JOHN THOMAS (CAMERON) ALEXANDER, Applicant v CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 859, Respondent and CITY OF SASKATOON, Respondent

LRB File No. 235-19; September 24, 2020

Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act*)

For the Applicant:	Self-represented
For the Respondent Union:	Val Harvey
For the Employer:	Reché McKeague

Duty of Fair Representation – Section 6-59 of *The Saskatchewan Employment Act* – Settlement of Grievance – Request for Proof of Misconduct – No Contravention of the Act – Application Dismissed.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to an application filed on October 30, 2019 [Application], alleging that the Canadian Union of Public Employees, Local 859 [Union] failed to fairly represent a member, John Thomas (Cameron) Alexander [Applicant]. The Union is certified to represent certain employees of the City of Saskatoon [Employer]. The Applicant is one of those employees. For the following reasons, the Board has decided to dismiss this Application.

[2] The Applicant alleges that the Union failed to comply with its duty pursuant to section 6-59 of *The Saskatchewan Employment Act* [Act]. He acknowledges that the Union filed a grievance on his behalf, pursued the grievance through multiple steps, and then reached a potential resolution of that grievance. The resolution includes a reduction of the Employer-imposed suspension from three days to one. Despite this, he states that the Union was wrong to have foregone arbitration to negotiate a settlement on his behalf in the absence of proof that he committed the acts complained of.

[3] This hearing was held on September 9, 2020, via Webex pursuant to the Board's covid-19 guidelines.

Argument on Behalf of the Parties:

[4] The Applicant's primary argument is that there is no proof of wrongdoing. In the absence of this proof, the Union should have proceeded to arbitration on his behalf. It should not have relied solely on its own notes as proof of misconduct, but should have instead insisted on proof that he had made inappropriate statements. City management should share with employees the policies upon which its discipline will be based. He did not receive and was not aware of the relevant policies in advance of the alleged events.

[5] The Union, for its part, states that the Applicant has failed to meet his onus on this Application. He is required to prove on a balance of probabilities that the Union acted in an arbitrary, discriminatory, or bad faith manner, contrary to section 6-59 of the Act. He has not done this. Instead, he has shown that the Union was not only careful in performing its representative role, but exemplary, and has in no way failed in exercising its duty under the Act. The Applicant's case should be dismissed.

[6] The Employer attended the hearing but did not actively participate.

Evidence:

[7] Testifying at the hearing were the Applicant, on his own behalf, and Landen Aquilon [Aquilon], who is the Vice-President of the Local.

[8] In the initial stages of the investigation, the Applicant was called to a meeting to discuss his behavior. Present at that meeting were representatives from management and the Union. Another investigative meeting was held a few weeks later. During the course of the investigation, the Applicant admitted to certain things freely and denied others. In particular, he admitted to creating a "snitch booth" at work, to no longer speaking to a co-worker as a result of that person's involvement in the Employer's investigation, and maintained that it was generally acceptable to refer to people as "rats and snitches". At the close of the investigation, the Employer provided him with a letter outlining its conclusions and imposing a three-day suspension without pay, during which he was not permitted to work for the City in any capacity.

[9] The Union filed a grievance on the Applicant's behalf, dated April 11, 2018. The grievance requested that the three-day suspension be removed from the Applicant's file and that he be reimbursed for all lost wages and benefits.

[10] The Applicant asked for "proof" of the allegations but says that he was provided none. He claimed that the Employer failed to provide him with the relevant policies. His grievance was denied at every Step. The Union advanced the grievance to arbitration. Aquilon, who was centrally involved in the grievance process, believed that the Union had a strong case. However, at the arbitration stage, the Local's defense fund came into play, and it was the Executive's decision to make whether to proceed to arbitration.

[11] Aquilon had gathered information during the Employer's investigation, and he submitted that information to the National Representative for her review of the merits of the case. On July 19, 2019, the National Representative completed a thorough and highly analytical assessment recommending that the grievance be withdrawn. The Executive then considered the information that Aquilon had gathered, along with the National Representative's assessment, and decided to pursue settlement instead of arbitration. It was determined that, at arbitration, the Union may very well end up with the same result, and it was not worth using the defense fund for that outcome.

[12] Ultimately, the Union advised the Applicant that it was prepared to settle by accepting the Employer's offer of a reduced suspension of one day from the original three. The Union provided him with an opportunity to appeal that decision to the Executive. The Applicant took the opportunity to plead his case. Upon further consideration, the Executive decided to stay the course and pursue a settlement with the Employer. The Union then provided the Applicant with a second opportunity to appeal to a differently composed group. He did not attend this second appeal.

[13] At some point, Aquilon provided the Applicant with a redacted version of the notes he had taken throughout the investigation. He provided the Applicant with these notes to better inform the Applicant of the Union's reasoning in deciding not to proceed to arbitration. According to Aquilon, the Union followed the CBA grievance process to the letter. There was significant direct communication with the Applicant. While the original goal was to eliminate the suspension entirely, the Union reached a reasonable settlement and that outcome was a success. In addition to reducing the length of the suspension, the Employer had agreed to remove certain references from its disciplinary letter.

Applicable Statutory Provisions:

[14] The following provision of the Act is applicable:

> ***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:

General

[15] The Applicant bears the onus of proof in this Application.[1] In assessing the allegations, the Board considers whether the evidence demonstrates that it is more likely than not that the Union contravened its obligation pursuant to section 6-59 of the Act.

[16] This Board has on many occasions recited the governing principles on a duty of fair representation claim, as captured in a few key cases.

[17] One of these cases is *Glynna Ward v Saskatchewan Union of Nurses*, [1988] Winter Sask Labour Rep 44 at 47 [*Ward*], in which the Board explained:

> *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.*

[18] The Board has also adopted the Ontario Board's explanation in *Toronto Transit Commission*, [1997] OLRD 3148, at paragraph 9, that an applicant must demonstrate, to the satisfaction of the Board, that a 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*

[1] *Zalopski v Canadian Union of Public Employees, Local 21,* 2017 CanLII 68784 (SK LRB) ["*Zalopski*"] at para 42.

(3) "in Bad Faith" – that is, motivated by ill-will, malice, hostility or dishonesty.[2]

[19] In the current case, the Applicant insists that the Union should have proceeded to arbitration on his behalf, or at least demanded proof of misconduct prior to deciding whether to settle. The Board in *Zalopski v Canadian Union of Public Employees, Local 21*, 2017 CanLII 68784 (SK LRB) ["*Zalopski*"] summarized the principles relevant to allegations of a union's decision not to proceed to arbitration, at paragraph 40:

> *…A helpful summary of these principles is found in Mwemera v United Brotherhood of Carpenters and Joiners of America, Local Union No. 2010. There the Alberta Board stated as follows at para. 20:*
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> > *This Board's decision in Reid v United Steelworkers of America Local Union No. 7226, [2000] Alta. L.R.B.R. LD-064 (at para. 3) summarizes some of the key principles underlying the duty of fair representation:*
> >
> > - *The Union need not take every grievance to arbitration. It need not take a grievance to arbitration just because the grievor asks the Union to do so. The Union is entitled to assess the merits of the grievance, the chances of success at arbitration, the costs of the arbitration process and other factors when deciding whether or not to advance a grievance to arbitration.*
> > - *The Board focuses its examination on the Union's conduct and considerations while the Union represented the employee and in making its decision, rather than on the merits of the grievance, which is the question an arbitrator would answer.*
> > - *The Union is entitled to make a wrong decision, as long as it fairly and reasonably investigates the grievance and comes to an informed decision.*
> > - *The Union must give the employee a fair opportunity to present the employee's own case to the Union and to provide input on the result of the Union's investigation.*
> > - *The Union should communicate fairly with the employee about all aspects of its representation. Communication with the employee can play a significant role in representation, but the union need not take direction from the employee or answer all questions to the employee's satisfaction nor must it act within the employee's time limits.*
> > - *A Union does not breach its duty of fair representation just because it reaches a conclusion with which the employee does not agree.*

[20] The Board does not embark on a fact-finding mission or conduct its own investigation of the Union leadership. Nor does it determine whether the grievance has merit, or sit in appeal of the Union's decision about pursuing a grievance.[3] The Board may find for the Union if it "took a reasonable view of the circumstances and made a '*thoughtful decision*' not to advance" a

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[2] For example, as cited *in Owl v Saskatchewan Government and General Employees' Union*, 2014 CanLII 42401 (SK LRB), at para 43.
[3] *Ibid* at para 57.

grievance to arbitration.[4] The Union is not required to take every grievance to arbitration. The grievor does not have to agree with the Union's approach.

[21] The Board will now consider whether the Applicant has discharged his onus in respect of this Application.

[22] It is sufficient to briefly address the following two issues.

