BILLY-JO TEBBOTT, Applicant v. CONSTRUCTION AND GENERAL WORKERS UNION, LOCAL 151 (CLAC), Respondent Union and PCL ENERGY INC., Respondent Employer

LRB File No. 264-14; May 21, 2014

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

For the Applicant:	Mr. Sterling McLean
For the Respondent Union:	Mr. David deGroot
For the Respondent Employer:	No one appearing

Duty of Fair Representation – Onus of Proof – Board confirms that onus falls upon the Applicant to demonstrate behaviour which is discriminatory, arbitrary or in bad faith. Board finds onus not satisfied by evidence lead by Applicant.

Duty of Fair Representation – Nature of Conduct – Board confirms earlier jurisprudence regarding meaning of terms "arbitrary", "discriminatory" or "bad faith". Board finds that Union has not failed to properly represent Applicant.

Duty of Fair Representation – Nature of the Union's Representation – Board confirms prior jurisprudence regarding criteria for representation. Board finds that Union satisfied those criteria.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** This is an appeal pursuant to Section 6-59 of *The Saskatchewan Employment Act* (the "*SEA*") S.S. 2013, c.S-15.1 in respect to the representation of Billy-Jo Tebbott (the "Applicant") by the Construction and General Workers Union, Local 151 (the "Union") while employed at the Agrium Vault Project by PCL Energy Inc. (the "Employer).

Facts:

[2] The Applicant was originally employed by the Employer in Alberta and was represented by the Alberta local of the Union. She moved from Alberta to Saskatchewan to be employed at the Agrium Vault site.

[3] During the course of her employment in Saskatchewan, she was the subject of employee discipline by her Employer on July 30, 2014, again on September 5, 2014, and finally on September 22, 2014, when she was terminated by the Employer.

[4] In respect of the first incident, the Applicant testified that she went to the Union's office in Saskatoon to complain about the discipline, but no record of any such contact could be found by the Union. In respect of the second incident, she did contact the Union who commenced and investigation concerning the allegations. Before that investigation could be completed, the final discipline and termination occurred on September 22, 2014.

[5] The Union provided evidence concerning how it approached the discipline issue. Mr. Kornelson, a local Union representative, provided extensive evidence concerning the steps that were taken in respect of the second discipline of the Applicant. That evidence included discussions with the Employer, discussions with the shop steward on site, a review of previous incidents reported in Alberta, and numerous discussions with the Applicant.

[6] The Union, following its review, provided a letter to the Applicant on October 15, 2014. In that letter, the Union summarized the investigation it conducted, and concluded that the Employer "…had just cause for termination. CLAC has decided not to grieve your termination and discipline record". In that letter, the Union advised the Applicant of a right of appeal from this decision to an appeal panel established under the Union's constitution. The Applicant availed herself of this right of appeal, but was unsuccessful.

Relevant statutory provision:

[7] Relevant statutory provisions are as follows

> ***Fair representation***
> ***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:

[8] The Applicant's arguments focused more on the fairness and incorrectness of the discipline received by the Applicant. The only reference to arguments concerning the Union having acted in an arbitrary, discriminatory or bad faith manner was at paragraph 40 of her written Brief:

> *The failure by Local 151 to take any steps to support Ms. Tebbott between September 6, 2014, after she received the* ***SECOND*** *Employee Discipline Notice and September 22, 2014 when it undertook to investigate the matter, represents in our view acting in bad faith and further actin arbitrarily on behalf of Ms. Tebbott and clearly a breach of section 6-59 of The Employment Act [sic].*

Union's arguments:

[9] The Union argued that there was no evidence provided to support any conclusion that the Union failed in its duty of fair representation concerning the Applicant.

Analysis:

Onus of Proof:

[10] The Applicant bears the onus of proof with respect to this application. The evidence that she provided focused on the nature of the discipline and the fairness and incorrectness of that discipline, rather than the conduct of the Union in its representation of her. That evidence cannot support a finding that the Union failed in its duty of fair representation. What is required to be shown under Section 6-59 is that the Union has been arbitrary, discriminatory, or has acted in bad faith insofar as its representation of the Applicant is concerned. In the absence of evidence showing that the Union was arbitrary, discriminatory or acted in bad faith, the onus upon the Applicant cannot be met.

The Nature of the Duty of Fair Representation:

[11] The Board's jurisprudence with respect to the duty of fair representation is well settled. The Board recently reviewed and confirmed its jurisprudence in *Banks v. Saskatchewan Federation of Labour.*[1] That jurisprudence does not need to be repeated here.

[12] The Board also provided guidelines for unions to follow in respect of complaints regarding the duty of fair representation. In *Lucyshyn v. Amalgamated Transit Union, Local 615,*[2] the Board provided the following guidelines:

> 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;*
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> 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*
>
> 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.*

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[1] [2014] CanLII 42401 (SKLRB) at paragraph [43] et seq.
[2] [[2010] CanLII 15756 (SKLRB)

[13] There is no absolute right to have a grievance filed or prosecuted by a Union. The *SEA* provides only that an employee, because of the nature of his or her representation by the Union for collective bargaining, must be represented fairly.[3]

[14] In this case, the Union properly, and without discrimination, bad faith or arbitrary conduct, attempted to investigate the discipline issues faced by the Applicant. Those investigations were ultimately overtaken by the termination of the Applicant.

[15] The Union reviewed the basis for the termination and found that they would not likely succeed in arbitration and accordingly advised the Applicant that they would not be proceeding with a grievance in her case. In so doing, they did not act in a discriminatory, arbitrary, or bad faith manner.

[16] One comment insofar as the process is concerned, which should be brought to the attention of the Union, for future applications like this. It would, given the time restrictions in the collective agreement, seem prudent to file a grievance to preserve jurisdiction should the union later wish to pursue the grievance. In appropriate circumstances, failure to file a grievance to preserve the grievor's rights might be seen to be negligence on the part of the Union, which has, in some instances been found to constitute arbitrary behavior.[4]

Decision and Order:

[17] For the reasons outlined above, the application is denied. An appropriate order will accompany these reasons.

DATED at Regina, Saskatchewan, this **21st** day of **May, 2015.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

[3] See *Canadian Merchant Service Guild v. Gagnon et al* [1984] 1 SCR, 509, [1984] CanLII 18 (SCC)
[4] See *Beauchamp v. SGEU* [2014] CanLII 46061 (SKLRB)