

Manitoba Labour Board

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DISMISSAL NO. 1803
CASE NO. 764/06/LRA

IN THE MATTER OF: THE LABOUR RELATIONS ACT

- and -

IN THE MATTER OF: An Application by

D.C.H.

Applicant,

- and -

CARLSON STRUCTURAL GLASS INC.,

Employer,

- and -

Manitoba Fiberglass Union,

Respondent/Union.

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

WHEREAS:

1. On October 20, 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 from his assertion that the Respondent failed to properly represent him regarding his dismissal from employment by the Employer for theft on or about October 5, 2006. The Applicant seeks general remedies under Section 31(4) (g), (h), (i) and (j) of the *Act*.
2. On December 5, 2006, following an extension of time, the Employer, through counsel, filed its Reply disputing the Application and requesting that it be dismissed..
3. On December 6, 2006, following an extension of time, the Respondent, through counsel, filed its Reply disputing the Application and denying that it has breached its duty of fair representation to the Applicant. In particular, the Respondent asserts that the Application does not contain an allegation or statement of fact which would support a finding that the Respondent acted in a manner that was arbitrary, discriminatory or in bad faith or that it failed to take reasonable care to represent the Applicant's interests. Accordingly, the

Respondent submits that the Application does not present a *prima facie* case and should be summarily dismissed.

4. Based on a review of the Application and the Replies, and after considering the legal principles applied by the Board in its decisions defining conduct that constitutes a breach of Section 20 of the *Act*, the Board has determined, to its satisfaction, the following:
 - a. The fact that the Applicant disagrees with the Respondent's decision not to file a grievance relating to his dismissal does not constitute a breach of Section 20. A union may decide not to file a grievance or to pursue a grievance to arbitration as long as the union's decision is not arbitrary, discriminatory or made in bad faith and that reasonable care was taken to protect the interests of the employee.
 - b. In deciding not to file a grievance on behalf of the Applicant, the Respondent did not act in an "arbitrary" or "discriminatory" manner, as those terms have been interpreted by the Board. The material facts reveal that the Respondent directed its mind to the circumstances. In particular, the Respondent conducted an investigation of the circumstances surrounding the dismissal of the Applicant and reviewed the video tape evidence in the Applicant's presence. The Respondent interviewed the Applicant and had the Applicant re-enact the events of the day in question. The Respondent ultimately decided that the explanation offered by the Applicant was not credible.
 - c. In respect of these matters, the Application does not recite any acts or omissions which, if proven, would establish that the Respondent made its decision on the basis of irrelevant factors or that the Respondent, through its Representative, 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].
 - d. The Application does not reveal, on its face, that the decision of the Respondent 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].
 - e. 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. The Respondent's decision that there was no basis to file a grievance was a reasonable one and 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.

Based on the foregoing, the Board has determined that the Applicant has failed to establish a *prima facie* case 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.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by D.C.H. on November 20, 2006.

DATED at **WINNIPEG**, Manitoba, this 9th day of January 2007 and signed on behalf of the Manitoba Labour Board by

"Original signed by"

William D. Hamilton, Chairperson

WDH/dr/rb-s