that Dr. Van Heerden has advised my employer that I am fit for work on September 1/06 and again on January 23/07. I was put off work by Dr. Van Heerden and Dr. Smith, Surgeon because of a clavicale [sic] fracture and <u>NOT</u> due to my disability which is depression. Being off work when I am fit, ready, willing, and able has caused me undue stress and Dr. Van Heerden is aware.*

[33] Mr. Seiferling, who had received a copy, responded to the February 8, 2007 letter on February 12, 2007. In his letter, he confirmed that the Applicant would continue on leave with pay until the end of February. He also requested that he be apprised of the date of the appointment with Dr. Ahlijah in order that the Employer could "consider its options in regards to your continuing leave."

[34] On February 26, 2007, Mr. Seiferling again wrote to the Applicant regarding a meeting they had had on February 23, 2007. He confirmed that the conditions originally

imposed, which included a doctor's certificate, would continue to be required for her to return to work. In his letter, he noted that "we remain committed to having these concerns assessed by a professional prior to your return to work."

[35] In his letter, Mr. Seiferling also extended the Applicant's definite leave with pay from March 1, 2007 to March 31, 2007. He noted that the Employer hoped to receive Dr. Ahlijah's report by March 31, 2007. Failing that, he noted that the Employer would need confirmation of an appointment with Dr. Ahlijah. In the event that no report was received by March 31, 2007 Mr. Seiferling noted that the Employer would "evaluate our position on continued leave with pay."

[36] An appointment with Dr. Ahlijah was set up for March 21, 2007. On March 16, 2007, Mr. Yam, on behalf of the Employer, wrote to Dr. Ahlijah posing questions which the Employer would like to have answered by him following his examination. Those questions were somewhat different than the questions posed to Dr. Van Heerden, but were directed to a medical/psychiatric reason for the Applicant's significant absenteeism.

[37] The Applicant attended the appointment with Dr. Ahlijah, but proved to be unco-operative to the extent that Dr. Ahlijah was unable to properly assess her and make a response to the questions posed by Mr. Yam. The Applicant also refused to sign a consent to permit Dr. Ahlijah's report to be forwarded to the Employer. While the propriety of that consent form is at issue, as a result, the Employer did not receive a report from Dr. Ahlijah.

[38] On March 29, 2007, the Applicant obtained a note from Dr. Van Heerden to the effect that she had attended the appointment with Dr. Ahlijah but that Dr. Van Heerden had not, as yet, received the report from Dr. Ahlijah.

[39] On March 30, 2007, Mr. Seiferling wrote to the Applicant. In his letter, he noted that "[T]he branch has made every effort to accommodate you and better understand any medical issues that may be associated with your declining performance and work relationship issues." However, in the absence of any medical assessment, the Applicant was placed on definite leave, but without pay, effective April 1, 2007.

[40] On June 7, 2007, Ms. Saunders wrote to the Applicant. Ms. Saunders confirmed that the Applicant remained willing to attend an appointment with a doctor of the Employer's choice, but that she was unwilling to consent to the release of the report to the Employer without knowledge of what the report contained. Ms. Saunders provided counsel to the Applicant concerning the labour relations issues regarding medical information to be provided by employees to their employer. She enclosed a form of consent which the Union found to be acceptable in respect to medical information to be supplied to the Employer. In the letter, Ms. Saunders noted:

> *. . . as you know from your research, the employer's duty to accommodate is only initiated when an employee provides sufficient medical information which substantiates the need for accommodation. It is for this reason that you need to provide the employer with a medical report which shows that an accommodation is necessary. For this reason, I am concerned when you indicate that you will attend a physician of the employer's choosing but refuse to release the information required to initiate the accommodation process.*

[41] Ms. Saunders followed up with the Employer by email on July 12, 2007, advising that the Applicant was prepared to see a physician of the Employer's choice. After an exchange of emails, the Employer finally says, "[W]e would prefer that Dr. Ahlijah answer the questions directly from a psychiatric perspective. [The Applicant] can easily provide Dr. Ahlijah with approval to release answers to our questions."

[42] At the hearing of this matter, the Applicant provided the Board with a copy of the report from Dr. Ahlijah. In his letter, he notes:

> *[The Applicant] refused my request to allow me to get in touch with her employers to get a clearer picture of what is going on at work. She wants her Union's involvement. Clearly, to enable me to do a proper evaluation I need adequate information on which to base a valid clinical judgement [sic]. My evaluation needs her full co-operation and it must be contextual; I cannot do it in a vacuum. Since our session was going nowhere it was ended.*

[43] The matters referenced above remain unresolved and no medical information has been provided by the Applicant to the Employer. Nor have the grievances referenced above been exhausted and all three are currently at the second stage of the three stage process under the collective agreement.

Relevant statutory provision:

[44] 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.*

Decision:

[45] The Applicant bears the onus of proof in the present application.

[46] The case law that the Saskatchewan Labour Relations Board consistently follows with respect to the duty of fair representation owed by the Union to the Applicant as set out in s. 25.1 of the *Act* was extensively reviewed in *Beatty v. Saskatchewan Government and General Employees Union*, [2006] Sask. L.R.B.R. 440, LRB File No. 086-04 at 464 through 473. It is unnecessary to repeat that review here.

[47] The remaining point in the Applicant's application which was left for consideration by the Board following the letter decision of September 27, 2007 was:

> *Alternatively, it has been alleged that the use of Dr. Ahlijah, a psychiatrist has cured the initial breach of the duty of fair representation. Therefore, if one takes a leave for medical reasons related to a physical injury has the Union failed its duty of fair representation by consenting to the use of a psychiatrist to assess whether an individual is fit for work?*

[48] From the recitation of the facts above, it is clear that this question was not the question which the evidence presented addressed nor was it the true question with respect to the issues between the Applicant, the Union and the Employer.

[49] However, even if the Board takes an expansive view of the overall situation and the actions of the Union in its representation of the Applicant, the Board can find no fault with the Union's actions in representing the Applicant.

[50] The Board is of the view that the Applicant is primarily responsible for the lack of medical evidence necessary to support any return to work. This evidence is required, and is provided for under the collective agreement. The Union has been active and supportive of the Applicant in her discussions with the Employer and has filed and continues to process three grievances on her behalf. At the nub of the issue is the Applicant's refusal to permit proper information concerning her condition to be obtained by the Employer and indirectly to provide the Union with sufficient support to allow it to argue for an accommodation on her behalf with the Employer.

[51] For the Applicant to be successful, it would be necessary for her to show that the Union was "arbitrary, discriminatory, or in bad faith." She has failed to provide any evidence of any arbitrary conduct on the part of the Union in its representation of her. She has failed to provide any evidence of discrimination on the part of the Union in its representation of her. And finally, she has provided no evidence of any bad faith on the part of the Union in its representation of her.

[52] The application is therefore dismissed.

DATED at Regina, Saskatchewan, this **18th** day of **April, 2008**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson