Saskatchewan
Labour Relations Board

SAI RAJU RAGALA, Applicant v SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent and PUBLIC EMPLOYEES BENEFIT AGENCY, Respondent

LRB File No. 168-20; September 9, 2021
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act*)

For the Applicant, Sai Raju Ragala:	Self-Represented
Counsel for the Respondent, Saskatchewan Government and General Employees' Union:	Greg Fingas
For the Respondent, Public Employees Benefit Agency:	No one appeared

Employee-Union Dispute – Duty of Fair Representation – Section 6-59 of *The Saskatchewan Employment Act* – Probationary Employee.

Employment terminated at conclusion of probationary period – Employee seeks that grievance be filed – Preliminary assessment by Union not to file grievance – Employee files application with Board – Follow-up meeting with employer cancelled.

Employee has onus to prove breach of Union's duty – No evidence of arbitrary, discriminatory or bad faith action – Union was conscientious – Sought out information and made assessment based on available information – Continued to represent employee after making preliminary assessment.

Investigation ongoing – No evidence that Union was refusing or failing to represent employee in the interim – Complaint is premature – Application is dismissed.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to a duty of fair representation application filed by Sai Raju Ragala [Applicant] against the Saskatchewan Government and General Employees' Union [Union].

[2] On August 19, 2019, the Applicant was offered the permanent full-time position of Senior Database Administrator with the Public Employees Benefit Agency, which is an agency under the

Ministry of Finance, Government of Saskatchewan [Employer]. The commencement date was October 13, 2019, and the first day of work was October 14, 2019. The location of the position was in Regina. To take the position, the Applicant had to relocate from Prince Edward Island.

[3] The Applicant's permanent status was subject to an initial probationary period of 12 months from the commencement date of the position. At the end of the 12-month term, the Employer concluded that the Applicant had not successfully completed the probationary period and, on October 8, 2020, terminated the Applicant's employment. The Applicant signed a waiver of union representation in relation to the meeting at which this decision was communicated to him.

[4] After receiving this news, the Applicant contacted the Union and asked that a grievance be filed on his behalf. The Union's representative, Donna Cook [Cook], conducted an assessment of this request. She decided that, based on the materials that she had received, there was no merit to a grievance. Despite this, she continued to investigate the matter and ultimately set up a follow-up meeting with the Employer. The meeting was scheduled to take place on November 9, 2020, and the Applicant, the Union representative, and an Employer representative were to be in attendance. Before the meeting could take place, and on November 6, 2020, the Applicant filed this application.

[5] The hearing of this matter took place through Webex according to the Board's Covid-19 protocols, on June 28 and 29, 2021. The Board heard testimony from the Applicant and from Cook.

Evidence:

[6] The Applicant testified that the Employer breached Articles 7.1, 7.3, 20.2, 20.3.1, and 20.4 of the collective bargaining agreement [CBA], and the Union failed to fairly represent him in relation to those alleged breaches.

[7] Article 7.1 deals with the initial appointment of a probationary employee. The Applicant highlights the following, specific provisions:

> *7.1 B) At the start of the probationary period, employees will be advised of expectations regarding standards of performance.*
>
> *C) The initial probationary period may be extended by the employer.*
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> *D) Should the Employer decide to terminate the employee or extend the employee's probation, the employee will be given the reasons prior to their termination or extension and an opportunity to respond.*

H) An employee who is notified that they have not successfully completed their initial probationary period by the expiry date, shall have their employment terminated. If the employee is not notified by the expiry date of the initial probationary period, the employee will be appointed to permanent status.

[8] Article 7.3 deals with probationary evaluations, and includes the following provisions:

A) Probationary evaluations shall be completed on every probationary employee or permanent employee on subsequent probation as follows:

2. during the fifth and eleventh months for a twelve (12) calendar month probationary period; …

B) The Employer shall assess performance during a probationary period for the purpose of discussing with the employee his work performance, accomplishments, strengths, as well as areas requiring development. Prior to submission to the Commission, or ministry in the case of labour service, the employee shall sign all probationary evaluations. At his request, the employee shall be provided with a copy of his assessment.

C) *When an employee is to receive a probationary review that identifies a requirement for significant improvement in order to be considered for permanent status, the Employer will advise the employee that they may bring union representation. Confidentiality of work/client information must be maintained.*

[9] According to the Applicant, the Employer failed to clearly communicate its expectations, and failed to complete the probationary evaluations within the timelines set out in the CBA. The Employer held a meeting with him on the third month of his term. This meeting was positive. Other than this, all of the Employer's communications started on the ninth month. Where he had only partially met the required competencies, he was told that he would meet them by the end of the probationary period. Ultimately, the Employer wrongfully chose not to extend the probationary period and then failed to provide him with an opportunity to respond to the reasons for the termination.

[10] Article 20.2 deals with dismissal for cause. The Applicant stated that he received no proper or timely evaluations, feedback, coaching or warnings about his performance. The Employer characterized as coaching what was nothing more than work distribution. He believes that the Employer had an ulterior motive in terminating him, and that the termination had nothing to do with his performance.

[11] The Applicant testified that he had tried to explain all of the above to Cook but she simply took the Employer's side and offered little to no assistance.

[12] The Applicant stated that the Employer also breached Article 20.3.1, which provides that a probationary employee who is dismissed for reasons other than misconduct shall be given

seven calendar days of notice or pay in lieu, in addition to pay in lieu of earned vacation leave. The Applicant states that his requests for vacation leave were not approved prior to his termination, and he was not paid in full for the vacation time that he had earned. Although he raised this issue with some Union representatives, he could not recall if he raised it with Cook, specifically.

[13] The Applicant suggested that the Employer failed to comply with Article 20.4, which requires the Employer to advise an employee that they have the option of having union representation at any meeting where discipline, including termination, is imposed. The Employer forced him to sign the union waiver at the termination meeting. He was not provided sufficient information about the purpose of the meeting, nor sufficient time to prepare and to seek out union representation. He explained all of this to Cook but she claimed that the Employer did not have to reveal the nature and purpose of the meeting. He disagreed.

[14] The Applicant testified that he had no formal communication with the Union about his concerns, and when he did hear from his representative, she appeared to be siding with the Employer. He was not given a sufficient opportunity to discuss his concerns. He requested a one-on-one meeting with Cook but his request was not granted. While all of this was going on, he believed that he was constrained by a “90-day deadline” and so he filed this application to preserve his rights.

[15] According to Cook, she first heard from the Applicant on October 9. At that time, he told her that the Employer had failed to provide him with an opportunity to obtain Union representation. He also claimed that he had passed his probation. Cook took notes of the initial discussion. She asked the Applicant whether he had received coaching or other training during the probationary period. He told her that none had been provided. They had a thorough discussion about Articles 7.1 and 7.3 of the CBA.

[16] Cook explained to him that due to the pandemic she was not doing in-person meetings, but that they could meet by phone or video. She asked him to provide any information that might be helpful. He indicated that it was all on a flash drive which he would leave at the Union office. She received the drive, had all of the contents printed, started a paper file, and added it to the database. The information included the probationary reviews, letter of offer, emails, and possibly some assignments that the Applicant had worked on.

[17] They spoke on the phone a few days later. She asked the Applicant if the Employer had had verbal conversations with him and he said “no”. He said he did not sign anything and was not given the knowledge or training to be able to perform his duties.

[18] After this exchange, Cook reached out to the Executive Director and had a brief discussion. The Executive Director suggested a meeting with human resources. That meeting took place. At that meeting, Cook was told that the Applicant had been advised of the October 8th meeting two days prior and was provided the opportunity to bring union representation. He signed the waiver when he showed up without a union representative. The Employer had provided coaching and various one-on-one meetings on approximately 12 occasions. She asked for documentation to that effect, which was provided.

[19] Cook wrote to the Applicant on October 21 to explain her conclusions. By that time, she had reviewed the contents of the flash drive, the Applicant’s emails, and the Employer’s information. She had considered whether the Employer had breached Article 7 of the CBA. In her view, the Employer had provided evidence of coaching, of having communicating clear expectations, and of having provided additional supports. She had asked the Employer representatives why they had not extended the probationary period and was told that an extension would not have made a difference in this case.

[20] Although she had decided that, based on what she knew thus far, there was no reason to file a grievance, she continued to work on the file with the goal of uncovering something that would help.

[21] On October 22, she inquired with the Employer about why the Applicant’s interim review was not done at the five-month period. She was advised that it was due to the complications arising from the pandemic, including the shift to working from home. A decision had been made to delay the review. She also asked why they did not provide union representation for the interim review. She was told that, at that time, failure of the probationary period had not been considered. But then, in the remaining time, his performance slipped even more, so much so that there was no point in extending the probationary period.

[22] In her view, there was still a possibility, as of October 22, that a grievance could be filed. Around that time, Cook advised the Applicant that they were going to set up a meeting with the Employer. The Applicant communicated to her that she was taking the Employer’s side. She

replied that she was looking at all angles, and that the purpose of the meeting was to obtain information to establish a breach for the purpose of filing a grievance.

[23] On November 3, she advised the Applicant that she had set up another meeting with the Employer, and that she was planning to forward the meeting invite. At the time, they had a lengthy discussion about the purpose and process of the meeting and about Articles 7.1, 7.3, and 20 of the CBA. She explained what the Union would do to provide representation in the case of discipline. She explained that she cannot make an employer extend the probationary period but that the Union could hold the Employer to task by inquiring about its justifications for choosing not to do so.

[24] Shortly after, Cook was notified that the Applicant had filed this application, and so the meeting with the Employer was cancelled. Cook explained that there had been no final decision about a grievance. Cook had been hopeful that they could learn something at the meeting. She had intended to ask more questions to clarify the conflicting information she had received from the Applicant and the Employer.

Arguments of the Parties:

The Applicant:

[25] The Applicant says that he approached the Union for help but the Union held no formal meetings with him and only did what the Employer wanted, and as a result, wrongly concluded that there was no merit to a grievance. The Union dispensed incorrect advice, specifically, that the Employer had the right under the CBA to terminate his employment at the conclusion of the probationary period.

[26] The Union failed to demand answers from the Employer about: the movement of his interim review from the fifth month to the ninth month of his term; the Employer's failure to set goals with him at the beginning of his probationary period; and, the Employer's failure to provide him with an opportunity for Union representation when the Employer began to notice the performance issues. Nor was the Union able to produce sufficient evidence that the Employer had coached him, as was required.

[27] The Union is simply unwilling to file a grievance. This is discriminatory and improper.

Union:

[28] The Union says that it has complied with its duty. Furthermore, the Applicant's request for remedies is premature. There is no evidence that any of the Union's actions were improper, that it discriminated or acted in bad faith, or that it failed to exercise the appropriate diligence in investigating and reviewing the case. To the contrary, at the time that the application was filed, the Union was in the midst of gathering information for the purpose of deciding whether to file a grievance on the Applicant's behalf. The Union says that this application should be dismissed.

Analysis:

[29] The Applicant has the onus to prove, on a balance of probabilities, that the Union has breached its duty pursuant to section 6-59 of the Act. Section 6-59 provides:

> ***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.*

[30] In reciting the applicable law, the Union relies on the following passage *from International Brotherhood of Boilermakers, Lodge No. 532 v Ahmed*, 2021 CanLII 39860 (SK LRB) [*Ahmed*]:

> *[22] The description in Berry v SGEU, 1993 CarswellSask 518 continues to provide guidance on the meaning of the terms "arbitrary", "discriminatory" and "bad faith", as they are used in duty of fair representation applications:*
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> > *21 This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:*
> >
> > > *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 favouritism. 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.*
> >
> > *22 In the case of Gilbert Radke v. Canadian Paperworkers Union, LRB File No. 262-92, this Board observed that, unlike the question of whether there has been*

> *bad faith or discrimination, the concept of arbitrariness connotes an inquiry into the quality of union representation. The Board also alluded to a number of decisions from other jurisdictions which suggest that the expectations with respect to the quality of the representation which will be provided may vary with the seriousness of the interest of the employee which is at stake. They went on to make this comment:*
>
> > *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*
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> *[23] In Owl v Saskatchewan Government and General Employees' Union, 2014 CanLII 42401 (SK LRB) [Owl], the Board adopted the descriptions used in Toronto Transit Commission, [1997] OLRD No 3148:*
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> > *[28] In Toronto Transit Commission, [1997] OLRD No. 3148, at paragraph 9, the Ontario Labour Relations Board cited with approval the following succinct explanation of the concepts provided by that Board in a previous unreported decision:*
> >
> > > *. . . a complainant must demonstrate 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.*

[31] The Board in *Hargrave et al v CUPE, Local 3833 and Prince Albert Health District*, [2003] Sask LRBR 511 provided a helpful and extensive overview of the guiding principles for determining whether a union has acted in an arbitrary manner. Overall, a union is afforded latitude with respect to its handling of a grievance, including with respect to its decision whether to file a grievance. In a case involving critical job interests, a union's conduct may well be held to a higher standard. However, mistakes, honest errors, and "mere negligence" are not sufficient to ground a breach pursuant to section 6-59.

[32] Overall, union officials are expected to act honestly, conscientiously and without prejudgment or favoritism. Arbitrary conduct may be found to have occurred if a union representative has failed to direct one's mind to the merits of the matter, to inquire into or to act on available evidence, or to conduct any meaningful investigation, or if a union representative has

acted based on irrelevant factors, or displayed an indifferent attitude. To constitute arbitrary conduct, the union's actions must be found to have been flagrant, capricious, totally unreasonable, or grossly negligent.

[33] In this case, the first, and most relevant, question is whether the Union acted arbitrarily, and therefore failed in its duty of fair representation.

[34] The evidence demonstrates that the Union acted conscientiously on the Applicant's case. The Applicant did not raise with the Union any issues about the administration of the probationary period until after his termination. He first spoke to Cook on October 9. The next day, and on Cook's request, he attended the Union's office to submit documentation in support of his request for a grievance. The flash drive contained planning documents, emails, and the probationary review documents. He provided additional documents to Cook by email. Cook sought out information from the Employer, including by meeting with the Employer to discuss the case. She made a determination based on her review of the significant information provided by the Applicant, as well as that of the Employer. She communicated with the Applicant clearly, carefully, and repeatedly. She provided a lengthy explanation of the process. She responded to the Applicant's additional concerns and sought out additional information.

[35] On October 21, 2020, the Applicant wrote to Cook requesting a meeting. Cook wrote back a few hours later indicating that she had reviewed the documentation that he had provided. She described a meeting she had had with the Employer representative and the HR Business Partner. She provided a detailed explanation of her understanding of the events including the probationary review, one-on-one meetings, and the KSAs (Knowledge, Skills, and Abilities) that were lacking.

[36] She considered the explanations that were provided by the Employer. The Employer said, for example, that the probation had not been extended because it would not make a material difference for the Applicant. She highlighted certain Articles of the CBA, including 7.1(G) which states that the Permanent Head may terminate an employee's appointment at any time during the initial probationary period. She advised that she had decided not to file a grievance.

[37] On October 22, 2020, Cook sent an email to the Applicant to advise that she had emailed the Employer to request further information and documentation in relation to the probationary reviews. She also provided detailed responses to the Applicant's questions. She included within these responses some quotations from the Applicant's interim review which outlined the

Employer's concerns. She had interpreted these passages to mean that, contrary to what the Applicant had told her, he was not successfully passing his probation.

[38] Cook drew similar conclusions based on a variety of emails and other documents in which the Employer had outlined its expectations, provided guidance, explained mistakes, and provided opportunities for improvement. Included within those documents are communications from the Employer representatives to the Applicant advising him that he was to assume a leadership role as a senior member of the team.

[39] Cook made further inquiries of the Employer, including about the interim review. She set up another meeting with the Employer. She continued to investigate the case.

[40] With respect to the payment in lieu of vacation leave, it is unclear whether Cook considered this issue. Under the circumstances, this is not sufficient to establish a breach of the duty. The Applicant does not appear to have communicated about this issue to Cook, or to the other Union representatives, at least not clearly or directly. Furthermore, the email he sent to the other Union representatives, which does not specifically ask for an investigation into the payment in lieu, was sent only a few days before he filed this application. It would be, at the least, premature to grant a remedy in relation to this issue.

[41] In weighing the evidence, the Board has considered the reliability of the Applicant's testimony. In doing so, the Board has noted significant inconsistencies between the Applicant's testimony and the remaining evidence, including Cook's testimony and the documents that were entered as exhibits. The inconsistencies were apparent in relation to whether the Applicant had an opportunity to obtain union representation, whether Cook was available and willing to meet with him, whether he was truly concerned about attending the first meeting with the Employer, and whether he was transparent with the Union about various issues, including coaching, Employer expectations, and his success in his probationary period. In most cases, the Applicant provided no rational or satisfactory explanation for those inconsistencies. For these reasons, the Board prefers the evidence of the Union over that of the Applicant. The many contradictions in the Applicant's testimony undercut his credibility overall.

[42] In conclusion, the Union investigated the Applicant's concerns, considered the relevant issues, and made a reasoned decision not to file a grievance based on a careful review of the information provided to date. This includes a consideration of the Employer's non-compliance with the CBA. The Union continued to pursue the matter after continuing to communicate with the

Applicant and reviewing his concerns. The Union is not held to a standard of perfection. There is no evidence that the Union acted based on irrelevant factors or in an indifferent manner. The Union's conduct was certainly not flagrant, capricious, totally unreasonable, or grossly negligent. The Union did not act in an arbitrary manner.

[43] The next question is whether the Union acted in a discriminatory manner, that is, based on "invidious distinctions without reasonable justification or labour relations rationale". To establish discriminatory treatment, the Applicant has to demonstrate that he has been treated in a differential manner. There is no evidence of differential treatment. There are no grounds to find that the Union acted in a discriminatory manner.

[44] The Applicant has repeatedly stated that there was racial discrimination in the workplace but has admitted that there is no supporting evidence for that assertion. Relatedly, there is no evidence of racial discrimination on the part of the Union.

[45] The Applicant has not established that the Union has acted in bad faith. To establish an assertion of bad faith, an applicant must persuade the Board that underlying the Union's actions was an improper purpose: *Owl v Saskatchewan Government and General Employees' Union*, 2014 CanLII 42401 (SK LRB) [*Owl*] at paras. 77-9. The Applicant has presented no evidence of an improper motive on the part of the Union.

[46] Finally, there is no evidence that the Union has done anything other than handle this matter with the utmost care and attention. By filing this application when he did, the Applicant seems intent on pressuring the Union to file a grievance during the Union's ongoing investigation. This is not the proper approach to a duty of fair representation application.

[47] For all of these reasons, this application is dismissed.

DATED at Regina, Saskatchewan, this **9th** day of **September, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson