THERESA EYNDHOVEN, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 21, CITY OF REGINA, and REGINA CIVIC MIDDLE MANAGEMENT ASSOCIATION, Respondents

LRB File No. 229-17; January 31, 2019

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

For the Applicant:	Self Represented
For the Respondent CUPE, Local 21:	Sachia Longo
For the Respondent City of Regina:	Jim McLellan
For the Respondent RCMMA:	Crystal Norbeck

Duty of Fair Representation – CUPE Local 21 breached duty of fair representation by acting in an arbitrary manner – Classification review of Applicant's position resulted in no change – While Local 21 was under administration, National representative identified several potential errors in classification – When Local 21 came out of administration it summarily rejected National representative's advice and refused to assist Applicant.

Duty of Fair Representation – Board issued declaration that Local 21 contravened section 6-59 by acting in an arbitrary manner in representing Applicant – Local 21 to compensate Applicant for two days' pay representing time spent attending hearing – Reasons and Order to be posted for 60 days.

REASONS FOR DECISION

Background:

[1] Theresa Eyndhoven is employed by the City of Regina ["City"]. Her position is classified as being included within the certification order for the City's employees who are represented by the Canadian Union of Public Employees, Local 21 ["Local 21"]. While much of Ms. Eyndhoven's evidence addressed the issue of whether her position is properly within Local 21's jurisdiction,

that is not the issue before the Board. The issue before the Board is whether Local 21 met its obligation to fairly represent her in a manner that was not arbitrary, discriminatory or in bad faith, in her efforts to have the proper classification of her position accurately and appropriately assessed.

[2] The facts underlying this application date back to August 16, 2011, when the City completed a Job Classification Request Form[1] for a new position of Distribution Clerk Coordinator. In October 2011 the City suggested, and in due course received agreement from the three unions they consulted[2], that this was a Local 21 position. The job posting, dated May 17, 2012, included the following statement respecting salary grade: "CUPE Local 21-2J (Under Review)"[3]. Ms. Eyndhoven testified that she applied on the basis that the salary grade was under review. She was the successful candidate.

[3] Local 21 and the City reviewed the position in accordance with the job classification and rating process they have developed for Local 21 positions. Local 21's representative on the joint classification review committee was Maria Kotsetas, the current president of Local 21. During the review process, Ms. Eyndhoven was given an opportunity to provide input to the committee. By letter dated February 18, 2015 Ms. Eyndhoven was advised that the City and Local 21 had agreed there would be no change to the classification of her position.

[4] Later that year Local 21 was placed under administration by the Canadian Union of Public Employees National Office. When Local 21 was placed under administration, National Representative Dave Stevenson took over the function of Local 21's executive. Ms. Eyndhoven contacted him about her job classification. He undertook a detailed review of the classification and identified several potential errors. He then sent a letter to the Acting City Manager, dated October 6, 2015, appealing the classification rating of Ms. Eyndhoven's position in accordance with Article 18(C)(2) of the Collective Agreement[4]. In this letter he went into detail about why her classification rating was wrong, in particular the ratings attributed to Analysis and Judgment, Accountability, Supervision, Financial and Contacts. On January 20, 2016, the City denied Local 21's ability to access the appeal process in the Collective Agreement for the classification rating.

---

[1] Exhibit U-4.
[2] CUPE Local 7, CUPE Local 21, Regina Civic Middle Management Association.
[3] Exhibit A-3
[4] Exhibit A-6.

[5] On January 29, 2016 Mr. Stevenson filed a grievance of that decision, on Ms. Eyndhoven's behalf. He attempted to refer the grievance to arbitration, but the City continued to deny the ability of Local 21 to grieve the decision, saying that since Local 21 had agreed to the classification, it could not appeal a decision it itself had made. The City's position was that there is a process in Articles 18(C) and (D) of the Collective Agreement for appealing a classification to the City Manager and then a Joint Council if Local 21 had disagreed with the classification. Since Local 21 had agreed to the classification, the City said, that process was not available.

[6] When Local 21 was in the course of transitioning out of administration, Tim Anderson, then Local 21 president, reviewed all of the grievance files. He decided there was no merit to Ms. Eyndhoven's grievance. Local 21 advised Ms. Eyndhoven, by letter dated October 13, 2016, that the Grievance Committee had recommended that Local 21 not proceed further with the grievance[5]. Ms. Eyndhoven met with Mr. Anderson and Ms. Kotsetas. They advised her that they were unwilling to move the grievance forward because they agreed with the City's interpretation of Articles 18(C) and (D) of the Collective Agreement.

[7] The October 13, 2016 letter advised Ms. Eyndhoven that she could appeal the Grievance Committee's recommendation to the Grievance Appeal Committee. That appeal took place on or about October 18, 2016. Ms. Eyndhoven was allowed to make submissions at the meeting. Mr. Anderson and Ms. Kotsetas also spoke at the meeting. The Grievance Appeal Committee voted not to proceed with the grievance. Ms. Eyndhoven's view of the appeal was that since its members were all outside workers, they did not understand her job and she was not fairly heard.

[8] At the hearing before this Board, Mr. Anderson and Ms. Kotsetas 21 admitted that, even though Ms. Kotsetas was aware of it, Exhibit A-6 was not provided to the Grievance Appeal Committee to consider in making its decision. Mr. Anderson testified that he did not see the letter before making his decision to recommend that Local 21 refuse to proceed with the grievance. He testified that it did not matter what the appeal letter sent by Mr. Stevenson to the City Manager said, he was not going to support the grievance.

[9] To make matters worse for Ms. Eyndhoven, Ms. Kotsetas had been a member of the joint classification review committee since 2006 and she was not prepared to even consider Mr. Stevenson's opinion that the committee had been in error when it classified Ms. Eyndhoven's

[5] The evidence provided at the hearing indicated no Grievance Committee review, only a review by Mr. Anderson.

position. She was clearly insulted that Mr. Stevenson would have the temerity to send Exhibit A-6 to the City without talking to her first. Nor would she listen to Mr. Stevenson's opinion that Local 21 does not have a proper job evaluation tool for Ms. Eyndhoven's position. She was the expert, in her mind she had done her due diligence, and she was not prepared to listen to Mr. Stevenson's advice with an open mind.

[10] Unfortunately for Ms. Eyndhoven, she was caught up in this turmoil between Local 21 and the National Office representative.

Relevant statutory provisions:

[11] Ms. Eyndhoven's application claims that Local 21 breached the duty of fair representation that it owes to her under section 6-59 of *The Saskatchewan Employment Act* ["Act"]:

> ***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 and Decision:

[12] The Board has, through numerous decisions, established its approach to applications under section 6-59 of the Act[6]. Many of these decisions were relied on by Local 21 in its helpful Brief of Law and Book of Authorities.

[13] An oft-quoted, foundational statement of principle can be found in *Glynna Ward v Saskatchewan Union of Nurses*, [1988] Winter Sask Labour Rep 44 at 47:

> *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*

[6] Formerly section 25.1 of *The Trade Union Act*.

> *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.*

[14] Further elaboration, that the Board has adopted, is found in the Ontario Labour Relations Board decision 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.*

[15] No evidence of discrimination was provided to the Board by Ms. Eyndhoven. She was not treated differently from other members of Local 21 on the basis of a form of discrimination prohibited by *The Saskatchewan Human Rights Code*, nor on the basis of preferential or differential treatment.

[16] Nor was there any evidence of bad faith towards the Applicant. There was no evidence that Local 21's actions in this matter were motivated by ill-will, malice, hostility or personal animosity toward Ms. Eyndhoven.

[17] The issue, then, is whether Local 21 acted in an arbitrary manner in its decision to not proceed with the grievance or assist her in any other way.

[18] The Board has frequently[7] relied on the following guidance from the Canada Labour Relations Board, set out in *Rousseau v. International Brotherhood of Locomotive Engineers et al.,* 1995 CarswellNat 1622, 95 CLLC 220-064 at paragraph 107, in determining whether a union has acted in an arbitrary manner:

> *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*

[7]For example, *CB, HK & RD v Canadian Union of Public Employees, Local No. 21, CUPE National, and The City of Regina*, 2017 CanLII 68786 (SK LRB); *Hargrave, et al. v Canadian Union of Public Employees, Local 3833 and Prince Albert Health District*, [2003] Sask LRBR 511; *Prebushewski v Canadian Union of Public Employees, Local No. 4777 and Prince Albert Parkland Health Region*, 2010 CanLII 20515 (SK LRB).

> *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.*

[19] In *CB, HK & RD v Canadian Union of Public Employees, Local No. 21, CUPE National, and The City of Regina*, 2017 CanLII 68786 (SK LRB), the Board found that the union's failure to undertake even a cursory investigation of the applicants' complaints demonstrated arbitrary treatment:

> As described in *Noël*, *supra*, at paragraph 50, once a complaint is made to the union, at a bare minimum it "must investigate the complaint, review the relevant facts or seek whatever advice may be necessary". CUPE Local 21 did not do any of this; rather, it ignored these particular allegations raised by the Applicants. As a consequence, this inaction by CUPE Local 21 amounts to arbitrary conduct and constitutes a violation of subsection 6-59(2) of the *SEA*. (para 241)

[20] In *Larry Hernandez v. Teamsters Local Union 395 and Saputo Dairy Products Canada G.P.***,** 2015 CanLII 50198 (SK LRB) the Board relied on the following comments that it had earlier made in *Radke v. Canadian Paperworkers Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57, at pages 64-65:

> *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.*

[21] The Union also referred the Board to the decision of the Canadian Industrial Relations Board in *McRaeJackson v CAW-Canada*, 2004 CIRB 290, 2004 CarswellNat 6044. That Board made the following comments respecting a union's duty not to act in an arbitrary manner:

> *[29] A union must not act arbitrarily. Arbitrariness refers to actions of the union that have no objective or reasonable explanation, that put blind trust in the employer's arguments or that fail to determine whether the issues raised by its members have a factual or legal basis (see John Presseault, supra, but see Orna Monica Sheobaran, [1999] CIRB no. 10, that upheld a complaint where the union referred an employee to the employer rather than assist the employee; and Clive Winston Henderson, supra, where the union's decision jeopardized an employee's seniority).*
>
> *[30] It is arbitrary to only superficially consider the facts or merits of a case. It is arbitrary to decide without concern for the employee's legitimate interests. It is arbitrary not to investigate and discover the circumstances surrounding the grievance. Failure to make a*

> *reasonable assessment of the case may amount to arbitrary conduct by the union (see Nicholas Mikedis (1995), 98 di 72 (CLRB no. 1126), appeal to F.C.A. dismissed in Seafarers' International Union of Canada v. Nicholas Mikedis et al., judgment rendered from the bench, no. A-461-95, January 11, 1996 (F.C.A.)). A non-caring attitude towards the employee's interests may be considered arbitrary conduct (see Vergel Bugay et al., supra) as may be gross negligence and reckless disregard for the employee's interests (see William Campbell, [1999] CIRB no. 8).*

[22] All of these precedents lead the Board to the conclusion that Local 21 contravened section 6-59 of the Act by acting in an arbitrary manner in its dealings with Ms. Eyndhoven. They came to the conclusion that the process followed by the National representative, in trying to have Ms. Eyndhoven's classification reconsidered, was wrong. It is not the role of the Board to second guess that decision or micro-manage the steps taken by Local 21 to assist Ms. Eyndhoven. The arbitrary conduct was that they took no steps to assist Ms. Eyndhoven. They did not turn their minds to the question of what would be the correct procedure. They refused to listen to her when she told them that the classification of her position was based on a misunderstanding of her job. This was a particularly arbitrary approach given that a National representative of their union had identified at length so many areas of concern. They did not direct their minds to the merits of her concerns. They displayed an indifferent approach toward her concerns. They did not undertake even a cursory investigation of her concerns or review of the relevant facts. They did not act conscientiously and without pre-judgment. They decided to provide no assistance to Ms. Eyndhoven. Local 21 lost sight of their responsibilities to her as their member.

Remedy:

[23] The final issue for the Board is the appropriate remedy. The Board's goal in crafting an appropriate remedy is to attempt to put the parties in the position they would have been in had the contravention of the Act not occurred.

[24] Local 21 suggested that a declaration would be sufficient. Based on the evidence that was submitted at the hearing the Board is not completely confident that a declaration will lead Local 21 to right the wrong suffered by Ms. Eyndhoven. The Board urges Local 21 to address Ms. Eyndhoven's concerns with an open mind and with the goal of representing her interests fairly.

[25] Local 21 also suggested that Ms. Eyndhoven can pursue another classification review. That appears to be the best route for addressing her concerns. It is unfortunate that Local 21 did not provide her with that advice in October 2016, when she asked for their assistance, rather than

waiting until the hearing of this matter in September 2018 to admit that was what they should have advised and assisted their member, Ms. Eyndhoven, to do.

[26] Ms. Eyndhoven asked the Board to award her compensation for the wages (and pension contributions) she believes she should have been receiving since 2012. Local 21 says compensation is not appropriate or possible to calculate. The City agreed with Local 21 that there was no evidentiary base on which to order compensation, but went a step further and stated that the Board has no jurisdiction to order compensation.

[27] The Board clearly has the authority to order compensation. Clause 6-104(2)(e) of the Act authorizes the Board to determine the monetary loss suffered by an employee and require the persons whose contravention of Part VI of the Act caused that loss to pay to the employee all or a portion of the monetary loss suffered[8]. The Board does agree, however, that it was not provided with an evidentiary basis on which to calculate Ms. Eyndhoven's monetary loss. Given the variables in predicting the outcome of a reclassification application, the Board has come to the conclusion that it would not be possible to determine with any precision an appropriate quantum of damages calculated on the basis proposed by Ms. Eyndhoven. However, even though it may be viewed as a symbolic gesture, the Board recognizes that Ms. Eyndhoven was required to spend two work days at the hearing of this matter. If Local 21 had fulfilled its statutory obligations to her, this would have been unnecessary. The Board therefore orders that Local 21 pay Ms. Eyndhoven the amount required to compensate her for two days' pay.

[28] Local 21 also suggested that if Ms. Eyndhoven is dissatisfied, she could apply for a position outside Local 21. This is a troubling comment. She should not have to leave her current position to be ensured she will be represented fairly by her union, in accordance with its statutory obligations in section 6-59 of the Act. Local 21 needs to understand and accept that it has a statutory obligation to treat its members fairly, in a manner that is not arbitrary, discriminatory or in bad faith. It is because of their apparent lack of understanding and acceptance of this obligation that the Board considers this an appropriate case in which to make an Order pursuant to clause 6-111(1)(s) of the Act that Local 21 post a copy of these Reasons for Decision and the Board's Order in the manner described below.

---

[8] See *Candace Hartmier v. Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955* 2017 CanLII 20060 (SK LRB); *Lyle Brady v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771 and Jacobs Industrial Services Ltd.,* 2018 CanLII 68442 (SK LRB).

[29] The Board therefore makes the following orders:

(a) A declaration that Local 21 contravened section 6-59 of the Act by acting in an arbitrary manner in failing to fairly represent Theresa Eyndhoven;
(b) An order that Local 21 refrain from contravening section 6-59 of the Act;
(c) An order that Local 21 pay to Theresa Eyndhoven the amount required to compensate her for two days' pay;
(d) An order that within three days of receipt of these Reasons for Decision, Local 21 post a copy of these Reasons for Decision, together with the Board's Order, for a period of 60 days, in all places in the workplace where Local 21 or its officials normally post notices to its members respecting union business.

[30] The Board makes no order against the Regina Civic Middle Management Association. Ms. Eyndhoven was not a member of that Association when the issues in question in this matter arose.

[31] The Board makes no order against the Canadian Union of Public Employees, Local 7. Ms. Eyndhoven has never been a member of that Local and did not allege any misconduct by them in this matter.

DATED at Regina, Saskatchewan, this 31st day of January**,** 2019**.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson