



TAMMY KURTENBACH, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 2268 and GREATER SASKATOON CATHOLIC SCHOOLS, Respondents

LRB File No. 196-17; January 25, 2019

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

For the Applicant:	Rob Westfield
For the Respondent CUPE, Local 2268:	Sachia Longo
For the Respondent Greater Saskatoon Catholic Schools:	Katherine Kowal

Duty of Fair Representation – Applicant was unsuccessful candidate in competition – Union filed grievance, but withdrew it after Step 2 – Union filed second grievance, alleging harassment – Second grievance withdrawn following receipt of third party report that found no harassment.

Duty of Fair Representation – Applicant alleged Union did not proceed with grievances because of her friendship with previous Union president – No evidence to support that suspicion – Union took appropriate steps to address Applicant’s apprehension of bias.

Duty of Fair Representation – Applicant failed to demonstrate Union acted in a manner that was arbitrary, discriminatory or in bad faith – Application dismissed.

REASONS FOR DECISION

Background:

[1] Tammy Kurtenbach is an Educational Assistant with Greater Saskatoon Catholic Schools [“Employer”]. In 2014 Doug Kinzel was the Program Facilitator at the Farm School operated by the Employer. When he was elected as president of the Canadian Union of Public Employees, Local 2268 [“Union”], Ms. Kurtenbach was hired to fill in for him one day per week, when he was performing Union duties. This position was to run from October 22, 2014 to June 26, 2015. When Mr. Kinzel went on medical leave in December 2014, a position was posted to fill in for him on the additional four days a week, until March 6, 2015 or his earlier return. Ms. Kurtenbach was the only

applicant and was awarded the position. Mr. Kinzel's recovery was slower than anticipated, and Ms. Kurtenbach's term was extended nine times for six to eight weeks at a time, depending on Mr. Kinzel's medical reports, eventually all the way to June 29, 2016. During the 2015-16 school year, Mr. Kinzel attempted a gradual Return to Work schedule, attending at the Farm School a few hours a day, a few days a week. Rather than re-posting the position, the Employer allowed Ms. Kurtenbach to continue to work there while he was trying to return to work. At some point during the school year he ceased the Return to Work schedule, when it became clear that he was not going to be able to return to work.

[2] On August 24, 2016, rather than extending Ms. Kurtenbach's term again, the Employer posted the Farm School Program Facilitator position. Ms. Kurtenbach was not the successful candidate. She asked the Union to grieve this decision.

[3] On September 20, 2016 the Union filed a grievance on behalf of Ms. Kurtenbach, claiming the position should have been awarded to her because she had the necessary qualifications and more seniority than the employee who received the position. During the Union's investigation of this matter, the Employer disclosed to the Union that Ms. Kurtenbach scored 12/20 on her interview, while the successful candidate scored 19/20¹. According to the Collective Agreement between the Union and the Employer², seniority is the determining factor only if applicants "are deemed to be equal with respect to qualifications and ability":

Article 10.08 Vacancies

Promotions

Where more than one (1) employee, possessing the required qualifications and ability from the Union makes application for a position, the following procedure will be followed:

- *Where there are no applicants permanently employed in the same job classification with the same job title as that posted, the position shall be awarded to the union member based on qualifications and ability. When two (2) or more applicants are deemed to be equal with respect to qualifications and ability, seniority shall be the determining factor.*

[4] A Union representative attended Step 1 and Step 2 grievance meetings with Ms. Kurtenbach in October 2016, at which each of them made submissions to the Employer. The

¹ Exhibit U-12.

² Exhibit U-2.

Employer denied the grievance at both Steps. The Union unsuccessfully attempted to negotiate a resolution to the grievance. At a meeting on October 26, 2016, the Union advised Ms. Kurtenbach that they had decided not to refer the grievance to Step 3. She was advised of her right to appeal that decision to the Local Executive Board at a meeting that was to be held on November 2, 2016. She did not appeal. She was given a second opportunity to appeal the decision to the Local Executive Board at their meeting on December 5, 2016. Again, she did not appeal.

[5] At the same October 26, 2016 meeting the Union suggested, and Ms. Kurtenbach agreed, that the Union file a grievance on her behalf, alleging she had suffered harassment and discrimination while working at the Farm School. That grievance was filed on October 28, 2016. By letter dated December 2, 2016, the Employer denied this grievance at Step 1. The Employer's finding was that what Ms. Kurtenbach considered harassment was reasonable supervisory practices related to her performance. The Union moved the grievance to Step 2 on January 2, 2017.

[6] In early February 2017 the Employer hired a third party to conduct an investigation into the harassment complaint. The report by the third party, dated June 13, 2017, was lengthy and thorough. The employee was a full participant in its preparation, being interviewed seven times. The investigator found that Ms. Kurtenbach failed to prove on a balance of probabilities that she had been harassed³. As a result, the Employer denied the grievance at Step 2.

[7] The Union forwarded the grievance to Step 3 on July 10, 2017. After reviewing the report in detail with Ms. Kurtenbach, the Union decided there was not sufficient evidence to support pursuing the grievance. On August 30, 2017 the Union Grievance Committee decided to withdraw the grievance. Ms. Kurtenbach appealed that decision to the Local Executive Board on September 6, 2017. The appeal was denied.

[8] On September 28, 2017, Ms. Kurtenbach filed this application, stating the following:

³ This report, which was filed as Exhibit U-10, went into great detail about the facts. The evidence before the Board in this matter is consistent with the facts as found by that report and as a result, it is unnecessary for these Reasons to set out the evidence in great detail.

I allege the Union Cupe 2268 did not fight for my position as a program facilitator. The Job was given to a less senior employee with no experience. I had done the Job for 18 months, had a positive evaluation and no write up with six extensions.

[9] This case arose out of unfortunate management practices at the Farm School. Soon after Ms. Kurtenbach took over the full-time position as Program Facilitator, her supervisor became aware that Ms. Kurtenbach did not have the necessary skills to do the job. Rather than address the issue, or coach her in a meaningful way, the Employer kept hoping that Mr. Kinzel would be well enough to return to work. During this time the Employer provided Ms. Kurtenbach with a performance evaluation that could be interpreted as meaning she was doing well in the position⁴. Informal attempts to draw to her attention the shortcomings in her work were unsuccessful and, according even to Ms. Kurtenbach's evidence, ignored or downplayed by her. This situation was allowed to drag on for too long. As a result, when the position was finally re-posted in August 2016, Ms. Kurtenbach was unwilling to accept the Employer's statement that she did not have the qualifications or ability to do the job.

[10] During the same time that these events were occurring, there was turmoil within the Union. Mr. Kinzel was significantly involved in these issues. Ms. Kurtenbach is of the opinion that the Union did not properly support her in her grievances because she is a friend of Mr. Kinzel. There was no evidence before the Board to support that suspicion.

[11] Janice Janzen, Union National Representative, testified that after Ms. Kurtenbach's first grievance was denied by the Employer at Step 2, Gwen Murphy (Union Local Vice-president) and Tim Powchuk (Union Local President) contacted her for advice. She reviewed the file and recommended that the grievance not proceed. She attended the meeting with Ms. Kurtenbach on October 26, 2016 (with Murphy and Powchuk also in attendance), at which they attempted to explain to Ms. Kurtenbach why the grievance would not be proceeding, and proposed that a harassment grievance be filed. After the October 26, 2016 meeting Ms. Kurtenbach objected to the continued involvement of Ms. Murphy and Mr. Powchuk in her grievances.

[12] Ms. Janzen testified that she and Ms. Murphy wrote up the harassment grievance together, but that she then took over carriage of the grievance. Many emails and other correspondence received as evidence in this matter confirm Ms. Janzen's evidence. Even though

⁴ Exhibit A-2.

there was no evidence of improper conduct by either Ms. Murphy or Mr. Powchuk, the Union acceded to Ms. Kurtenbach's request that they no longer be involved.

[13] Will Bauer is also a Union National Representative. When he returned from leave in June 2017 he took over responsibility for this matter from Ms. Janzen, about the same time as the harassment investigation report was issued. He met with Ms. Kurtenbach, Mr. Kinzel and Ms. Janzen in late July 2017 to discuss the report and obtain Ms. Kurtenbach's feedback on it. On August 16, 2017, he advised Ms. Kurtenbach that he was recommending to the Union Local that the grievances be withdrawn⁵. He prepared an assessment of the grievances for the Grievance Committee. The Grievance Committee met on August 30, 2017 and decided to withdraw the grievances. At the Union Local Executive Board meeting on September 6, 2017, Ms. Kurtenbach presented her appeal of the Grievance Committee's decision to withdraw her grievances. Mr. Bauer testified that he was present at the meeting and that Ms. Kurtenbach had an opportunity to make a presentation and appeal the withdrawal of both grievances. Mr. Powchuk and Ms. Murphy did not vote on the appeal.

Analysis and Decision

[14] Sections 6-59 and 6-60 of *The Saskatchewan Employment Act* ["Act"] provide 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.

Applications re breach of duty of fair representation

6-60(1) Subject to subsection (2), on an application by an employee or former employee to the board alleging that the union has breached its duty of fair representation, in addition to any other remedies the board may grant, the board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of that time, if the board is satisfied that:

(a) the denial of fair representation has resulted in loss of employment or substantial amounts of work by the employee or former employee;

(b) there are reasonable grounds for the extension; and

(c) the employer will not be substantially prejudiced by the extension, either as a result of an order that the union compensate the employer for any financial loss or otherwise.

⁵ Exhibit U-18.

(2) *The board may impose any conditions that it considers necessary on an order made pursuant to subsection (1).*

[15] The onus is on Ms. Kurtenbach to prove her claim. It is not enough for her to show that she disagreed with the Union's decisions. Section 6-59 of the Act⁶ requires Ms. Kurtenbach to provide the Board with evidence that the Union acted in a manner that is arbitrary, discriminatory or in bad faith. These terms have been consistently interpreted by the Board in the manner explained by the Board in *Glynnna Ward v Saskatchewan Union of Nurses*, [1988] Winter Sask Labour Rep 44, at 47:

Section 25.1 of The Trade Union Act obligates 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. So long as it does so, it will not violate Section 25.1 by making an honest mistake or an error in judgment.

[16] The Board routinely⁷ relies on the explanations of the concepts of "arbitrary, discriminatory or in bad faith" that were established by the Ontario Labour Relations Board in *Toronto Transit Commission*, [1997] OLRD 3148, at paragraph 9:

. . . a complainant must demonstrate that the union's actions are:

- (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.*

[17] With respect to the first grievance, Ms. Kurtenbach argues that the Union did not challenge the Employer's interpretation of Article 10.08 of the Collective Agreement or their opinion that she was not qualified for the position. In fact, a grievance was filed and pursued through Steps 1 and

⁶ Section 6-59 of the Act is equivalent to section 25.1 of *The Trade Union Act*.

⁷ For example, *Banks v Canadian Union of Public Employees, Local 4828*, 2013 CanLII 55451 (SK LRB); *Coppins v United Steelworkers, Local 7689*, 2016 CanLII 79633 (SK LRB); *Zalopski v Canadian Union of Public Employees, Local 21*, 2017 CanLII 68784 (SK LRB); *Hernandez v Teamsters Local Union 395*, 2015 CanLII 50198 (SK LRB).

2. The Union's investigation led to the conclusion that the grievance would not be successful. She was given two opportunities to appeal this decision, which she declined.

[18] Rather than walk away at that point, the Union decided to pursue a second grievance on her behalf. With respect to the second grievance, Ms. Kurtenbach argues that after initially agreeing to it, she later changed her mind. It was clear that, throughout this time period, her focus was on obtaining the Program Facilitator position. What she failed to acknowledge was that the Employer was equally firm that they would not award her the position, and they were not required to by the Collective Agreement.

[19] The Union, on the other hand, understood this. Based on the information she provided to them they decided to proceed with the second grievance. The Summary and Recommendations in the investigation report support the Union's argument that proceeding in this manner was not arbitrary.

[20] With respect to both grievances, the evidence presented in this case showed that Ms. Kurtenbach had ample opportunity to present her case to the Union before they made decisions on how or whether they would proceed with the grievances.

[21] The Union clearly put its mind to the merits of the grievances and their probability of success. Their decisions were not flagrant, capricious, totally unreasonable or grossly negligent.

[22] There was no evidence of discrimination by the Union against Ms. Kurtenbach, either discrimination based on a factor set out in *The Saskatchewan Human Rights Code* or differential treatment because of her friendship with Mr. Kinzel.

[23] The decisions made not to proceed with the grievances were not influenced by any bad faith considerations. No evidence was presented to the Board of ill will, malice, hostility or dishonesty in the Union's dealings with her.

[24] Ms. Kurtenbach has not met her onus of proving to the Board that the Union's decisions were taken in a manner that was arbitrary, discriminatory or in bad faith. Accordingly, the application is dismissed.

DATED at Regina, Saskatchewan, this **25th** day of **January, 2019**.

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson