MARIUS PINTILICIUC, Applicant v. COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION, LOCAL 649, Respondent Union and SASKENERGY, Respondent Employer

LRB File No. 083-14; February 5, 2015

Chairperson, Kenneth G. Love, Q.C, sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1

For the Applicant:	Self Represented
For the Respondent Union:	Gary Bainbridge
For the Respondent Employer:	Meghan McCreary

Duty of Fair Representation – Employee involved in three (3) incidents where Employer imposed discipline – Union grieved all discipline – Employee terminated in culminating incident for insubordination.

Duty of Fair Representation – Grievance on first incident withdrawn by Union at request of Applicant – Applicant later requested Union to re-open Grievance – Union advised it was unable to do so.

Duty of Fair Representation – Union initially grieved suspension and Applicant's termination – Finally Union determined on legal advice not to pursue grievances to arbitration – Board finds that Union did not act in and arbitrary, discriminatory or in bad faith in making determination not to proceed.

Onus of Proof – Applicant has onus of proof that Union acted in an arbitrary, discriminatory or bad faith manner – Applicant failed to discharge this onus.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: Marius Pintiliciuc (the "Applicant") is a former employee of SaskEnergy. He was represented, while employed with SaskEnergy, by Communications, Energy and Paperworkers Union, Local 649**,** (the "Union"). The Applicant was

initially employed in Estevan, Saskatchewan, but transferred to Wadena, Saskatchewan, where this matter played out.

[2] I do not intend to provide specifics of the Applicant's medical condition and will simply refer to it as a back injury. The Board was provided numerous medical opinions and other documents related to the severity and nature of the injury, but that is not an issue in this matter.

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

Facts:

[4] This matter relates to three (3) workplace incidents involving the Applicant. I will provide a brief overview of each of those incidents:

> ***Incident #1:***
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> *On January 9, 2012, the Applicant contacted his supervisor to advise that he would require a two (2) week sick leave commencing on January 17, 2012. He attended his physician on January 16, 2014 and obtained the necessary doctor's note concerning this absence.*
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> *On January 17, 2012, he went on vacation in Cuba. SaskEnergy was not made aware of this trip until later contacted by The Workers' Compensation Board with respect to a claim for a workplace injury made by the Applicant.*
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> *During his sick time, a Health nurse with SaskEnergy contacted his physician and was advised that the Applicant could be at work on modified duties. The Applicant argued that his physician later claimed he never made such a statement.*
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> *When asked for an explanation regarding his absence during the grievance procedure, the Applicant was not forthcoming. When asked where he had been, he initially responded that he was "not home". Later, he stated that the trip to Cuba had been booked by his wife and was a "last minute decision" by her.*
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> *When asked to provide proof that the trip had been booked "last minute", he refused on several occasions to provide that proof, invoking concerns about his wife's privacy and confidentiality.*
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> *The result of this incident was that the Applicant received a three (3) week suspension, which was grieved by the Union in accordance with the collective agreement. It ultimately was withdrawn by the Union, at the*

request of the Applicant, due to his failure to provide proof that the trip had been booked "last minute".

Sometime later, The Workers' Compensation Board determined that this sick period was a work related compensable injury and compensated the Applicant for this period. However, since the Applicant had already utilized sick time for this period, that payment should have gone to SaskEnergy.

Following the decision by The Workers' Compensation Board, the Applicant requested that the Union revisit his Grievance. The Union declined to do so.

Incident #2:

Following the Applicant's transfer to Wadena, there were issues between himself and some of his co-workers. The Union attempted to meet with the parties to resolve the issues, but was unsuccessful. A harassment complaint was made by a co-worker against the Applicant, which was investigated by an independent investigator appointed pursuant to SaskEnergy's workplace harassment policy. That investigation concluded that the Applicant was engaged in workplace harassment. The result was that he was given a one (1) week suspension.

The Union grieved the suspension in accordance with the collective agreement, but was unsuccessful. After taking legal advice, the Union determined not to take the matter to arbitration and the grievance was discontinued.

Incident #3:

This was the culminating incident that lead to the Applicant being terminated. On April 24, 2014, SaskEnergy requested that the Applicant submit to an independent medical examination ("IME") with respect to his back injury. It scheduled an appointment for him to attend at the CBI Physical Rehabilitation Centre in Saskatoon for the purposes of this analysis.

The Applicant had had experience related to his back injury at this clinic. He wrote to the Union to request that he not be required to attend to that clinic. The Union complied with that request and contacted SaskEnergy who arranged for an appointment for him at the CBI Physical Rehabilitation Centre in Regina. SaskEnergy hand delivered a letter on May 5, 2014 to the Applicant advising of this appointment which was scheduled for May 12, 2014.

SaskEnergy also followed up the letter by telephone and email. The Applicant refused to answer all but one of these calls and also did not respond to any email follow up. He ultimately failed to attend the scheduled appointment.

As a result, of his failure to attend the IME, the Applicant was determined by SaskEnergy to have been insubordinate and his employment was terminated. The Union grieved the termination in accordance with the collective agreement. After taking legal advice, the Union determined not to take the matter to arbitration and the grievance was discontinued.

The Applicant testified that he did not attend the scheduled appointment because his doctor had advised that he should not drive during that time. Also, he testified that he had another appointment some days later with a back specialist in Saskatoon. He testified that the result of that later appointment was that he was scheduled for back surgery in Saskatoon, which surgery was to be performed approximately one (1) week following the date of the hearing of this matter.

He did not ask the Union to advise SaskEnergy, nor did he, himself, advise SaskEnergy of this upcoming appointment with the specialist in Saskatoon. Furthermore, he confirmed that he was taken to the Saskatoon appointment in Saskatoon by his wife in the family car.

Relevant statutory provision:

[5] Relevant statutory provisions are as follows:

> ***6-59****(1)An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.*
>
> *(2)Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee.*

Applicant's arguments:

[6] The Applicant's arguments focused on his providing medical support for his back injury as justification for his vacation during sick leave (Incident #1), and his failure to attend the IME (Incident #3). In respect of Incident #2, he argued that the Union and SaskEnergy had been complicit in siding with other employees against him in respect of the harassment complaint.

[7] The Applicant further argued that the Union should have "gone to bat" for him in respect of Incident #1 and taken his side, rather than insisting on his providing proof that the vacation was not premeditated and was booked "last minute". Furthermore, he argued that the sick leave was eventually determined to be legitimate by virtue of it having been accepted by The Workers' Compensation Board for payment.

[8] The Applicant argued that he was justified in not attending the IME based upon his assertion that SaskEnergy had no authority to require him to attend for the IME. Secondly, he argued that the medical specialist in Saskatoon, which he visited days after the proposed visit, supported his claim of disability and should have been accepted by the Union and SaskEnergy as validation of his disability in lieu of the IME.

Union's arguments:

[9] The Union provided a written Brief which we have reviewed and found helpful. In support of its position that it had not failed to properly represent the Applicant, it cited *Laurence Berry v. SGEU,*[1] which decision outlined the general principles that emerged from the Supreme Court of Canada's decision in *Canadian Merchant Guild v. Gagnon.*[2]

[10] The Union also cited the more recent decision of this Board in *Re: Banks,*[3] wherein the Board reviewed its jurisprudence with regard to the duty of fair representation, and the meaning to be ascribed to "Arbitrary", "Discriminatory" and "Bad Faith".

[11] The Union argued that it was not required to follow the wishes of a particular employee with respect to the prosecution of a grievance, citing *Liick v. C.U.P.E. Local 600.*[4] It also argued that the question to be considered is not whether the Union was right or not, but rather, the Board must look to the nature of the Union's representation. Furthermore, it argued that the Union must be found to have been seriously negligent or been guilty of major negligence before its representation would be found to have been arbitrary, citing *Roger Johnston v. Service Employees International Union, Local 333.*[5]

[12] The Union further argued that it "put its mind" to all the Applicant's issues. It argued it did not arbitrarily dismiss the Applicant, nor was it discriminatory. It argued that it responded completely, promptly and politely to all of the Applicant's requests. It also argued that it had not been perfunctory with the Applicant.

[13] The Union argued that it acted in good faith throughout and did not ignore the Applicant. It also argued that there was no evidence of hostility or personal animosity towards

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[1] [1993] S..L.R.B.D. No. 62. LRB File No. 134-93
[2] [1984] 1 S.C.R. 509
[3] [2013] CanLII 55451, S.L.R.B.D. No. 20, LRB File No. 144-12
[4] [1995] S.L.R.B.D. No. 43

the Applicant. Nor, it argued, was the Union negligent in not advancing the grievances further. It argued that it would have a difficult time in overturning the employer's decisions before an arbitrator.

Employer's arguments:

[14] SaskEnergy did not provide argument, but supported the views expressed by the Union.

Analysis:

[15] The Board's jurisprudence with respect to Section 6-59 of *The Saskatchewan Employment Act*[6] (the "*SEA*") is well established from the Board's earlier decisions with respect to Section 25.1 of *The Trade Union Act.*[7] In *Glynna Ward v. Saskatchewan Union of Nurses,*[8] 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]

[16] In *Toronto Transit Commission,*[9] 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*

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[5] [2003] CanLII 62879, S.L.R.B.D. No. 2, 92 C.L.R.B.R. (2d) 298, LRB File No. 158-02
[6] S.S. 2013 c. S-15.1
[7] R.S.S. 1978 c. T-17 (now repealed by the *SEA)*.
[8] [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at 47.
[9] [1997] OLRD No. 3148.

> *(3) "in Bad Faith" – that is, motivated by ill-will, malice hostility or dishonesty.*
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> > *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".*
> >
> > *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:*
> > >
> > > *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.*

[17] In *Radke v. Canadian Paperworkers Union, Local 1120,*[10] 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.*

[18] The Applicant bears the onus of proof under Section 6-59 of the *SEA*. It is necessary for the Applicant to show that the Union has acted "in a manner that is arbitrary,

discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee." In this case, the Applicant has failed to discharge this onus.

[19] As is often the case in applications of this nature, the evidence from the Applicant focuses on establishing that the Applicant had a good case, which the Union should have pursued to his advantage. However, the Board has consistently ruled that it is not the merits of the grievance which it seeks to adjudicate, nor to second guess the Union with respect to decisions made in its representation of its member. The nature of this duty arises out of the Supreme Court of Canada decision in *Canadian Merchant Guild v. Gagnon.*[11] The Board has often discussed this duty. One of those occasions was in the decision cited by the Union in *Laurence Berry v. SGEU.*[12]

[20] In that decision, the Board says at pages 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:*
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> > *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*

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[10] [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, at 64 and 65.
[11] [1984] 1 S.C.R. 509
[12] [1993] S.L.R.B.D. No. 62. LRB File No. 134-93

> *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.*

[21] In the Board's opinion, the evidence before it clearly shows that:

1. In the case of Incident #1, the Grievance was withdrawn at the request of the Applicant. Prior to its withdrawal, the Union acted in good faith, objectively and honestly with respect to its representation of the Applicant. Its representation was frustrated by the Applicant's refusal to provide any evidence to show that the booking of the trip to Cuba was "last minute". The decision to withdraw the grievance was initiated by the request of the Applicant and not by the Union.

2. In respect of Incident #1, the Board is also satisfied that the Union acted properly with respect to the refusal to attempt to restart the grievance upon it being determined by The Workers' Compensation Board that the period under review was compensable under their legislation. The discipline given to the Applicant in respect of Incident #1 had nothing to do with whether he was entitled to Workers' Compensation benefits or not. Furthermore, once withdrawn, the Grievance could not again be re-activated since it would likely offend the time limits for filing of grievances established by the collective agreement. In respect of this Grievance, the Board is unable to find any arbitrary, discriminatory or bad faith conduct on the part of the Union.

3. In respect of Incident #2, the Applicant failed to provide any evidence of his conspiracy theory that the Union and SaskEnergy were, in combination, seeking to discriminate against him. He suggested that the review by the investigator was not impartial since the investigator

was paid by SaskPower. However, he pointed to no aspect of the report, or in its preparation or the processes utilized by the investigator to suggest that the report was less than impartial.

4. The Union processed the Grievance in good faith, attempting to either have the discipline removed or lessened, but was unsuccessful. After taking legal advice, it determined to abandon that Grievance. In so doing, there was no suggestion that the Union was negligent in its representation of the Applicant, nor was there any suggestion that it was incompetent or made a gross error. In respect of this grievance, the Board is unable to find any arbitrary, discriminatory or bad faith conduct on the part of the Union.

5. In respect of Incident #3, a higher standard of conduct by the Union is required due to the serious nature (i.e.: the termination of the Applicant) of the discipline involved. Again, however, the Board is unable to find any arbitrary, discriminatory or bad faith conduct on the part of the Union.

6. The Union attempted to assist the Applicant with respect to SaskEnergy's demand that he attend for an IME. Unfortunately, the Applicant was uncooperative, with respect to a proper direction under the terms of the Collective Agreement, that he attend.

7. The Applicant objected to the first appointment which was made, and the Union assisted him by arranging for an alternate assessment in Regina rather than Saskatoon. Nevertheless, upon written notice of the appointment having been delivered to the Applicant, he refused to co-operate by not answering follow up telephone calls and emails. He steadfastly maintained that the Employer had no right to require him to attend the IME, but failed to communicate that to either the Union or SaskEnergy. Furthermore, he failed to provide any excuse for not attending the arranged IME, seeking to excuse this behavior by later claiming to have had another appointment arranged, but, which was never communicated to either the Union or the Employer.

8. Again, the Union represented him through the grievance procedure, finally withdrawing the Grievance after seeking legal advice as to the chances of success at arbitration.

9. Even with the higher standard of conduct required in cases like this, the Board is unable to find any conduct by the Union which would amount to arbitrary, discriminatory or bad faith conduct which would breach the Union's duty of fair representation. Again, there was no negligence, incompetence of gross error in the representation of the Applicant. Nor was there any discrimination or bad faith. The Applicant decided that he would not comply with the request to attend the IME nor did he communicate any justification for his refusal.

[22] For these reasons, the application is dismissed. An order dismissing the application will accompany these reasons.

DATED at Regina, Saskatchewan, this **5th** day of **February**, **2015.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson