BRENDA E. MCDONALD, Applicant v. SASKATCHEWAN UNION OF NURSES and SASKATCHEWAN HEALTH AUTHORITY (FORMERLY HEARTLAND REGIONAL HEALTH AUTHORITY), Respondents

LRB File No. 227-17; July 16, 2018

Chairperson, Susan C. Amrud, Q.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act*)

For the Applicant, Brenda E. McDonald	Self-represented
For the Respondent, Saskatchewan Union of Nurses	Ronni Nordal
For the Respondent, Saskatchewan Health Authority (formerly Heartland Regional Health Authority)	Darlene Smith

Non-suit – Union applies for non-suit following applicant employee's evidence - Board exercises discretion to permit application for non-suit without union first electing not to call evidence.

Non-suit – Board finds that employee has not provided any evidence that union breached its duty of fair representation.

REASONS FOR DECISION

Background:

[1] **Susan C. Amrud, Q.C., Chairperson**: On November 3, 2017, Brenda McDonald ("Employee") filed an application with the Board alleging that the Saskatchewan Union of Nurses ("Union") is or has been engaged in a contravention of section 6-59 of *The Saskatchewan Employment Act* ("Act").

[2] The Employee was employed as a Community Mental Health Nurse with the Heartland Regional Health Authority ("Employer") for many years. Her employment was terminated by the

Employer on November 12, 2014. At issue in this application is whether the Union breached the duty of fair representation that it owed to her during her employment and after her termination.

[3] The background for this case starts in 2008. The Employee's son was injured in a serious motor vehicle accident that required her to take an extended leave of absence to care for him. An agreement was entered into between the Employee and the Employer that the Employer would pay the Employee wages out of her sick leave during this period of leave. Then, when Saskatchewan Government Insurance paid the Employee the benefits she was entitled to for providing care to her son, she would reimburse the Employer, who would then reinstate her sick leave. In accordance with this agreement, the Employee provided a money order to the Employer on December 15, 2008 and assumed that the Employer would, in return, reinstate her sick leave.

[4] By letter dated January 27, 2014 the Employee was advised by her bank that the Employer had never cashed the 2008 money order. The Employee advised the Employer of its error. The Employee became concerned that the Employer may have also made an error in reinstating her sick leave under the 2008 agreement. She decided she needed to look into this. She engaged the Union to assist her. The Union representative (Mr. Kitchen) began communicating with the Employer in early February 2014, in an attempt to assist the Employee. The Employee and Mr. Kitchen met with Employer representatives on March 11, 2014. At the meeting they discussed next steps. The Employee was unhappy with the assistance she received from Mr. Kitchen at the meeting. The Employee's evidence was that he did not stand up for her during the meeting and after the meeting encouraged her to provide the Employer with a replacement cheque.

[5] Because of the stress caused by this situation, the Employee obtained a medical certificate on March 12, 2014 indicating that she was medically unable to work until March 26, 2014 at which time her health would be reviewed. The date she would be fit for full duties was stated to be "unknown"[1]. On March 19, 2014 the Employee provided a cheque to the Employer to replace the 2008 money order.

[6] After the Employee went off work on sick leave on March 12, 2014, the Employer advised her it required medical clearance that she was fit to return to work before they would

[1] Exhibit A-9.

allow her to resume her duties. Medical clearance was not provided; the Employee was not cooperative with the return to work process; she refused to apply for the disability income plan once she was no longer eligible for sick leave; she denied being ill but did not provide a satisfactory explanation for her continued absence from work; she refused to apply for a leave of absence. By letter dated November 12, 2014, the Employer terminated her employment for abandonment of her position[2].

[7] During 2014 the Employee became very concerned about a number of issues that, to her, arose out of the 2008 agreement and the Employer's failure to deposit the money order. Many of these issues involved alleged breaches of the privacy of her online information. She has reached out to numerous organizations in an attempt to obtain assistance in resolving these issues to her satisfaction. No one has been able to do that.

[8] One of the organizations she went to for assistance was the Union. The only issue before this Board is whether they fulfilled their statutory obligation to assist her. The Board has no jurisdiction with respect to the other organizations against which she has raised complaints.

[9] Though it would appear that other communications occurred between the Employee and the Union between the events described below, evidence was presented to the Board that the following assistance was provided by the Union to the Employee:

(a) February 8, 2014: The Employee sent an email to the Union asking for assistance in verifying her sick leave entitlements[3]. On February 12, 2014, apparently in response to some communication with the Union, the Employee sent three emails to Mr. Kitchen about the issues of the uncashed money order and verification of sick leave credits she was to have received in 2008 when the money order was provided. Mr. Kitchen immediately contacted the Employer and asked for information about the sick leave that had been credited to the Employee in 2008[4].

(b) March 11, 2014: Mr. Kitchen attended a meeting between the Employee and Employer respecting these issues. The Employee was not satisfied with the outcome of the

[2] Exhibit U-10.

[3] Exhibit A-13.

[4] Exhibits U-1, U-2 and U-3 include emails from the Employee to Mr. Kitchen all dated February 12, 2014. Exhibit A-1 includes Mr. Kitchen's response one minute after the email in Exhibit U-3 was sent, acknowledging receipt and indicating his intent to review the information and ask the Employer to look into it. It also included emails from Mr. Kitchen to the Employee and from Mr. Kitchen to the Employer with a copy to the Employee, both dated February 18, 2014 providing the Employee with an update.

meeting; she was unhappy that, in her view, Mr. Kitchen did not back her up. In an email later that day she stated "I feel like you shoved me under a bus"[5]. However, Mr. Kitchen's response provides further information about what was discussed at the meeting and shows that he was working on resolving her issues[6]. He noted that "Upon investigation, it turns out your sick leave and vacation banks were restored back in Jan 2009". He also noted that she had raised a new issue at the meeting about whether certain leave was properly characterized in 2009. He cautioned her: "Without supporting documentation, it would be very difficult for the Union to assert this claim after this period of time".

(c) August 6, 2014: Ms. Miner, another Union representative, emailed the Employee, apparently in response to an email from the Employee that was not entered into evidence. She advised the Employee that she did not understand the issue with which the Employee was requesting assistance. She provided the Employee with telephone numbers for herself and Mr. Kitchen and stated "I am not aware of any further issues but if there is something further that you have questions about or need assistance, we are happy to assist you"[7]. In the Employee's response she stated she had documentation that proved she was not paid from December 2008 to January 2009. There is no further mention of this claim in her evidence until an email dated November 6, 2014, a copy of which was sent to Ms. Miner[8]. As previously noted by Mr. Kitchen[9], this claim was being raised well beyond the timelines allowed under the collective agreement.

(d) At some point in this time period Ms. Miner recommended that the Employee apply for a leave of absence, but she refused to do so[10].

(e) November 7, 2014: The Employee and Ms. Miner exchanged several emails in which Ms. Miner continued to offer the Union's assistance and the Employee continued to refuse their assistance[11]. For example, Ms. Miner wrote "I am concerned that the Region is going to terminate you and I would like to prevent that"[12]. She indicated that she had

[5] Exhibit A-6.
[6] Exhibit U-4.
[7] Exhibit A-15.
[8] Exhibit U-9.
[9] Exhibit U-4.
[10] Paragraph 5 of the Employee's Application to the Board; also Exhibit U-9, November 7, 2014 email: "some approval for your absence is required".
[11] Exhibit U-9.
[12] Exhibit U-9.

stopped the Employer from issuing a termination letter to the Employee two weeks previously but that she could not prevent that indefinitely.

(f) December 3, 2014: Ms. Miner sent an email to the Employee that included the following paragraphs:

> *I would like to take this opportunity to once again express our concern at your termination. As I have previously communicated, SUN has concerns with the employer's action to move to terminate your employment. Despite your refusal to meet with us, we were successful in delaying your termination but could not prevent it without some cooperation from you. We remain committed to assisting you with matters relating to your employment and remain willing to file a grievance on your termination. As you are likely aware, there is a 30 day time limit to file a grievance. With that time restriction in mind, we ask again if you would be willing to meet with representatives of SUN to review the facts of your termination and prepare a grievance. We are more than prepared to request an extension to file if we need some more time to accommodate a meeting.*
>
> *It is clear from the emails you have sent or copied SUN that this has been stressful for you. SUN can assist you with the issues that flow from your employment related to the collective bargaining agreement and would be happy to do so.* [13]

On December 7, 2014, the Employee responded to this email, indicating that she did not wish to proceed with a grievance[14].

(g) December 4, 2014: The Union sent a letter to the Employee by registered mail that included the same paragraphs as set out in the December 3, 2014 email, quoted above[15]. Canada Post's records indicate that the Employee signed for the letter on December 9, 2014[16].

(h) December 22, 2014: The Employer, as required by *The Registered Psychiatric Nurses Act*, advised the Registered Psychiatric Nurses Association of Saskatchewan of the Employee's termination. The Employee acknowledged in cross-examination that the Union sent a letter to the Employee offering to provide her with up to $5000 to obtain legal assistance to defend herself in this matter and that the Employee declined the Union's offer.

[10] The Employee indicated a number of times in her evidence that Ms. Miner would not return her phone calls, and that she only spoke to her once, when Ms. Miner's only response was "it is what it is"; she also indicated, though, that she had been in touch with Ms. Miner

[13] Exhibit U-11.
[14] Exhibit U-11.
[15] Exhibit U-12.
[16] Exhibit U-14

continuously. Given the evidence disclosed in the emails admitted as Exhibits, the Board is of the view that the latter description is more accurate.

Argument on behalf of the Parties:

[11] Like many self-represented litigants, the Employee struggled to provide her evidence in a manner that focused on the issue before the Board: the Union's conduct. At times she was less than forthcoming in describing the assistance the Union offered to her. For example, Exhibits A-6 and A-7 (tendered by the Employee) and Exhibit U-4 (tendered by the Union) include identical emails from the Employee to the Union, but in Exhibits A-6 and A-7 the intervening response by Mr. Kitchen was removed. The Employee admitted that many of the issues she raised during the hearing could not be solved by the Union. Her position, however, was that the Union was just one of many organizations that could have done something to help her.

[12] The Union argued that, through its cross-examination of the Employee, the Board was provided with evidence that it had fulfilled its duty of fair representation to the Employee. It argued that there was no evidence that the Union had acted in an arbitrary manner, and no evidence of discrimination or bad faith in its dealings with the Employee. The Union argued that this case satisfies the Board's test for the granting of a non-suit, which was most recently reviewed in *Amenity Health Care L.P. v. Workers United Canada Council* ("*Amenity Health Care*"), 2018 CanLII 38254 (SK LRB). The Union noted that this application was filed three years after her employment was terminated and should also be dismissed on that basis.

[13] The Employer's representative did not make any submissions during the hearing.

Relevant Statutory Provisions:

[14] Section 6-59 of *The Saskatchewan Employment Act* is relevant to this application:

> *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.*

Analysis:

[15] The Employee represented herself during the hearing. She provided evidence, and was cross-examined by counsel for the Union. At the conclusion of the Employee's case, the Union moved for non-suit without the necessity of first making an election not to call evidence. These reasons relate to the Union's request to apply for a non-suit without an election, as well as its application for non-suit.

[16] As the Union pointed out, the Board recently reviewed the tests for granting non-suit in *Amenity Health Care*. The first issue is whether the Board should exercise its discretion and not require the Union to make an election whether or not to call evidence if the non-suit is unsuccessful. The factors relied on in *Amenity Health Care* include:

> *whether permitting the non-suit without an election will either delay or expedite the proceedings; the impact of any decision in terms of the costs of the proceedings; the policy against requiring a party to respond to allegations of wrongdoing where there is no case for it to meet; whether hearing the non-suit without requiring an election would give either party an unfair or undue advantage; and, the interest in making a decision based on hearing all of the evidence.*[17]

[17] The Board accepts the arguments of the Union that it has satisfied all of these factors. Permitting the non-suit without an election will not delay or add to the cost of the proceedings: an adjournment would have been required at the conclusion of the Employee's case in any event, as the Union was facing evidence on a number of matters that it had not previously heard (the Union sent a request for particulars to the Employee on November 14, 2017, with which the Employee declined to comply, and that the Union chose not to pursue in advance of the hearing as it did not appear that further communication with the Employee would lead to the requested particulars). As there is no case for the Union to meet, there is no reason to require it to respond to the allegations of wrongdoing raised by the Employee, most of which have nothing to do with

[17] Paragraph 13, quoting from paragraph 52 of *Saskatoon (City) v. Canadian Union of Public Employees, Local 59*, 2009 CanLII 67430 (SK LRB).

the Union. Hearing the non-suit without requiring an election does not give the Union an unfair advantage in this case. With respect to the interest in making a decision based on hearing all of the evidence, as the Union pointed out, it was able to present considerable evidence through cross-examination of the Employee. Therefore, the Board permits the Union to make its application for non-suit without first making an election not to call evidence if the non-suit is unsuccessful.

[18] The second question, then, is whether the test for granting non-suit has been satisfied by the Union. Again, *Amenity Health Care* is instructive with respect to the test to be applied. It relied on two cases that confirmed that a test similar to the test applied by the Board to an application for summary dismissal was the proper test to be applied to an application for non-suit.

[19] First, in *Saskatoon (City) v. Canadian Union of Public Employees, Local 59*, 2009 CanLII 67430 (SK LRB), the test was stated as follows, at paragraph 58:

> *The Board dismissed the Union's application for a non-suit without the necessity of hearing from counsel for the City. The Board was satisfied based upon the test set out in Mitchell's Gourmet Foods, that the City had made out a prima facie case. As noted in that case, a "motion for non-suit cannot succeed if there is some evidence upon which the Board could return a finding" that the alleged unfair labour practice has occurred.*

[20] This test was confirmed in *Communications, Energy and Paperworkers Union, Local 922 v. Potash Corporation of Saskatchewan*, LRB File No. 167-11, July 27, 2012, at paragraph 26:

> *Based upon those recently added powers, the Board now enjoys statutory authority to "summarily dismiss a matter if there is a lack of evidence or no arguable case." This authority has generally been utilized by the Board prior to a hearing in accordance with the tests set out in Beverly Soles v. C.U.P.E., Local 4777. In Soles, supra, the Board adopted the test taken from the Canada Board, which was that the case could be dismissed if there was a finding by the Board that the applicant has disclosed no "arguable case". We are of the view that this should also be the standard by which applications for non-suit are analyzed.*

[21] The Employee bears the onus of proving a breach of the Union's duty of fair representation. The Board has considered this issue on many occasions. Most recently, it was enunciated in *Miroshnichenko v. SEIU West and YWCA Saskatoon*, (2018) CanLII 38252 (SK LRB). That decision cited many cases that considered the issue of what section 6-59 of the Act (and its predecessor, section 25.1 of *The Trade Union Act*) mean when they say that a union

must not act in a manner that is arbitrary, discriminatory or in bad faith. The most succinct description, which appears at paragraph 57 states that, to be successful, the Employee would have to satisfy the Board 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.*

[22] The Employee did not present an arguable case that the Union breached its duty of fair representation. The Employee provided no evidence to satisfy these criteria. On the contrary, the evidence shows that the Union repeatedly tried to assist the Employee with the issues on which it could provide assistance. In particular, when the Employee was terminated, the Union urged the Employee to let them file a grievance on her behalf: she refused that offer of assistance, and refused to even meet with them to discuss it. She cannot now, three years later, come before the Board and expect the Board to grant the remedies she has requested. If breaches by the other organizations referred to by the Employee did occur (an issue on which the Board expresses no opinion), they do not fall within the Union's jurisdiction to investigate or the Board's jurisdiction to provide remedies.

[23] The Board orders that the Union's application for non-suit is granted. The Employee's Application is dismissed.

DATED at Regina, Saskatchewan this **16th** day of **July, 2018**.

LABOUR RELATIONS BOARD

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Susan C. Amrud, Q.C.
Chairperson