[23] First, the Applicant has not alleged that the Union has acted in a discriminatory manner, that is, based on invidious distinctions without reasonable justification or labour relations rationale. He has not alleged that the Union has discriminated against him on the basis of any grounds prohibited by *The Saskatchewan Human Rights Code* or on the basis of "preferential or differential treatment".[5] Nor is there evidence of the Union having acted in a discriminatory manner in its representation of the Applicant. Therefore, there is no basis for a determination that the Union breached section 6-59 by acting in a discriminatory manner in its representation of the Applicant.

[24] Second, the Applicant has not suggested that the Union has acted in bad faith in representing him. He has presented no evidence that the Union has acted in a manner that was motivated by ill-will, malice, hostility or dishonesty. There is no basis to find that the Union failed to fairly represent the Applicant due to bad faith conduct.

[25] Given these conclusions, the remaining issue is whether the Union acted in an arbitrary manner in representing the Applicant. In *Rousseau v International Brotherhood of Locomotive Engineers et al.,* 95 CLLC 220-064 at 143, 558-9 [*Rousseau*], the Canada Board elaborated on this consideration:

> *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.*

[26] The Union's investigation of the matter was conducted in accordance with the guidance provided in *Lucyshyn v Amalgamated Transit Union, Local 615*, 2010 CanLII 15756 (SK LRB);

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[4] See, *Ward* at para 27.
[5] See, *Theresa Eyndhoven v CUPE*, 2019 CanLII 10594 (SK LRB) at para 15.

CB, HK & RD v Canadian Union of Public Employees, Local No. 21, CUPE National, and City of Regina, 2017 CanLII 68786 (SK LRB); and *Makuch v CUPE,* 2019 CanLII 86847 (SK LRB).

[27] Here, the Union attended the Employer's investigative meetings, gathered information arising from that investigation, remained in direct communication with the Applicant, and sought advice from the National Representative. The Union's investigation was conducted in an objective and fair manner. The Executive considered the National Representative's assessment in deciding whether to proceed to arbitration. The Applicant was given a sufficient and fair opportunity to provide input into that process. By all accounts, the Union demonstrated that it was aware of its duty pursuant to the Act.

[28] The Union did not fail to direct its "mind" to the merits of the matter – quite the contrary. It considered the merits carefully. It did not fail to take into account the legitimate interests of the Applicant. Nor did it act on the basis of irrelevant factors or display indifference or treat the matter summarily. However, the Applicant argues that the Union failed to demand and/or obtain proof of the alleged misconduct prior to pursuing a settlement, which is akin to arguing, as alluded to in *Rousseau*, that the Union failed to inquire into or act on available evidence. The Board will address this argument next.

[29] It is clear from the evidence that Aquilon based his approach, and the Union based its decision, in part on an extensive interview process conducted by the Employer, which included interviews with the Applicant. Included in the information that was gathered were the Applicant's own admissions. Granted, he admitted certain details and not others. The Union articulated which was which. And, based on the admissions that he did make, the Union decided that the Employer's arguments had sufficient merit to justify a settlement. The settlement was to consist of a reduced suspension and altered language in the disciplinary letter.

[30] There is no evidence to suggest that the Union is unaware of the Applicant's denials or has failed to take those denials into consideration in deciding whether to negotiate a settlement of the grievance. Nor was it necessary, in light of the Applicant's admissions, to insist on "proof" of the events complained of. It should also be noted that in some cases insisting on better proof at an early stage of a proceeding can be detrimental, rather than helpful, to one's case.

[31] Lastly, the Board is not persuaded that the Union failed to take into account the Applicant's claims to having been unfamiliar with the relevant policies. The National Representative took note of the effective duration of a Respectful and Harassment Free Workplace Policy at the City (since

at least 2008), and pointed out that the policy was aligned with occupational health and safety legislation, before then proceeding to outline certain considerations when faced with an alleged breach.

[32] The Union, not the grievor, has carriage of the grievance. The Union was entirely within its rights to weigh the competing interests of the Applicant and the membership, and consider whether it could justify allocating a portion of its defense fund to proceeding to arbitration. It concluded that it was appropriate to settle instead.

[33] The Applicant has failed to persuade the Board that the Union acted arbitrarily, and has failed to discharge his onus that the Union failed in its duty of fair representation and thereby contravened section 6-59 of the Act.

[34] Lastly, the Board is appreciative of the Applicant's closing comments acknowledging that the Union, and in particular Aquilon, worked very hard in representing him in relation to his grievance. The Board agrees with this observation.

Conclusion:

[35] For the reasons set out herein, the Duty of Fair Representation Application, filed by the Applicant in LRB File No. 235-19, is dismissed.

DATED at Regina, Saskatchewan, this **24th** day of **September, 2020.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson