CONNOR FAST, Applicant v. CONSTRUCTION WORKERS UNION, LOCAL 151, Respondent Union and PCL ENERGY INC., Respondent Employer

LRB File No. 128-14; October 10, 2014

Chairperson, Kenneth G. Love, Q.C, (sitting alone pursuant to section 6-95(3) of *The Saskatchewan Employment Act*)

For the Applicant:	Andrew Mason
For the Respondent Union:	David de Groot
For the Respondent Employer:	Seamus Mulcahy

Duty of Fair Representation – Applicant alleges trade union failed to fairly represent him by not filing a grievance with respect to an incident at the jobsite – Applicant involved in accident or near miss at jobsite – Following an investigation by Employer, Applicant asked to provide urine sample – Applicant refused.

Refusal to provide urine sample constituted a breach of a safety absolute – Applicant aware that if he refused to provide sample he would be terminated.

Board not satisfied that trade union's conduct was arbitrary or otherwise in violation of *The Trade Union Act*.

The Trade Union Act, s. 25.1

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love Q.C., Chairperson:** The Construction Workers Union, Local 151, (the "Union") is certified as the bargaining agent for a unit of employees of PCL Energy Inc. (the "Employer") by an Order of the Board dated October 16, 2013.

[2] Connor Fast (the "Applicant") was employed as a 1st year apprentice Millwright at the Agrium Vault project near Vanscoy, Saskatchewan. He was involved in a workplace incident, more particularly described below, which ultimately led to the Employer demanding a urine sample, which he declined to provide. As a result, he was terminated from his position with the Employer on January 30, 2014, and was banned from the Agrium Vault project site for life.

[3] The Applicant complained to his union concerning his termination, but never personally requested that a grievance be filed on his behalf until April 13, 2014, although his father, allegedly on his behalf, had inquired about a grievance being filed as early as March 13, 2014.

[4] The Union concluded that a grievance would not be successful and did not submit a grievance on behalf of the Applicant. The Applicant applied on June 20, 2014 alleging that the Union had failed to properly represent him. While the application was filed pursuant to the provisions of *The Saskatchewan Employment Act*, the parties agreed that the facts giving rise to this situation occurred prior to the proclamation of that *Act* on April 29, 2014.

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

Facts:

The Incident

[6] Connor Fast (the "Applicant") was employed at the Agrium Vault Project near Vanscoy, Saskatchewan. The Applicant, at all time relevant to this application, resided in Delisle, Saskatchewan. He was engaged as a 1st year apprentice millwright.

[7] On January 30, 2014, the Applicant was tasked with operating the "runner truck", which transported men and materials around the jobsite. Around the lunch hour, he was transporting some journeymen millwrights and tools when he encountered a fuel truck blocking his path. After stopping, he decided to proceed to drive around the fuel truck and deliver his passengers and cargo to their appointed location.

[8] While passing the fuel truck, a beacon on his truck allegedly came in contact with the mirror on the fuel truck. The Applicant says he was not aware of any contact between the

vehicles and says that none of his passengers was aware of any contact. After passing the fuel truck, he proceeded to dispatch his passengers.

[9] After discharging his passengers, the Applicant was approached by the fuel truck driver who advised him that the runner truck had struck the fuel truck while passing and advised him to write up a statement as to what had occurred while he was passing the fuel truck. The Applicant did not do as requested and returned to his duties. Sometime later, a foreman from the operating engineers came to him and took him to write up the incident.

[10] The Applicant was required to remain in the trailer where he wrote up his statement while an investigation was undertaken and other statements obtained from other witnesses. After about 2 ½ hours, he was transferred to one of the safety trailers on site where he remained for some time. During that time, he asked if he could go to the bathroom to urinate. He was told that he could not.

[11] Sometime later, he was requested to provide a urine sample under the drug and alcohol testing policy at the site, but refused. As a result of his refusal he was terminated and banned for life from the Agrium Vault site. When he was terminated, a shop steward was called, who escorted him off the site.

Involvement of the Union

[12] The Applicant is a member of the Construction Workers Union, Local 151 (the "Union") and was represented by them at all times relevant to this application.

[13] Mr. Kent Kornelsen, who testified for the Union noted that the first contact the Union had had with the Applicant, with respect to the incident, was when a shop steward was called to be in attendance when the Applicant was terminated. Prior to that time, neither the Applicant, nor the Employer had requested the presence of a shop steward in relation to the incident.

[14] In cross-examination, the Applicant testified that he was not aware of the role of shop stewards. He testified that "he heard the word floating around, but that was all he knew about it".

[15] The Applicant acknowledged that when hired to work at the Agrium Vault Project, he was made aware of and signed the Employer's "Dismissal Discipline Process". This policy provided notice to employees regarding actions which would result in immediate dismissal. One of those actions was "A & D refusal – Refusal to provide and alcohol or drug specimen". The Applicant reviewed and signed this document on the date of his hire, June 13, 2013.

[16] The Applicant also testified during cross-examination, that when he refused to take the drug test "he knew he was done at Agrium".

[17] When the shop steward arrived after the Applicant's refusal to provide a urine sample, he was put through the discharge process. That involved the preparation of an employee discipline notice, which he refused to sign, but which was signed by the job steward, Mr. Richard Wuttonee. Attached to the Employee discipline notice were witness statements from Mr. Clayton R. Myram and Mr. Wallace Duquette regarding the incident with the fuel truck.

[18] Following the discharge of the Applicant from his employment, the shop steward walked him off the site. The Applicant did not request a grievance be filed at that time concerning his termination.

[19] On February 14, 2014, Mr. Malcolm Fast, the Applicant's father, emailed the Union concerning the incident. His email was received by Ms. Katelyn Hack, a Union employee who passed it along to Mr. Kornelsen for response. Mr. Kornelsen responded to Mr. Malcolm Fast with a request that the Applicant contact him directly. He also noted, "I will make our chief steward on site aware of the issue and see documentation and information he can obtain". [sic]

[20] The Applicant did attempt to contact Mr. Kornelsen on February 14, 2014, and left him a voicemail message. Mr. Kornelsen called him back and took down information concerning the incident. Mr. Kornelsen also followed up on the matter while on a site visit at the Agrium site on February 19, 2014. During that meeting, he was able to review statements and documents related to the incident. He also determined that if the Applicant were to complete a Drug and Alcohol Rehabilitation Program that he would be eligible to be rehired by PCL Energy Inc. ("PCL").

[21] Mr. Kornelsen testified that his review of the incident reports showed factually relevant and consistent statements. He concluded that there was reasonable evidence that an incident or near miss had occurred on January 30, 2014.

[22] Mr. Kornelsen contacted the Applicant on February 27, 2014 to discuss the results of his review of the incident. He advised the Applicant that he could return to work with PCL if he would complete a Drug and Alcohol Rehabilitation Program. The Union participated in such a program which was known as the "Ceritian Program". During that follow up conversation, Mr. Kornelsen's notes indicate that the Applicant said that he would discuss the program with his father and get back to him (Kornelsen).

[23] Mr. Kornelsen also testified that after his discussion with PCL on February 19, 2014, he discussed the case with senior Union reps and the shop steward on site. He testified that as a result of his investigations, that the Union felt that PCL had reasonable grounds to request a drug and alcohol test and that, therefore, no further action was warranted. He testified that he communicated this to the Applicant on February 27, 2014.

[24] Mr. Kornelsen testified that the Applicant's main concerns when he spoke to him in February were how he could access the pension contributions which he had made while employed as well as getting payment for some dental expenses. At the time, he was taking classes related to his apprenticeship at SIAST.

[25] The Union recieved another call from the Applicant on March 10, 2014. He again spoke to Ms. Hack who took a message for Mr. Kornelsen to return the call. Mr. Kornelsen returned the call on March 12, 2014. The notes of that call indicate that they again spoke about the Ceritian Program. His notes also indicate that the Applicant was wishing to access his RSP and Pension monies as he was, at that time he was taking classes related to his apprenticeship.

[26] On March 13, 2014, Mr. Malcolm Fast again emailed the Union. In this email, he asked the Union if a grievance had been filed in respect to his son's termination. No response appears to have been made to that email, so on April 13, 2014, the Applicant followed up by sending that email as an attachment to an email which he sent to the Union.

[27] The Union did not respond until April 30, 2014 when it advised that no grievance had been filed. The Applicant then brought this application on June 20, 2014.

Relevant statutory provision:

[28] Relevant statutory provisions are as follows:

> *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.*

Employer's arguments:

[29] The Applicant relied upon the Supreme Court of Canada decision in *Centre hospitalier Regina Ltee v. Judge Bernard Prud'homme et al*[1] and, in particular, the Court's reference to the oft cited seminal decision in fair representation cases, *Canadian Merchant Service Guild v. Gagnon.*[2] The Applicant argued that where critical job interests were at stake that the Union should have taken greater care to insure that the Applicant's job interests were respected.

[30] The Applicant also argued that once the onus on the Applicant had been satisfied, then the Union had the onus to show that it had properly represented the Applicant, especially when critical job interests were at stake. In this situation, the Applicant argued that the Union had been arbitrary in its dealings with the Applicant.

Union's arguments:

[31] The Union relied upon the Board's decisions in *Re: Hargrave*[3] and *Re: RR*[4]. The Union argued that the onus of proof of a failure by the Union to fairly represent the Applicant fell upon the Applicant and that he had failed to satisfy that onus.

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[1] [1990] 1 SCR 1330, CanLII 111 (SCC)
[2] [1984] 1 S.C.R. 509, CanLII 18 (SCC)
[3] [2003] CanLII, 62883 (SKLRB)
[4] [2011] SLRBD No. 15, 200 C.L.R.B.R. (2d) 249, LRB File No. 057-10

[32] The Union also argued that the Board should not minutely examine the Union's investigations into the incident. It argued that the process utilized by the Union was sufficient to discharge its responsibilities to the Applicant.

[33] The Union also argued that until they were contacted on March 13, 2014 by Malcolm Fast, there had been no mention of a grievance by the Applicant. It also argued that the case relied upon by the Applicant was not a duty of fair representation case and had no applicability to the present case.

Analysis:

[34] The Board's jurisprudence with respect to section 25.1 is well established. 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.*[Emphasis added]

[35] 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.*

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

> *The behavior 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.*

[36] 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.*

[37] The Applicant argued that the Union was arbitrary in its representation of the Applicant. He argued that the Union should have been more diligent in its representation and its investigation due to the fact that the Applicant had been terminated and was now banned for life from the Agrium site.

[38] We cannot agree with the Applicant's characterization of the Union's actions in this case. The Applicant acknowledged that he was aware that by refusing to provide the urine sample as requested that he would be terminated. In his testimony, he indicated that he had been drinking in the days prior to his coming back to work after a shift break. He testified that he had been willing to take the test, but as his frustration grew due to his not being permitted to urinate grew, he became more and more unhappy and ultimately refused the test. He also indicated that he was concerned that because of his prior heavy drinking (while on his shift break) that he was concerned that there may be residual traces of alcohol in his system.

[39] Both the Applicant and the Union knew that site safety was a priority at the Agrium site. Both the Applicant and the Union knew that a refusal to take a urine test on request following an accident or near miss would result in termination. That is precisely what occurred.

[40] Mr. Kornelsen reviewed the incident reports and found that PCL had cause to request the urine sample based upon those reports. Perhaps, in hindsight, if the Applicant had asked to have a steward present, he might have been counseled to take the test, which presumably, he would have passed. However, that is not what occurred. The Applicant, knowing the consequences of his decision, made a deliberate choice to refuse the test, and received what he anticipated.

[41] The Applicant did not show that the Union acted in an arbitrary manner, that is "flagrant, capricious, totally unreasonable, or grossly negligent". Once Mr. Kornelsen was made aware of the situation, he investigated the incident and the discipline and came to the reasonable conclusion that the employer was justified in making the request for a urine sample. Faced with the Applicant's refusal to provide that sample, there was little he could do given the policies in place and the Applicant's acknowledgement of the penalty he would face.

[42] Arguably, a case could be made out for a grievance being filed upon the Union gaining knowledge of the incident pending their investigation. However, that was not done. The Union did, however, negotiate a potential return to work with PCL if the applicant would take the drug and alcohol rehabilitation program. This too, however, the Applicant refused to do.

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

[43] In our view, the Applicant has failed to satisfy the onus of proof that the Union acted in an arbitrary fashion with respect to its representation of the Applicant.

[44] Even if the onus has been satisfied, the conduct of the Union is not, in our opinion, sufficient to find a violation of section 25.1 of the *Act*. It conducted an inquiry into the events, and drew a conclusion that a grievance would not be successful given the facts of the situation and the Applicant's refusal to provide a sample, which he knew would lead to termination.

[45] In *R.R. v. Canadian Union of Public Employees, Local 4777,*[8] the Board says at paragraph [43]:

> *When confronted with an allegation of arbitrariness on the part of a trade union in the representation of its members, the Board is not looking to determine whether or not we believe that the trade union erred in its strategies or that its decisions may have been wrong. To successfully sustain an allegation of arbitrariness, an applicant must establish more than mere negligence (i.e.: mistakes on the part of the union), an applicant must satisfy the Board that the trade union's impugned conduct was grossly or seriously negligent (i.e.: reckless, capricious, or perfunctory). See: Randy Gibson v. Communications, Energy and Paperworkers Union of Canada, Local 650, [2002] Sask. L.R.B.R. 574, LRB File No. 089-02. See also: Deb 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.*

[46] When tested against this standard, the Applicant did not show any mistakes on the part of the Union, instead, alleging that it should have done more because critical job interests were at stake. There was no demonstration of gross or serious negligence or any reckless, capricious or perfunctory behaviour on the part of the Union.

[47] The Board does not sit in appeal of the Union's decision not to file or advance a grievance. Nor, will the Board decide if a trade union's conclusion as to the likelihood of success of a grievance or rights arbitration is correct. The Board will not minutely assess each and every

[8] *Supra* Note 4

decision made by a trade union in the representation of its members.[9] There was no conduct demonstrated which would give rise to a breach of the provisions of Section 25.1 of the *Act*.

[48] The Application is accordingly dismissed. An order dismissing the application will accompany these Reasons.

DATED at Regina, Saskatchewan, this **10th** day of **October, 2014.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

[9] See *Chabot v. Canadian Union of Public Employees, Local 4777* [2007] Sask. L.R.B.R. 401, CanLII 68749 (SKLRB), LRB File No. 156-06