The Labour Relations Board
Saskatchewan

SHERRY MORTENSEN, Applicant v. CONSTRUCTION AND GENERAL WORKERS' LOCAL UNION 180, Respondent and JACOBS INDUSTRIAL SERVICES LTD., Employer

LRB File No. 044-12; May 24, 2013
Chairperson, Kenneth G. Love, Q.C (sitting alone pursuant to Section 4(2.2) of *The Trade Union Act*)

For the Applicant: Mr. Rainer Mortensen
For the Respondent Union: Mr. Jay Seibel
For the Respondent Employer: Mr. Brett Horan

Duty of Fair Representation – Board reaffirms criteria for minimum requirements imposed upon Union - Board reviews conduct by Union – Board finds that Union should have acted with more dispatch given the time limits for filing grievance in collective agreement – Board finds that investigation not completed in a timely fashion.

Duty of Fair Representation – Notwithstanding failure of Union to act in a timely fashion with respect to filing of grievance of conduct of investigation Board determines that conduct does not amount to conduct which is discriminatory, arbitrary or bad faith.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love Q.C., Chairperson:** The Construction and General Workers' Local Union 180, (the "Union") is certified as the bargaining agent for a unit of employees of Jacobs Industrial Services Ltd. (the "Employer") by an Order of the Board dated April 27, 1993.[1] Mrs. Sherry Mortensen, (the "Applicant") was employed by the Employer at the Mosaic potash mine at Belle Plaine, Saskatchewan.

[2] The Applicant was initially employed with the Employer for a "shutdown" period. She was laid off after the shutdown was completed, but was rehired approximately four (4) months later as a labourer. Her main duties were cleaning floors and machinery within the

[1] We note that this Order names the employer as Delta Catalytic Industrial Services Ltd. It appears that this Order should be amended to refer to the proper name of the Employer.

potash "dry end."[2] Ultimately, she was involved in an incident in which her supervisors felt she was insubordinate. She was terminated from her position as a result of the insubordination. Her union determined that the matter should not be grieved. She then made this application to the Board under Section 25.1 of *The Trade Union Act*, R.S.S. c.T-17 (the *"Act").*

[3] For the reasons that follow, this application is denied.

Facts:

[4] While the history of this matter goes back somewhat further, for the purposes of this application, the start point was a work-place back injury which the Applicant suffered in early 2011. She was placed on Workers Compensation and returned to the workplace with a modified/restricted work assignment from her physician.

[5] The Applicant is a small woman, but she was described by her immediate supervisors as a hard and dedicated worker, one who was able to handle the physical demands placed upon her in her position as labourer. Her position required that she sweep up potash which had spilled onto floors, load it into a wheelbarrow, move that wheelbarrow to where it was to be dumped, and then dump the wheelbarrow.

[6] Upon the Applicant's return to work, the Employer accommodated her with duties that the Employer felt were within the restrictions imposed by the physician. Her first assignment was to power wash equipment used at the plant. The Applicant found that the pressure exerted by the power washer was too difficult for her to handle. At her next doctor's appointment, she complained to her doctor. The Applicant was then off work for a further two (2) week period.

[7] When returning to work, the Applicant was again accommodated with a modified/restricted work assignment. That assignment was to inventory and label materials in the paint shop operated at the potash mine. Prior to working in that position, she was fitted with an approved safety mask that was to prevent exposure from paint fumes and other air borne material.

[8] The Applicant had a breathing difficulty. She found it difficult to work in the paint shop, notwithstanding that she was only required to be inside the facility for brief periods. The

[2] The area of the potash mine where the mined product is separated, crushed, screened or stored.

Applicant worked two (2) days in the paint shop. Her evidence was that during that period, she was physically ill and that she "threw up" in the presence of her supervisor, Ron Delorme. At one point, she was taken to the on site medical facility, where she was sent home as they did not think that she should drive in the condition she was in. Her husband, who worked at the same site with another contractor, was called and he arranged to take her home.

[9] The Applicant took the next day off sick, but returned to work the following day, which was June 22, 2011. She was again assigned to work in the paint shop. She expressed her displeasure with being put back in the paint shop to her supervisor.

[10] The Applicant had an appointment with her doctor at 11:30 a.m. and was scheduled to be off work at 11:00 a.m. to accommodate that appointment. Before she could leave work, she was advised that she was to report to the Employer's office trailer at the site. She was accompanied there, stopping first at the security office and then at her car to retrieve her asthma medication.

[11] When she arrived at the Employer's office, she was met by Mr. Dave Kelly, the Maintenance Superintendent, Ron Deslaurier, the Supporting Trade Superintendent and Mr. Derek Walter, the Safety Officer. Mr. Hoffman remained at the Employer's office, but did not participate in the meeting with the Applicant.

[12] What transpired at the meeting differs as between the Applicant and the Union. However, the Board heard testimony from Ron Deslaurier who was present at the meeting. Mr. Deslaurier was called as a witness by the Applicant as to what occurred at the meeting. From that testimony, the Board accepts that the meeting was called for the purpose of discussing the current and ongoing work placement of the Applicant. The Board also accepts that the meeting began in the office trailer, but quickly moved outside to a deck area as the discussion was becoming heated.

[13] Again, there is some difference in the testimony as to who was the person that was the loudest in the meeting. The Board accepts that it was the Applicant who was expressing her dissatisfaction with the work assignments given to her, in both a colourful and forceful way.[3]

[3] For a less diplomatic description of the language allegedly involved, please refer to Exhibit U-7 and U-8.

Following the conclusion of the meeting, the Applicant left the site to attend her doctor's appointment.

[14] Early the next morning on June 23, 2011 a conference call was held between Mr. Kelly, Mr. Deslaurier and Mr. Brett Horan regarding the incident the previous day. During that conference call, Mr. Horan made the decision that the Applicant's actions were such that termination was warranted. Mr. Deslaurier communicated that decision to the Applicant by telephone that morning prior to the commencement of her shift.

[15] The Employer advised the Union that the Applicant had been terminated by letter dated June 27, 2011 from Mr. Horan to Ms. Lori Sali, the business manager for the Union. The letter was delivered by fax to Ms. Sali on June 28, 2011. The letter requested that the Applicant not be dispatched by the Union to any of the Employer's sites.

[16] Ms. Sali testified that she had been advised on June 23, 2011 of the Applicant's termination. She testified that she had been advised by Laverne Trudelle, the Employer's head foreman, that the Applicant had been terminated and would not be returning to work. She testified that she was advised that the Applicant had "flipped out" and had been terminated.

[17] Ms. Sali testified that she contacted the Applicant on July 4, 2011. Her note from that call indicates that the Applicant complained to her that she was being harassed at work. Her notes indicated that she spoke to the job steward, Garrett, about this. Her note was that Garrett would look into those allegations. She testified that during her conversation on July 4, 2011, there was no discussion of a grievance being filed regarding the termination.

[18] Ms. Sali also testified that she again called the Applicant on July 22, 2011, but received no answer. She testified she left a message at that time for the Applicant to call her.

[19] Ms. Sali testified that she heard nothing further from the Applicant until the Applicant and her husband attended at the Union hall in early September of 2011. She testified that she advised them that she would investigate the matter.

[20] Ms. Sali testified that she contacted the job steward, Garrett, regarding the matter. She also requested the assistance of one of the International representatives for the Union, Mike Zaluski, to conduct an investigation.

[21] Ms. Sali also testified that she met with representatives of the Union and plead for them to reinstate the Applicant, but, she advises that plea fell on deaf ears.

[22] Mr. Zaluski testified that it was not unusual for him to be engaged in investigations of this nature. He testified that he routinely assists business agents to investigate workplace incidents and grievances.

[23] Mr. Zaluski testified that he contacted the Applicant on September 26, 2011 to get information regarding the incident. He requested she provide him with her description of the events. On October 3, 2011 she provided him with a copy of a report she had given to the Workers Compensation Board concerning the events.

[24] On October 12, 2011, he spoke with Mr. Horan. From Mr. Horan, he obtained statements and a response that the Employer had made to a Labour Standards complaint, which the Applicant had made. He also received from the Applicant, the names of persons involved whom she said could provide corroboration of the events as described by the Applicant.

[25] He testified that he was able to speak to three (3) of the four (4) persons who could provide verification of the Applicant's position. He spoke to Mr. Wayne Angus who advised that he had not been a witness to the discussions with the Employer Supervisors.

[26] Mr. Zaluski also spoke to Scott Thomas, who was a co-worker of the Applicant's husband. He too could provide no information as he did not work with the Applicant.

[27] Mr. Zaluski also spoke to Mr. Randy Riley. Mr. Riley, while he had known the Applicant for a long time, did not work with her and could provide no information regarding the incident.

[28] From his investigation, Mr. Zaluski formed the opinion that the Applicant was the one that was doing all the yelling and swearing at the meeting on June 22, 2011. He also formed the conclusion that there was no basis for a grievance of the termination.

[29] Having reached this conclusion, Mr. Zaluski telephoned the Applicant on or about October 14, 2011, to advise her of the results of his investigation. He advised that the witnesses she had provided were unable to corroborate her story and without proper evidence, he was unable to recommend the filing of a grievance of the termination. On being provided this information, Mr. Zaluski's evidence was that the Applicant and her husband started yelling at him, at which point he terminated the conversation by hanging up on them.

[30] The Applicant then filed this complaint under Section 25.1 of the *Act* on March 8, 2012.

Relevant statutory provision:

[31] Relevant statutory provisions include the following:

> *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.*

Applicant's arguments:

[32] The Applicant's arguments were that the Union failed to properly represent her with respect to a number of issues, most of which were unrelated to the actual termination event.

Union's arguments:

[33] The Union argued that they did not breach the duty of fair representation as outlined in Section 25.1 of the *Act*. They argued that the evidence did not disclose any discrimination, arbitrary conduct or bad faith on the part of the Union. They also argued that the Union properly investigated the allegations and formed a reasonable opinion regarding the probability of success of a grievance.

Analysis:

[34] The Board's jurisdiction under s. 25.1 is limited. The Board has held that it is not necessarily bound jurisdictionally to the strict provisions of s. 25.1. In *Mary Banga v. Saskatchewan Government Employees' Union,*[4] the Board said at page 98:

> *The concept of the duty of fair representation was originally formulated in the context of admission to union membership. In the jurisprudence of the courts and labour relations boards which have considered this issue, however, it has been applied as well to both the negotiation and administration of collective agreements. Section 25.1 of The Trade Union Act, indeed, refers specifically to the context of arbitration proceedings. This Board has not interpreted the section in a way which limits the duty to that instance, but has taken the view that the duty at "common law" was more extensive, and that Section 25.1 does not have the effect of eliminating the duty of fair representation in the context of union membership, collective bargaining or the grievance procedure.*

[35] However, many of the matters complained of by the Applicant with respect to her representation by the Union fall outside of even this expanded definition. She complained of a failure to intervene in her modified job duties, *albeit* she did not actively seek the Union's assistance, but rather took it upon herself to make complaints to her supervisor.

[36] The Applicant also complains of a failure to assist her with her Workers Compensation Board claim, again something for which Union representation is not generally provided, since there are Workers' Advocates whose responsibility it is to assist injured workers to process their claims.

[37] Her complaints and her evidence were directed more at the conduct of the Employer in its actions leading up to her termination and the termination itself. In her application at paragraph 4(a) she states that a violation of the *Act* has been and/or is being engaged in by the trade union by reason of the following facts:

- *wrongful dismissal for disportination [sic] while on active W.C.B. claim from injury sustained from work, voiced my concern's [sic] to employer pertaining "proper modified duties" on instruction's [sic] from doctor not addressed by union.*
- *being intimidated + interrogated [sic] by employer and not represented proper on this matter, or receiving any representation on dismall! [sic]*

[4] [1993] Sask. Labour Rep. 88, LRB File No. 173-93.

- *being put in un-safe medical enviorment [sic] for 3 days which resulted in me trying to defend myself from employer's behaviour [sic] and attitude toward's [sic] me.*

[38] However, given a liberal reading of these allegations, I can take it from what is raised that the complaint is that the Union did not file a grievance against the Employer in relation to her termination. That conclusion is buttressed by the note in paragraph 4(c) which was:

> *Not sure if actual grievance was ever filed by union, I was just told they wouldn't help me in matter.*

[39] In *Glynna Ward v. Saskatchewan Union of Nurses,*[5] the Board set out the distinctive meanings for "arbitrariness", "discrimination", and "bad faith".

> *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.*

[40] In *Toronto Transit Commission,*[6] the Ontario Labour Relations Board cited the following succinct explanation of the concepts of "arbitrary, "discriminatory" or "bad faith" as follows:

> *. . . a complainant must demonstrate that the union's actions were:*
>
> *(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
>
> *(2) "Discriminatory – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
>
> *(3) "in Bad Faith" – that is, motivated by ill-will, malice hostility or dishonesty.*

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[5] [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at 47.
[6] [1997] OLRD No. 3148.

> *The behaviour under review must fit into one of these three categories. …[M]istakes or misjudgments are not illegal; moreover, the fact that an employee fails to understand his rights under a collective agreement or disagrees with the union's interpretation of those rights does not, in itself, establish that the union was wrong – let alone "arbitrary", "discriminatory" or acting in "bad faith".*
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> *The concept of arbitrariness, which is usually more difficult to identify than discrimination or bad faith, is not equivalent to simple errors in judgment, negligence, laxity or dilatoriness. In Walter Prinesdomu v. Canadian Union of Public Employees, [1975] 2 CLRBR 310, the Ontario Labour Relations Board stated, at 315:*
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> > *It could be said that this description of the duty requires the exclusive bargaining agent to "put its mind" to the merits of a grievance and attempt to engage in a process of rational decision making that cannot be branded as implausible or capricious.*
> >
> > *This approach gives the word arbitrary some independent meaning beyond subjective ill will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.*

[41] In *Radke v. Canadian Paperworkers Union, Local 1120,*[7] the Board said:

> *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.*

[42] At issue, therefore, is to determine if the Union's conduct in its failure to file a grievance with respect to the Applicant's termination was discriminatory, arbitrary, or in bad faith.

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[7] [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, at 64 and 65.

[43] The Union, during argument, took the view that the process undertaken by the Union was the same as the process which they argued the Board had approved in *Don Eason and Ryan Babcock v. Construction and General Workers Union, Local 180.*[8] With respect, the Board does not agree with this position. The factual situation and the nature and timeliness of the investigation in the *Eason and Babcock* case were much different that what occurred here.

[44] However, the Board has, in *Lucyshyn v. Amalgamated Transit Union, Local 615,*[9] outlined the minimum standard of conduct by a Union in the handling of a grievance. At para. [36], the Board sets out the following seven (7) requirements:

> 1. *Upon a grievance being filed, there should be an investigation conducted by the Union to determine the merits or not of the facts and allegations giving rise to the grievance;*
>
> 2. *The investigation conducted must be done in an objective and fair manner, and as a minimum would include an interview with the complainant and any other employees involved;*
>
> 3. *A report of the investigation should go forward to the appropriate body or person charged with the conduct of the grievance process within the Union. A copy of that report should be provided to the complainant;*
>
> 4. *The Union, Grievance Committee, or person charged with the conduct of grievances, should determine if the grievance merits being advanced. Legal advice may be sought at this time to determine the prospects for success based on prior arbitral jurisprudence;*
>
> 5. *At this stage, the Union may determine to proceed or not proceed with the grievance. However, in making that determination, the Union must be cognizant of the duty imposed upon it by s. 25.1 of the Act;*
>
> 6. *At each stage of the grievance procedure, the Union will be required to make a determination as to whether to proceed with the grievance or not. Again, its decision to proceed or not must be made in accordance with the provisions of s. 25.1 of the Act; and*

[8] [2011] CanLII 27550 (SKLRB), LRB File Nos. 058-10 & 078-10.
[9] [2010] CanLII 15756 (SKLRB), LRB File No. 035-09.

> *7. It must also be recognized that the Union has carriage of the grievance, not the grievor. There may be instances where the common good outweighs the individual grievor's interest in a matter. Where such a decision is made (i.e.: not to proceed with a grievance) which is not arbitrary, discriminatory, or in bad faith, that decision will undoubtedly be supported by the Board.*

[45] There are several points that come into play here which were not included in the recitation of facts above, but were provided as a part of the evidence. Firstly, the Collective Bargaining Agreement[10] provides in Article 7.100 that "all grievances, including discharge for just cause…must be initiated within fifteen (15) working days of the incident". This incident occurred on June 23, 2011. Therefore, a grievance, to be in accord with the terms of the agreement, would have to be filed on or around July 14, 2011.

[46] Ms. Sali was advised of the termination both orally on June 23rd (by Laverne Trudelle) and on June 28, 2011 by letter from the Employer. Ms. Sali then contacted the Applicant on July 4, 2011. While she testified that the Applicant did not request that a grievance be filed, Ms. Sali did not say whether or not the Union offered to file a grievance during that conversation. Nor did she take what would have been a prudent step to file a grievance to maintain jurisdiction in respect of the matter, prior to the expiry of the deadline for filing a grievance in the collective agreement.

[47] For the reasons that follow, and primarily because of the investigation which was later conducted, and which disclosed that there was no merit to the complaint, the Board has not found the failure by Ms. Sali to clearly determine at the outset if (a) the Applicant wished to have a grievance filed, or (b) failing to file a grievance to preserve jurisdiction to be a fatal flaw in this case. However, for future reference, in appropriate circumstances, such a failure might be considered to be arbitrary and thereby constitute a failure to meet the minimum standards set out in *Lucyshen, supra*. Ms. Sali seemed to take a very cavalier approach to this matter and did not actively and immediately move to deal with what was a serious matter for the member, who had lost her employment.

[48] Often, in situations like this, it may be sufficient answer for the Union to show that they immediately (or as soon as possible given the hiring list) moved to obtain new employment

[10] Being the Project Agreement for Maintenance by Contract in Canada.

for the employee involved.[11] The Board recognizes that in this situation (the fact that the Applicant continued with her WCB claim), re-employment may not have been an option.

[49] The investigation conducted by Mr. Zaluski met the *Lucyshen* requirements, *supra*, in that it was done in an objective and fair manner. It did involve an interview with the complainant. It also involved a discussion with the Employer and the obtaining of statements from the Employer and some employees involved in the incident. Mr. Zaluski also interviewed the persons which the Applicant advised would be able to verify her complaints.

[50] On the other hand, the investigation was not completed in a timely fashion, insofar as it was conducted three (3) months after the incident occurred. Investigations must be conducted in a timely fashion. Most, if not all, collective agreements contain time limits in which grievances must be filed and processed. These requirements alone give added emphasis to the timeliness required of investigations into incidents where grievances are or could be filed.

[51] Again, given the results of the investigation that was finally conducted, and the Union's determination that a grievance would be fruitless, the Board has not found this failure to be a violation of Section 25.1 of the *Act.* However, again, the Union is put on notice that their investigations must be conducted in a timely fashion to avoid such a finding in the future.

[52] The Board can find no fault with respect to the report of the results of the investigation. The results were transmitted to both Ms. Sali and the Applicant in a timely fashion once the determination was made that a grievance was unsustainable.

[53] There was no evidence to suggest that the decision not to pursue a grievance was motivated in any way by any discriminatory conduct, any arbitrary conduct, or bad faith on the part of the Union. The decision reached, which was within the Union's right to determine, was that the grievance would not succeed.

[54] Since the Union determined not to file a grievance in the first instance, there is no ongoing requirement to continue to re-evaluate its position. The Union has carriage of the

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[11] See *Perry v. United Brotherhood of Carpenters, Local 1985 and South WBD Holdings Ltd.*[2012] CanLII 86208 (SK LRB), LRB File No. 184-12.

grievance and may, for good and sufficient reason (such as here where it found no support for the Applicant's position), decide not to file or proceed with a grievance.

[55] As noted above, the conduct of the Union in this case is not beyond reproach. However, that conduct, based primarily upon the conduct of the investigation, albeit well after the fact, provided a rationale for the Union's failure to proceed to initiate a grievance. In making this determination, the Union did not act in a discriminatory or arbitrary fashion as defined above. Nor did it act in bad faith towards the Applicant. For these reasons, this application is dismissed.

DATED at Regina, Saskatchewan, this **24th** day of **May**, **2013**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson