

Manitoba Labour Board

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DISMISSAL NO. 1800
CASE NO. 677/06/LRA
C/R CASE NO. 832/06/LRA

IN THE MATTER OF: THE LABOUR RELATIONS ACT

- and -

IN THE MATTER OF: An Application by

J.A.,

Applicant,

- and -

HEALTH SCIENCES CENTRE,

Employer/Persons Concerned,

- and -

Manitoba Nurses' Union Local 10, HSC,

Respondent/Union.

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

WHEREAS:

1. On October 18, 2006, the Applicant filed an application with the Manitoba Labour Board (the "Board") seeking various remedies for an alleged unfair labour practice (the "Application") contrary to Section 20 of *The Labour Relations Act* (the "*Act*"), arising out of his contention that, between February and October of 2006, the Respondent failed to properly represent him. In particular, the Applicant complains that the Respondent failed to file grievances on his behalf in respect of certain matters arising out of his employment with the Employer (the "HSC"). The Applicant seeks general but unspecified remedies pursuant to section 31(4) of the *Act* and, in addition, seeks an order that the Respondent pay for any legal representation on his behalf; that the HSC and/or any associated party refrain from damaging his employability; that the HSC provide him with a generic reference letter and, further, provide references whenever requested; and that the HSC pay for refusing to schedule him for shifts between September 1, 2006, and September 12, 2006.

2. On October 24, 2006, the Applicant filed "Additional Statements" with the Board;
3. On November 6, 2006, the Applicant filed further documentation with the Board arising out of his request, made on November 3, 2006, that the Respondent file a grievance on his behalf relating to the position taken by the HSC on October 18, 2006 that the Applicant had abandoned his position and resigned his employment on account of his failure to attend a scheduled meeting with the Respondent and the HSC on that date.
4. On November 16, 2006, following an extension of time, the Respondent, through counsel, filed its Reply disputing the Application and asserting that it has not acted in an arbitrary or discriminatory manner or in bad faith in its representation of the Applicant. The Respondent further states that the Applicant has failed to demonstrate a breach of Section 20 of the *Act* through the materials submitted with the Application and that the Board ought to dismiss the Application summarily, without a hearing.
5. On November 17, 2006, following an extension of time, the HSC, through counsel, filed its Reply disputing the Application and asserting, *inter alia*, that the Applicant has failed to demonstrate a *prima facie* case and the Board ought to summarily dismiss the Application without a hearing pursuant to Section 140(8) of the *Act*, or, in the alternative, that if a hearing is held, it should be limited, in the first instance, as to whether the Application should be dismissed for failure to disclose a *prima facie* case.
6. Based upon a review of the Application and the Replies, the Board has determined that the material facts relevant to the disposition of this case are as follows:
 - a. At all material times, the Applicant was employed as a General Duty Registered Nurse by the HSC on GD2.
 - b. On May 10, 2006, the Applicant received a written warning (the "warning") for "inappropriate behaviour" arising out of certain incidents which occurred on February 1 and 2, 2006. In addition to the written warning, the Applicant was directed to attend certain educational sessions relating to inter-personal conflict resolution and communications (Item "A" to the Application).
 - c. Shortly thereafter, and on other occasions, the Applicant has requested that the Respondent file a grievance on his behalf contesting the issuance of the warning.
 - d. On June 23, 2006 (not June 13, 2006, as alleged in the Application), the Applicant attended a meeting with Representatives of the HSC and two Representatives of the Respondent. The purpose of the meeting was to discuss complaints that had been brought forward by co-workers of the Applicant regarding the inappropriate behaviour of the Applicant toward said co-workers. At the request of the

Respondent, it was determined that an investigation would be undertaken into various complaints made by the Applicant regarding certain co-workers and that an external investigator would be engaged for this purpose. In his Application, the Applicant acknowledges that, at the meeting of June 23, 2006, he made a request for an independent investigation (on the recommendation of the Respondent) and the HSC agreed to conduct such an investigation. It was further resolved, at the meeting of June 23, 2006, that any action which may be taken by the HSC as a result of complaints filed by the Applicant's co-workers would be placed on hold pending consideration of the results of the Investigation Report (the "Report").

- e. At the meeting of June 23, 2006, the HSC advised the Applicant that, prior to any return to work, the HSC would require medical documentation certifying that he was both physically and psychologically fit to return to work. This was confirmed in a letter dated June 28, 2006, from the HSC to the Applicant (Document "D" to the Application). The Applicant was also advised that the HSC had retained independent counsel to conduct the independent investigation pursuant to the Respectful Workplace Policy of the HSC. The costs of this independent investigation would be borne by the HSC.
- f. At the time of the meeting on June 23, 2006, the Applicant was off work on unpaid leave of absence due to a physical injury. On July 4, 2006, the Applicant provided the HSC with a medical certificate stating that he would be unable to work for medical reasons from July 4, 2006 to August 4, 2006 (Item "E2" to the Application).
- g. By letter dated July 24, 2006, the Respondent advised the Applicant that it was in discussions with the HSC to have the warning reduced to a verbal warning and that the filing of a grievance in relation thereto would be held in abeyance pending the outcome of such discussions. The Applicant was also advised by the Respondent that, prior to filing any grievance in relation to other harassment issues raised by both the Applicant and his co-workers, the parties should await the outcome of the independent investigation and the recommendations made in the Report (Item "C" to Application).
- h. On August 28, 2006, the Applicant provided the HSC with a medical note which stated that the Applicant was fit to return to work both psychologically and physically (Item "G" to the Application).
- i. Upon receipt of this medical note, the HSC advised the Respondent that it was considering the documentation provided and that, pending such consideration, the Applicant would not be allowed to return to work. The Respondent raised the issue of rescheduling shifts not worked by the Applicant from August 28, 2006 to the date of the return to work meeting (Item 21 of HSC's Reply).

- j. The independent investigator issued the Report on September 7, 2006 and a copy of the Report was provided to the Applicant on September 12, 2006. The Report concluded that the Applicant had not been subject to harassment and it further concluded that the employment relationship between the Applicant and his colleagues was irreparable. The Report recommended that the Applicant be given support to deal with the situation but concluded that he could not return to GD2. By letter dated September 12, 2006, the Respondent advised the Applicant that, prior to any return to work, he would have to undergo an independent psychological assessment with a named physician, the cost of which would be borne by the HSC and, pending receipt of that assessment, the Applicant would remain on leave of absence.
- k. The Applicant asserts that the Report was inadequate, unfair and unsatisfactory. The Applicant also made enquiries of both the HSC and the Respondent regarding payment for his missed shifts between September 1, 2006, and September 12, 2006.
- l. On September 12, 2006, the Applicant provided the HSC with a medical certificate stating that he would be unable to work for medical reasons from September 12, 2006 to October 30, 2006.
- m. The Board accepts that the Applicant had no further sick leave entitlement as of September 12, 2006.
- n. On October 2, 2006, the Applicant was notified, in writing, that he was to attend a meeting on October 4, 2006, to discuss the Report and other issues that were originally have been addressed at the meeting of June 23, 2006 (Item "K" to the Application). On October 2, 2006, the Applicant advised the HSC and the Respondent, in writing, that he could not make this meeting due to a "scheduled conflict" (Item "L" to the Application).
- o. On October 3, 2006, the Applicant requested, in writing, that the Respondent file grievances on his behalf in respect of the HSC's refusal to allow him to work between September 1, 2006, and September 12, 2006, and for refusing to pay him under the collective agreement and in respect of placing him on a leave of absence without pay from September 13, 2006.
- p. On October 11, 2006, the Applicant was notified, in writing, that the meeting had been rescheduled for October 17, 2006 (Item "M" to the Application). The Applicant advised both the HSC and the Respondent that he would not be able to attend this rescheduled meeting.

- q. On October 16, 2006, the Applicant wrote to the Respondent requesting that the Respondent file grievances on his behalf in respect of all pending matters including the refusal to schedule him for work and not paying him, placing him on leave of absence without pay and he also sought assistance to obtain a reference letter from the HSC, as the Applicant was then seeking employment elsewhere (Item "T" to the Application).
- r. On October 17, 2006, the Applicant was advised that the meeting had been rescheduled for October 18, 2006. The Applicant was advised that if he did not attend this meeting then he would be considered to have abandoned his position and would no longer be an employee of the HSC. On October 17, 2006, a Representative of the Respondent spoke with the Applicant and advised him that he should attend the meeting on October 18, 2006. Similar calls were received from the HSC. On October 17, 2006, the Applicant advised both the HSC and the Respondent that he could not attend the October 18, 2006, meeting because he had "... an interview scheduled and other stuff pre-planned ..." (Item "P4" to the Application). The Respondent did not attend the meeting on October 18, 2006.
- s. The Application was filed with the Board on October 18, 2006.
- t. On October 18, 2006, the HSC wrote to the Applicant and advised him that he was deemed to have resigned his employment due to abandonment. The Applicant was further advised that payment would be processed for the shifts he did not work between August 28, 2006, and September 12, 2006. A copy of this letter was sent to the Respondent.
- u. Based on discussions with the HSC during October 2006, the Respondent wrote to the Applicant on October 24, 2006, advising him that the Union would not be filing a formal grievance to have the warning reduced to a verbal warning.
- v. On November 3, 2006, the Applicant wrote to the HSC and the Respondent. His letter to the HSC stated that he had neither abandoned nor resigned his position and that he had been unavailable to meet for a number of reasons but he was willing to reschedule the meeting. The Applicant wrote "... I am filing for grievance on the grounds of wrongful termination of my employment at HSC." In a letter of same date, the Applicant requested the Respondent to file grievances respecting the written warning, leave of absence without pay and the abandonment of position/termination of employment matter.
- w. The Respondent acknowledges that it did not file a grievance in respect of the leave of absence from September 12, 2006, because the Applicant has continually advised the Respondent that he was on sick leave and unable to work after September 12,

2006. A medical certificate to this effect was filed with the HSC. In these circumstances, the Respondent maintains that there is no basis, nor any ability on its part, to grieve the unpaid leave of absence from September 12, 2006.
- x. The Respondent says that the attendance of the Applicant at the various meetings which were scheduled with the HSC was critical because the purpose of these meetings was to discuss the Report and other concerns related to the Applicant's employment. The Respondent takes the position that the unwillingness of the Applicant to participate in the rescheduled meetings with the HSC showed a lack of co-operation and prevented the Respondent from taking any additional action on his behalf.
 - y. In respect of the Applicant's request of November 3, 2006 to file a grievance regarding his termination, the Board accepts the Respondent's statement that no request of this nature was made by the Applicant prior to November 3, 2006. The Board accepts that the Respondent has formally invited the Applicant to contact the Respondent if he wishes the Respondent to represent him with respect to the termination issue but that the Applicant has not availed himself of that opportunity and has not contacted the Respondent as of the date of the filing of the Respondent's Reply.
 - z. The Applicant has been paid for any shifts he otherwise would have worked between August 28, 2006, and September 12, 2006.
7. In the context of the material facts recited in paragraph 6 and after considering the legal principles applied by the Board in its decisions defining conduct which constitutes arbitrariness, discrimination or bad faith, the Board has determined, to its satisfaction, the following:
- a. The Applicant claims that the Respondent breached its duty under Section 20 of the *Act* between February and October of 2006 (Para. 1 of the Application) and, therefore, his complaints regarding matters which pre-dated this period are not properly within the scope of the Application itself.
 - b. The fact that the Applicant disagrees with the decision of the Respondent not to file a grievance or to pursue a grievance to arbitration in respect of the matters complained of in the Application does not constitute a breach of Section 20. A union may decide not to file a grievance, not to pursue any grievance to arbitration; or it may decide to settle a grievance without an employee's agreement as long as the union's decision is not arbitrary, discriminatory or made in bad faith.

- c. When assessing the conduct of the Respondent, an objective standard of review and not a subjective standard must be used, meaning that the proper question to be asked is whether the Respondent's decision was one that could reasonably have been made in the circumstances. In this regard:
- i. As a result of the intervention of the Respondent, the HSC did pay the Applicant for the period September 1, 2006, to September 12, 2006, based on shifts which the Applicant would otherwise have been scheduled to work. Having achieved this result, there is no valid basis upon which the Applicant can assert the Respondent breached its duty to him by failing to file a grievance claiming pay for this period;
 - ii. The Respondent's decision not to file a grievance with respect to the HSC placing the Applicant on an unpaid leave of absence, effective September 12, 2006, was a legitimate exercise of discretion on the part of the Respondent because the Applicant himself filed medical evidence that he was unable to work for medical reasons for the period September 12, 2006, to October 30, 2006, and his sick leave had been exhausted;
 - iii. The Respondent's recommendation (accepted by the Applicant) that an independent investigator be appointed to investigate the harassment/complaint issues in the workplace involving the Applicant and holding other matters in abeyance until the Report was issued was a reasonable decision in the circumstances; and
 - iv. The final decision not to grieve the warning was based upon a further investigation by the Respondent which disclosed there were grounds for some discipline, in the judgment of the Respondent;

It is not the role of the Board to assume the role of surrogate arbitrator and decide whether the Applicant would have succeeded at arbitration in respect of any of the foregoing matters.

- d. In deciding not to file a grievance in respect of either the warning or the placing of the Applicant on unpaid leave of absence after September 12, 2006, the Respondent did not act in an "*arbitrary*" or "*discriminatory*" manner under Section 20(b), as those terms have been interpreted by the Board. The material reveals that the Respondent directed its mind to the relevant factual circumstances and the Application does not recite any acts or omissions which, if proven, would establish that the Respondent made its decision(s) on the basis of irrelevant factors or that the Respondent, through its Representative(s) displayed an attitude which can be characterized as "... indifferent and summary, or capricious and non-caring or

- perfunctory" [see *Re Moreau - and - Manitoba Association of Health Care Professionals*, [2004] 102 CLRBR (2nd) 263, at p. 268].
- e. The Application does not reveal, on its face, that any decision of the Respondent or the conduct of its Representatives was made in "*bad faith*." There are no facts alleged in the Application that the Respondent acted on the basis of hostility, ill will or dishonesty or that it attempted to deceive the Applicant or refuse to process a grievance for sinister purposes [see *Moreau, supra*, p. 268; and *Re Beach*, [2005] MLBD No. 2].
 - f. The material filed reveals that the Respondent addressed the merits of the Applicant's concerns in the factual circumstances prevailing, that it considered relevant factors, and then made an objective and rational judgment regarding the likelihood of the grievances being successful.
 - g. The Respondent's position that, in all of the circumstances prevailing, it was critical for the Applicant to co-operate and attend a meeting with the HSC to discuss the Report, its ramifications and what future steps may be undertaken in respect thereof was a reasonable one.
 - h. Matters relating to the Applicant's seeking of an order that the HSC provide generic or other letters of references and matters arising from what may have transpired with other prospective employers where the Applicant was seeking employment does not fall within the ambit of Section 20 of the *Act*; and
 - i. As to the supplementary material filed by the Applicant relating to his deemed abandonment-resignation, the Board accepts that the Respondent has invited the Applicant to contact it if the Applicant wishes the Respondent to represent him regarding this matter. The Board accepts that the Applicant had not availed himself of that offer as of the date of filing the Respondent's Reply and, therefore, it cannot be said that, as of November 3, 2006, the Respondent has breached any duty it owes to the Applicant under Section 20 of the *Act* in respect of that matter.

Based on the foregoing, the Board has determined that the Applicant has failed to establish a *prima facie* case in respect of the matters complained of, *as those matters existed on November 3, 2006*, and, accordingly, the Board declines to take any further action on the complaint, pursuant to Subsection 30(3) of the *Act*. In the result, the Application is to be dismissed.

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T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by J.A. on October 18, 2006, as supplemented by the additional documentation filed by the Applicant on November 6, 2006.

DATED at **WINNIPEG**, Manitoba, this 8th day of February 2007 and signed on behalf of the Manitoba Labour Board by

"Original signed by"

William D. Hamilton, Chairperson

WDH/dr/rb-s