Labour Relations Board
Saskatchewan

ATTAH MUSTAPHA ENEFOLA, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondent

LRB File No. 131-09; August 18, 2010
Chairperson sitting alone: Kenneth G. Love, Q.C.

The Applicant:	Attah Enefola Mustapha
For the Respondent Union:	Heather Jensen

Duty of Fair Representation: Employee subject to discipline makes comments during discipline proceeding which lead to suspension – Union files grievance regarding suspension on a timely basis – At meeting to discuss suspension Employer advises that Employee will be terminated – Employer offers employee opportunity to resign and receive reference or be terminated - Union and Employee meet to consider Employer's offer. Employee determines that he will resign.

Employee files application under s. 25.1 alleging *inter alia* that Union did not provide proper advice as to options provided by Employer. - Employee alleges that he was pressured to resign - Employee having second thoughts regarding tendering his resignation.

Board restates purpose and interpretation of s. 25.1 – Finds Union did not fail in its duty of fair representation – Pressure to reach a speedy conclusion implicit in Employer's offer to allow voluntary resignation – Union acted with dispatch throughout .

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

REASONS FOR DECISION

Background:

[1] Kenneth G. Love Q.C.: On November 18, 2009, Attah Enefola Mustapha (the "Applicant") filed an application claiming that the United Food and Commercial Workers Union, Local 1400 (the "Union") failed to fairly represent him in a grievance process, in a manner that was not arbitrary, discriminatory or in bad faith, contrary to s. 25.1 of *The Trade Union Act*[1]. The Applicant's complaint against the Union arises out of the Applicant's suspension and his subsequent resignation from his employment with Western Grocers (one of the Loblaw Group of Companies) (the "Employer"), in

November, 2009. The Applicant alleged in his application that the Union failed to properly represent him following his suspension and did not properly communicate with him nor provide proper advice in respect of an offer by the Employer; to resign with a letter of general recommendation or be terminated and thereafter grieve his termination.

[2] In its Reply to the Duty of Fair Representation application, the Union denied that it had failed to fairly represent the Applicant, insofar as it filed a grievance against the alleged unjust suspension and met with the Employer to review the suspension. The Union says that based on the facts disclosed by the Employer at the meeting to review the suspension. At that meeting, the Employer advised the Applicant would be terminated for cause. The Employer offered to accept a voluntary resignation by the Applicant, and agreed that it would provide a letter of recommendation for the Applicant. The Union provided that it advised the Applicant that he could refuse to resign, be terminated and file a grievance. However, the Union cautioned that it could make no promise of success if the matter proceeded to arbitration. After discussion with the Applicant, the Union says that the Applicant agreed to take the offer of settlement provided by the Employer, which was to voluntarily resign and accept a letter of recommendation.

Evidence:

[3] At the hearing, the Applicant testified on his own behalf. In reply, the Union called the evidence of Vern Brown, the shop steward who had been involved in the incident that lead to the Employer determining to terminate the Applicant, and Mr. Darren Kurmey, the Secretary-Treasurer of the Union and Service Representative for Western Grocers.

[4] The Applicant emigrated from Nigeria to Canada in May, 1992. Prior to coming to Canada, he graduated from high school in Nigeria, attended university for a period of time, but did not graduate. He also attended a trade school in Communications. His native language is English. He is a Canadian citizen. He began his employment at Western Grocers in January of 2007. He worked as a maintenance worker at a warehouse facility operated by the Employer. His work included sweeping, cleaning,

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[1] R.S.S. 1978 c. T-17

removal of garbage, removal of damaged goods, and the operation of equipment such as a forklift.

[5] The Applicant testified at length concerning the circumstances leading up to his termination from employment and some other problems that he believed he was having with the Employer and with his co-workers. Unfortunately, much of the evidence was not necessary to our determination of whether the Union violated s. 25.1 of the *Act*. In complaints such as this, the Board focuses on the steps the Union took, or did not take, in its representation of the Applicant, in order to determine if the Union acted in a manner that was arbitrary, discriminatory or in bad faith.

[6] The Employer operates a warehousing facility in Saskatoon, Saskatchewan. The Applicant worked the night shift at that facility (10:00 PM to 6:30 AM). Early on the morning of November 5, 2009, the Applicant was advised by his supervisor that he wished to meet with the Applicant and two other employees before the end of those employees' shift that day.

[7] The Applicant met with the supervisor as requested. The meeting had been called by the supervisor to discuss what the Employer considered were extended breaks by the three employees involved. Mr. Brown was present at the meeting as discipline was expected to be considered in respect of each of the employees.

[8] The evidence from the Applicant focused on another incident involving a missing donair that he alleged was taken from the employee refrigerator. He testified about the fact that, in retaliation, he took and hid a power drink from the same refrigerator. Mr. Brown's evidence was that the original meeting to discuss the extended breaks quickly turned into something else when the Applicant made allegations that the supervisor was involved in sneaking into his home while he was away at work and raping his wife.

[9] As a result of the allegations made by the Applicant against the supervisor, the Employer determined to suspend the Applicant pending further investigation. The Union immediately filed a grievance (Novermber 6, 2009) in relation to the suspension of the Applicant.

[10] When the grievance was filed by the Union, following contact between Mr. Brown and Mr. Kurmey, Mr. Brown advised Mr. Kurmey as to the events that occurred and Mr. Kurmey filed the grievance on behalf of the Union. The grievance alleged an unjust suspension.

[11] Events moved quickly and a follow up meeting was scheduled between the Union and the Employer to discuss the grievance on November 13, 2009. At that meeting, the Employer was represented by three management representatives. The Applicant was accompanied by both Mr. Brown and Mr. Kurmey.

[12] The Applicant's evidence was somewhat unclear as to how he became aware of the meeting, i.e.: whether he contacted the Union or the Union contacted him. However, Mr. Kurmey testified that he did not meet with the Applicant to review the matter until just a few minutes prior to the commencement of the follow up meeting. At that time, he testified that he advised the Applicant as to the process being followed and what to expect during the meeting. Mr. Kurmey stated in his testimony in cross examination, that he had taken a statement from the Applicant, but that statement was not presented to us, nor did the Applicant agree that a statement had been given.

[13] At the meeting, the Employer took the view that the Applicant's conduct amounted to a "gross policy breach" insofar as they considered the Applicant had made false accusations and that by making a comment to the effect that "[T]his is not over", the Applicant was threatening the supervisor. As a result, the Employer presented two options. The Applicant could resign and receive a general letter of recommendation, or he would be terminated and the union could grieve that termination.

[14] Following the presentation of the two options, the Union representatives and the Applicant caucused to discuss the Employer's option. During that meeting, Mr. Kurmey made no recommendation to the Applicant as to a suggested course of action. However, he did advise the Applicant that the grievance process would likely go to arbitration and the outcome in arbitration proceedings was uncertain. In the end, the Applicant agreed to resign and accept a general letter of recommendation. That

resignation was executed by the Applicant on April 13, 2009 and delivered to the Employer.

[15] In accordance with the terms of that settlement agreement, and based upon the Applicant's resignation, the Union confirmed to the Employer on November 13, 2009 that the grievance concerning the suspension had been withdrawn. On that same date, the Employer provided the Applicant with a general letter of recommendation. On November 18, 2009, the Union wrote to the Applicant to confirm the resolution of the grievance based upon his resignation.

Arguments:

[16] The Applicant's argument was quite lengthy and somewhat difficult to follow. When originally submitted to the Board in writing, it was difficult to read and the Applicant, at the request of the Registrar, provided a more legible copy. In essence, the Applicant alleged that the Union did not give him a fair chance in taking the matter to a grievance arbitration and that the Union recommended that he resign. The Applicant's arguments were directed, in part, to an assertion that the Employer should not have acted in the manner it had and that the allegations against him were fabricated. He asserted that he should not have been asked to resign and should have been permitted to retain his position.

[17] The Applicant argued that he had been pressured to resign and wasn't given sufficient time to consider his options and that, on reflection, he would not have resigned and would have gone through the arbitration process.

[18] The Union's argument was fairly brief. The Union argued there had been no evidence advanced that they had acted arbitrarily, discriminatorily or in bad faith. They argued that the result obtained as a result of the voluntary resignation and issuance of the general letter of recommendation was a result better than they likely would have achieved following a lengthy arbitration process. The Union argued that the Applicant had not, at any time during the process, asked to have more time to consider his options and that the decision he made to voluntarily resign was his decision. They denied that the Union had made any recommendation to him regarding which option he should take.

[19] The Union relied on the following cases: *Quong v. Canadian Union of Public Employees, Local 3967*, [2008] CANLII 87261, LRB File No. 147-06, *Ajak v. United Food and Commercial Workers, Local 1400 and XL Foods Inc*., [2008] CANLII 87262 LRB File No. 075-07, 076-07 & 077-07; *Kelln v. United Food and Commercial Workers, Local 319w and Coca Cola Bottling Ltd.,* [2000] Sask. L.R.B.R. 639, LRB File No. 078-00 and *Chabot v. Canadian Union of Public Employees, Local 4777 and Prince Albert Parkland Health Region,* [2007] CANLII 68749, LRB File No. 158-06.

Relevant Statutory Provisions:

[20] The following provision of the *Act* is relevant:

> 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*

Analysis and Decision:

[21] The Board's general approach to applications alleging a violation of s. 25.1 of the *Act* was summarized 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.*

[22] In *Gilbert Radke v. Canadian Paperworkers' Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, the Board considered the nature of the task before it when assessing the conduct of the union in light of a duty of fair representation complaint. At 64, the Board stated:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*

[23] In the present case, the Applicant has not alleged any bad faith on the part of the Union in the sense that their representatives acted with personal hostility, political revenge or dishonesty. As is not uncommon in applications under s. 25.1, especially when the Applicant is not represented by counsel, the Applicant focused more on trying to show the Board that its grievance was just and should have been pursued by the Union through to arbitration, notwithstanding that he had voluntarily resigned. On second thought, the Applicant felt that he had made the wrong decision, and was, in effect, asking the Board to intervene on his behalf and try to convince the Employer and the Union to rehire him.

[24] The only complaint that the Applicant made which falls directly under the provisions of s. 25.1 is his suggestion that he was not afforded sufficient time to consider his options, that is, to resign or go through arbitration with an uncertain result. Of equal concern is the somewhat peremptory attention given to preparation for the meeting by the Union (i.e.: in meeting with the Applicant just prior to the follow up meeting).

[25] In the Board's view, the evidence does not establish that the Union acted discriminatorily or in bad faith toward the Applicant in any way. However, the evidence and arguments suggest that the Union may have acted in an arbitrary fashion with respect to its conduct of the grievance to the point of settlement. However, for the reasons that follow, we have concluded that the conduct of the Union was not so arbitrary so as to be a violation of s. 25.1 of the *Act*.

[26] In the cases cited by the Union, only the *Kelln* decision, *supra,* is of any assistance. In that case, the Board concluded that the failure of the Union to advise the Applicant as to the dates of his arbitration hearing was not sufficiently reckless so as to constitute reproachable arbitrary conduct under the *Act*. The Board concluded that the review of the case by the Union was sufficient. Also, with respect to the issue of pressure on the Applicant to accept the settlement proposal, the Board says at paragraph [26]:

> *[26] Fourth, was Mr. Kelln improperly pressured to accept the settlement? Mr. Logan testified that he informed Mr. Kelln of the settlement terms on Friday, February 11, 2000 and advised him that he required an answer shortly as the Employer might remove the offer from the table. This was a practical reality for the Union as the Employer would be pressuring for a quick decision. The time pressure was a real pressure and is not an uncommon feature in reaching any negotiated settlement. In our view, Mr. Kelln was not being unnecessarily pressured by the Union but was given accurate information by Mr. Logan on the dynamics of achieving a negotiated settlement of the matter. Mr. Logan also offered to give Mr. Kelln the weekend to think the matter over, which Mr. Kelln declined. Overall, we do not find that Mr. Logan exerted any improper pressure on Mr. Kelln to accept the settlement.*

[27] While the facts in this case are, of course, different from the facts in the *Kelln* case, *supra,* the principles are the same. That is, the process was moving quickly. The Union had acted quickly and resolutely in filing the grievance in a timely fashion. The

follow up meeting was scheduled quickly as well, being only a week from the date the grievance was filed. No prior discussions were held with the Employer. The Union had no idea that the settlement offer would be made or what the offer might be. When the offer was presented by the Employer, the evidence from Mr. Kurmey was that the decision was that the Applicant would be terminated. The alternative that he could voluntarily resign, while not expressly time limited, was, I think, by implication, limited to being accepted at that meeting, failing which the termination would be effected and the consequences of that termination would then follow. Therefore, as in the *Kelln* case, *supra,* the time for consideration was limited.

[28] As to the peremptory nature of the Union's consideration of the grievor's case, a similar result would pertain. As noted in paragraph [21] above, in the *Glenna Ward* case, *supra,* the Board stated that to avoid being found to have acted arbitrarily, the Union *"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."*

[29] As noted above, the grievance and the process it was following were unfolding quickly. Mr. Kurmey had received a briefing from Mr. Brown as to the events which gave rise to the suspension. The Union had no prior knowledge of the proposal the Employer made, or that termination was being contemplated until the follow up meeting commenced. There was no evidence to suggest that throughout the process the Union had not taken a reasonable view of the problem, even when the suspension turned into a potential termination, or that the Union had not made a thoughtful decision about what to do.

[30] Certainly, in hindsight, it could be suggested that the Union could have asked the Employer for more time to consider the options presented. However, that issue did not come up. The Applicant had asked that the Union explore the possibility that he be transferred to another work unit within the warehouse, but that suggestion was refused by the Employer. At no time did the Applicant express any desire to have additional time to consider the options given to him. In the context of the timelines in which these events took place, we cannot find the actions of the Union to have been arbitrary.

Conclusion:

[31] For the foregoing reasons, this application is dismissed.

DATED at Regina, Saskatchewan, this **18th** day of **August, 2010.**

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.,
Chairperson