BARRY CHESSALL, Applicant v. COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 649/UNIFOR and SASKENERGY, Respondents

LRB File No. 099-14; October 29, 2015

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

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

Duty of Fair Representation – Board discusses the genesis of the duty and its re-enactment in *The Saskatchewan Employment Act* – Board notes differences in legislative provisions under the new legislation.

Duty of Fair Representation – Notwithstanding changes in legislation Board reviews definitions of "arbitrary", "discriminatory" and "bad faith" and adopts definitions utilized under former statutory provisions.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Chairperson:** This is an application pursuant to Section 6-59 of *The Saskatchewan Employment Act* (the "*SEA"*). The Applicant, Mr. Barry Chessall, is a former employee of SaskEnergy (the "Employer") and was represented for collective bargaining by Unifor, Local 649 (the "Union") during the periods relevant to this application.

Facts:

[2] The Applicant was employed as a service technician with the Employer in Nipawin, Saskatchewan from June 14, 2002 to May 16, 2010. He was then employed in Prince

Albert, Saskatchewan from May 17, 2010 to February 28, 2011. Prior to leaving his employment with the Employer, he worked in Weyburn, Saskatchewan from March 1, 2011 to February 5, 2013.

[3] During the period that the Applicant was working in Nipawin, he was involved in a major gas pipeline explosion, which occurred on April 18, 2008, when a backhoe which was excavating in the commercial centre of Nipawin, struck an underground gas pipeline. Two (2) people died as a result of the explosion. The Applicant, as a service technician, was required to attend the scene of the explosion and took personal risk to shut off gas services in nearby buildings to help control any aftermath of the explosion.

[4] The Applicant testified that as a result of the explosion, and his participation in the aftermath of the explosion, he suffered from post-traumatic shock syndrome which affects him to the present day. He testified that he would have appreciated some counselling with respect to the incident, but the Employer did not provide any such assistance. He noted in his testimony that his wife, who worked in a credit union nearby where the explosion occurred, received counselling.

[5] When he transferred to Prince Albert in May, 2010, he testified that he was still suffering from the effects of the explosion. He experienced difficulties with his supervisors while in Prince Albert in respect of his work performance. In his testimony, the Applicant excused these performance issues by reference to the explosion impact and upon poor equipment and communication between himself and his supervisors. He testified that he felt harassed and that he had reached out to the Union for assistance. He testified that he spoke to Christy Best, the Union President, on October 31, 2010 and was advised to go through his local shop steward. He called Ms. Best again on November 12, 2010 to advise that he was still undergoing harassment. He finally sent a letter to Ms. Christy Best, the President of the Union seeking assistance by email on December 13, 2010. The Union did not assist him while in Prince Albert, so he determined to move to Weyburn, which he did on March 1, 2011.

[6] Shortly after his arrival in Weyburn, the Applicant filed a formal harassment complaint against his supervisors in Prince Albert. This complaint was quite detailed insofar as numerous complaints that he recounted. The Union assisted the Applicant with respect to this complaint and also helped him during the conduct of the investigation into the complaint. However, the investigation concluded that there was no harassment, but rather, that the

supervisors had been engaged in performance management of the Applicant. The investigation was done internally by the Employer. It was conducted by Mr. Robert Haynes, the Vice President, Human Resources and Corporate Affairs for the Employer. The only censure which the supervisors received was a review of the harassment policy then in effect and a rebuke for use of unnecessary colourful language.

[7] Ms. Best testified that following the completion of the harassment investigation, she initiated discussions with Mr. Haynes in respect of payment for expenses incurred by the Applicant in his move to Weyburn from Prince Albert. Such payment would be an extraordinary payment as the Applicant was not eligible, under the Employer's expense re-imbursement policy, for payment of his expenses. Nevertheless, the Employer granted an exception and made payments to the Applicant related to expenses he incurred in moving from Prince Albert to Weyburn.

[8] In November of 2011, the Applicant and his wife provided a letter to the Employer detailing the impact of the Nipawin explosion on himself and his family. These letters assisted the Union to negotiate a critical incident protocol with the Employer which would provide guidelines to deal with any critical incident, in the future, such as the Nipawin explosion and to provide support to employees involved in such an incident.

[9] Unsatisfied with the results of the harassment investigation, the Applicant resigned from his employment on February 5, 2013. He testified that he attempted to bring a harassment complaint under the *Occupational Health and Safety Act, 1993* (now repealed and replaced by the *SEA*), but his complaint was refused because he was no longer employed by the Employer. He then brought this application on May 23, 2014.

Relevant statutory provision:

[10] **Relevant statutory provisions include 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:

[11] The Applicant argued that the Union had not done enough to assist him during the time he claimed he was being harassed in Prince Albert and that they did not do enough to assist him during the investigation of his harassment claim. He argued that the harassment investigation was not properly conducted insofar as the investigator did not contact who were willing to speak up regarding the situation, nor did they investigate the Applicant's log books regarding the incidents which he complained about.

[12] The Applicant also argued that he had continuously and repeatedly brought safety issues to the attention of both the Employer and the Union, but nothing had been done about them. He argued that the Union folded under pressure from the Employer, who wanted to sweep the issue under the carpet.

Union's arguments:

[13] The Union argued that they had properly represented the Applicant in respect of his harassment issues. They argued that they had not been arbitrary, discriminatory or acted in bad faith towards the Applicant.

[14] They argued that the issue was with respect to the conduct of the harassment investigation by the Employer, something that the Union did not control. Additionally, they argued that the Applicant had not requested the Union to file a grievance against the investigation process or result.

[15] The Union argued that it did what it could with respect to assisting the Applicant and treated him with courtesy and candor throughout. The Union also argued that the Applicant had never requested the Union to file a grievance regarding the harassment issue and asserts that it was not up to the Union to seek out grievances to file.

[16] The Union relied upon the Board's past jurisprudence regarding Employee-Union disputes and its duty to fairly represent employees for whom they are the bargaining agent. The Union also argued that the Applicant's issue was not with the Union, but rather with the Employer over the harassment issue.

Employer's arguments:

[17] The Employer took no position with respect to the Application.

Analysis:

Legislative Changes

[18] With the proclamation of the *SEA* on April 29, 2014, the statutory duty owed by a trade union to represent its members changed somewhat. Under the former *Trade Union Act*[1], the statutory duty in Section 25.1 required that a trade union represent its members "in grievance or rights arbitration proceedings…in a manner which is not arbitrary, discriminatory, or in bad faith". This statutory responsibility arose from the common law fiduciary duty described by the Supreme Court of Canada in *Canadian Merchant Service Guild v Gagnon et al*[2]. At page 527, Mr. Justice Chouinard summarized the principles concerning a union's duty of representation in respect of a grievance which he distilled from the law and academic opinion consulted. These were:

> *1. The exclusive power conferred on a union to act as 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 employee.*

[1] R.S.S. 1978 c. T-17 (now repealed)
[2] [1984] 1SCR 332, {1984] CanLII 18 (SCC)

[19] In *Mary Banga v. Saskatchewan Government Employees Union*[3], the Board confirmed that section 25.1 of *The Trade Union Act* did not restrict or eliminate the duty imposed on a trade union as set out in *Gagnon*. In that decision at pp. 97 & 98, the Board said:

> *…As we have pointed out before, the duty of fair representation arose as the quid pro quo for the exclusive status as bargaining agent which was granted to trade unions under North American collective bargaining legislation. Once a certification order is granted on the basis of majority support, members of the bargaining unit have no choice as to who will represent them, whether or not they were among those who supported the union. This exclusive status gave trade unions security and influence; it was, however, viewed as imposing upon them an obligation to represent all of those they represented in a way which was not arbitrary, discriminatory or in bad faith.*
>
> *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 the 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 that duty of fair representation in the context of union membership, collective bargaining, or the grievance procedure.*** *[Emphasis Added]*

[20] This broadened duty of fair representation has been acknowledged by the provisions of Section 6-59 of the *SEA*. Subsection (1) of that section sets out the duty of fair representation owed to members from their trade union. Subsection (2), then goes on to establish the statutory duty, but that duty is "Without restricting the generality of subsection (1)".

[21] Additionally, subsection 6-59(1) of the *SEA* is not restricted to "grievance or rights arbitration proceedings" as was the case with section 25.1 of *The Trade Union Act.* Section 6-59(1) references fair representation "pursuant to a collective agreement or this Part".

[22] It is beyond the scope of the facts in this case to determine what impact the changes in the legislated duty of fair representation may be, but, it is clear that the legislature intended to embrace the common law duty and to enhance the statutory duty of fair representation as contained in the former legislation.

Did the Union Fail in its Duty of Fair Representation?

[3] [1993] 4th Quarter Sask. Labour Rep. 88, LRB File 173-93

[23] This application is not about the fact that the Union refused or failed to process a grievance on behalf of the Applicant. It is about the concern which an employee, who is unable to bargain on his own behalf, and is reliant upon the Union, has, when they are required to "go it alone" in situations such as this which involve harassment in the workplace.

[24] The Board, as a result of its new jurisdiction under the *SEA* to hear appeals from decisions of Adjudicators appointed pursuant to Part III (Occupational Health and Safety provisions), often hears appeals involving discriminatory conduct by employers which can include allegations of harassment. The Board also hears applications such as this from an employee who alleges that his union has not assisted him in the workplace when harassment is alleged. Often the same fact situation gives rise to complaints under both Part VI and Section 6-59 and under subsection 3-1(l) and processed under Part III, including Section 3-36 of the *SEA*.

[25] Compounding this concern is that in many instances, there is a harassment policy or procedure adopted under a collective agreement as is the case here. As a result, there are often multiple proceedings which arise out of one fact situation. There can be a grievance filed with the Union under the harassment policy provisions of the collective agreement, a complaint to an Occupational Health Officer under Section 3-36 of the *SEA*, and an application by the employee against the union under Section 6-59 of the *SEA*. In addition, there is also sometimes an application to either the Workers Compensation Board and/or the Saskatchewan Human Rights Commission.

[26] In this case, the Applicant did not request the Union to file a grievance under the harassment provisions of the collective agreement, but has filed a complaint under Section 3-36 of the *SEA.* Unions will often voluntarily assist their members in the processing of a complaint under Section 3-36. What duty, if any, a trade union may have in respect of representation of employees in such proceedings is outside the scope of this fact situation, but, nevertheless, the Board may, at some time, be called upon to make that determination.

[27] Subsection 6-59(2) requires that the Union "shall not act in a manner which is arbitrary, discriminatory, or in bad faith", both in considering whether to represent a member or in its representation of a member, or former member, in respect of that member's employment or previous employment, by that bargaining agent. In this case, there was no request by the member to have a grievance filed under the collective agreement.

[28] The terms "arbitrary, discriminatory" and "bad faith" have been previously defined by the Board on many occasions[4]. In *Banks*, the Board summarized its previous jurisprudence in that area. These terms were defined in *Toronto Transit Commission*[5] as follows:

> *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.*
>
> *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".*

Was the Union Arbitrary?

[29] The evidence does not establish that the Union was arbitrary with respect to its representation of the Applicant. It assisted the Applicant during the conduct of the harassment investigation and afterwards when it secured financial compensation for the Applicant related to his move to Weyburn. While the Applicant argues that the Union did not do enough for him while he was in Prince Albert, the evidence does not establish that the Union was flagrant, capricious, totally unreasonable or grossly negligent.

Was the Union Discriminatory?

[30] The evidence does not establish that the Union acted discriminatorily towards the Applicant. There was no evidence of any distinction in the way his situation was handled over another employee. Rather, he was provided an extraordinary payment for his moving expenses which other employees may not have received.

Did the Union act in Bad Faith?

[31] Again, there was no evidence to support a finding of bad faith, that is, ill will, malice, hostility or dishonesty on the part of the Union. The evidence was to the contrary, that the Union made an honest effort to assist the Applicant.

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[4] See Banks v. SFL {2013] CanLII 55451

[32] In his evidence and his examination of the Union President, Christie Best, the Applicant brought evidence of a meeting at a restaurant in Weyburn which he sought to show that the Union disregarded his privacy in meeting in a public restaurant to discuss his harassment complaint. The evidence from Ms. Best, however, showed that the Union was sensitive to privacy concerns and that the meeting was in a nearly vacant restaurant well away from other customers.

Did the Union fail the Applicant with respect to its Duty of Fair Representation?

[33] Based upon the above and my review of the evidence presented, I am unable to conclude that the Union failed to properly represent the Applicant as required. There was no animosity between the Applicant and the Union. This was demonstrated both at the hearing and in the correspondence between the parties. One email sent to the Union by the Applicant is telling in that regard. On September 10, 2013, the Applicant emailed Ms. Best as follows:

> *Good morning Christie this [sic] Barry Chessall and I am writing to you in regards to a letter I sent you in June of this year.*
>
> *I wrote this letter based on legal advise [sic] that I received and was told that to ensure that I held that company accountable for the treatment in received in the PA region I had to first start with the union.*
>
> *In hind site [sic] I regret sending that letter and know that the company is the one that failed me and refused to deal with their ongoing PA problems I am looking at the positive side and know that you did stand up for me but had an uphill battle even prior to my problems.*
>
> *I would like to say Christy that I do miss the people that I worked with in the union and miss the comradery that I felt all the years I worked as SEI.*
>
> *Take care and keep up the good fight and thanks for all you've done in the past in helping me with the PA incident and all of the other things that you've done behind the scenes to help your members.*

[34] In his cross-examination, the Applicant recanted this communication by saying that he now thought that the Union could have done more.

Decision:

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[5] [1997] OLRD No. 3148 at paragraph 9

[35] For the reasons outlined above, the application must be dismissed. The Union did not fail in its duty of representation of the Applicant. The Applicant honestly believes that the Union could have done more to assist him. That, however, is not the duty of care prescribed by either the *SEA* or the common law. In this case, the Union represented the Applicant in a manner which was not arbitrary or discriminatory. Nor was it in bad faith.

[36] An appropriate order will accompany these reasons.

DATED at Regina, Saskatchewan, this **29th** day of **October, 2015**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson