Manitoba

Manitoba Labour Board
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DISMISSAL NO. 2108
Case No. 202/13/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

C.C.,
Applicant,

- and -

Manitoba Nurses Union (MNU),
Bargaining Agent/Respondent,

- and -

ACTIONMARGUERITE (SAINT-BONIFACE) INC.,
Employer.

BEFORE: C.S. Robinson, Chairperson

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

SUBSTANTIVE ORDER

WHEREAS:

1. On August 7, 2013, the Applicant filed an Application Seeking Remedy for Alleged Unfair Labour Practice contrary to Section 20 of *The Labour Relations Act* (the "*Act*") with the Manitoba Labour Board (the "Board").

2. On August 27, 2013, following an extension of time, the Bargaining Agent/Respondent, through Counsel, filed its Reply, submitting that the Applicant has failed to provide a factual foundation in support of her application and the application should therefore be dismissed.

3. On August 27, 2013, following an extension of time, Counsel for the Employer filed documentation with the Board indicating the Employer takes no position with respect to the application. The Board notes the correct name of the Employer is Actionmarguerite (Saint-Boniface) Inc.

4. The Applicant claims that the Union provided only superficial representation to her and treated her in a discriminatory and bad faith manner contrary to Section 20 of the *Act*. The Union denied the allegations and requested the Board to summarily dismiss the application on the basis that the Applicant failed to establish a sufficient factual foundation to support her allegations.

5. The Board, following consideration of the material filed, has determined that the following material facts are relevant to the disposition of this case:

   a) On September 24, 2012, the Applicant filed a complaint with the Employer regarding her allegation of "the deliberate creation of a hostile, bullying and disrespectful environment through a series of occurrences".

   b) In the September 24, 2012 complaint, the Applicant advised the Employer that she "became emotionally distraught and then was verbally demeaned for over-reacting and 'falling apart'". She advised that her "personal physician has taken the position that I must be on medical leave and same has been submitted to the employer".

   c) The application does not indicate if, or when, the Applicant received medical clearance to return to her employment. The Union, at paragraph 16 of its Reply, states:

      > [The Applicant] was off work based upon medical advice. All information that the Union was aware of suggested that she was not deemed fit by either a medical practitioner or her disability benefits advisor. The Union, at no time came into receipt of information suggesting that the Applicant was ready to return to work.

   d) According to the Applicant, she spoke to a labour relations officer employed by the Union prior to submitting her September 24, 2012 complaint to the Employer. The Applicant states, amongst other things, that the labour relations officer treated her abruptly, employed a dismissive tone, and exhibited a patronizing attitude. The Union denies these allegations and indicates that it made all reasonable attempts to be supportive of the Applicant.

e) The Applicant does not claim that the Union breached its duty by failing to file a grievance on her behalf. In its Reply, the Union says that it reviewed the contents of the Applicant's respectful workplace complaint and determined that a grievance regarding the issues raised therein would have no reasonable likelihood of succeeding. Therefore, in order to assist the Applicant, the Union recommended that mediation be pursued.

f) On December 5, 2012, the Applicant and the Union met with the Employer's Chief Executive Officer regarding the Applicant's respectful workplace concerns. Attached to the application is a letter dated December 6, 2012 from the Applicant to the Union in which she advised the Union of "the withdrawal of the complaint and an indication of agreement to the mediation process".

g) A mediation process involving the Applicant, the Manitoba Nurses Union and the Employer was thereafter arranged. The Mediation was conducted on January 8, 2013 by an independent third party mediation service, which issued a report dated January 15, 2013.

h) The Applicant was not satisfied with the mediation process. Furthermore, she alleges that the Union was unduly supportive of the position taken by the Employer during the mediation. The Applicant alleged that the Union "fundamentally cooperated with the employer in the process" in order to undermine her right to earn a living and work towards her pension. The Union denied the allegation and referred to it as vexatious and unsupported by any documentation or facts.

i) The Applicant asserts that the Union violated its obligations to her when it suggested that she consider retirement as a possible option, and by advising her that the Employer would not agree to a "buyout". The Union acknowledged that it discussed a number of options to address the Applicant's concerns, including retirement, but at no time did it suggest that the Applicant retire. In addition, the Union agreed to explore a "buyout" for the Applicant, but was thereafter informed by the Employer that it refused to consider such an option. The Union informed the Applicant of the Employer's position in this regard. The Union further noted that as the Applicant has never been dismissed from her employment, there is no basis to demand a "buyout" without the concurrence of the Employer.

j) The Applicant further complains that the resolution of her issues and her return to work plan has been unduly delayed. The Union responded that the Applicant has not been certified as medically fit to return to work and the Employer has refused to participate in further mediation until such time she is able to return. As such, the Union says that it is not in a position to negotiate a return to work plan until the Applicant is medically cleared to return to work.

k) The Applicant claims that the Union has failed to represent her because she is "advanced in years and therefore not an economic or professional advantage to the membership, the union or the employer". No factual foundation is advanced in support of this accusation. Rather, the Applicant states that she believes this to be true because, given her age, she would not "generate long term monthly dues" for the Union. In addition, the Applicant suggests that the Union's representation of her was tainted by bad faith as one of the individuals in the workplace with whom she takes issue is "a member of the union hierarchy and therefore as (sic) person to be protected". Again, this allegation is a bare assertion for which no factual foundation is provided. The Union categorically denied discriminating against the Applicant, adding that her allegations of discrimination are "based on complete and total speculation and is made recklessly without any basis in fact".

l) The Applicant remains an employee of the Employer.

6. The following statutory provisions are relevant to the disposition of this case:

> **Duty of fair representation**
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> 20 Every bargaining agent which is a party to a collective agreement, and every person acting on behalf of the bargaining agent, which or who, in representing the rights of any employee under the collective agreement,
>
> (a) in the case of the dismissal of the employee,
>
> (i) acts in a manner which is arbitrary, discriminatory or in bad faith, or
>
> (ii) fails to take reasonable care to represent the interests of the employee; or
>
> (b) in any other case, acts in a manner which is arbitrary, discriminatory or in bad faith;
>
> commits an unfair labour practice.
>
> **Undue delay**
>
> 30(2) The board may refuse to accept a complaint filed under subsection (1) where, in the opinion of the board, the complainant unduly delayed in filing the complaint after the occurrence, or the last occurrence, of the alleged unfair labour practice.
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> **Disposition of complaint**
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> 30(3) Where the board accepts a complaint filed under subsection (1), the board may

> (a) refer the complaint to a representative of the board for purposes of subsection (4); or
>
> (b) proceed directly to hold a hearing into the alleged unfair labour practice; or
>
> (c) at any time decline to take further action on the complaint.
>
> **Matters without merit**
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> 140(8) Where, in the opinion of the board, a request, application or complaint is without merit or beyond the jurisdiction of the board, it may dismiss the request, application or complaint at any time.

7. Based upon a review of the application and the Reply, in the context of the material facts recited above in paragraph 5 and the relevant statutory provisions set out in paragraph 6, the Board has DETERMINED, to its satisfaction, the following:

   a) An oral hearing is not necessary as this matter can be determined by a review of the written material filed by the parties.

   b) The onus is on the Applicant to establish a violation of Section 20 of the *Act*.

   c) Section 20(b) of the *Act* applies to cases which do not concern the dismissal of an employee. As the Applicant has not been dismissed, the applicable provision to be considered is Section 20(b).

   d) Section 20(b) of the *Act* establishes that it is an unfair labour practice for a bargaining agent, and persons acting on behalf thereof, to act in a manner which is arbitrary, discriminatory or in bad faith in representing the rights of an employee under the collective agreement. The applicable standard of care under Section 20(b) of the *Act* is expressed in the negative. The Board's inquiry in such cases is limited to determining whether an applicant has demonstrated that the bargaining agent has acted in a manner prohibited by the section.

   e) A summary of the meaning ascribed to the terms "arbitrary", "discriminatory" and "bad faith" by the Board appears in *J.H.B. v. Canadian Union of Public Employees* (2009), 164 C.L.R.B.R. (2d) 182 at page 190:

      > "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 justify a decision. It has also been described as acting on the basis of irrelevant factors or principles, or displaying an attitude which is indifferent, summary, capricious, non-

> caring or perfunctory. Flagrant errors consistent with a non-caring attitude may also be arbitrary, but not honest mistakes, errors of judgment, or even negligence. "Bad faith" has been described as acting on the basis of hostility or ill-will, dealing dishonestly with an employee in an attempt to deceive, or refusing to process the grievance for sinister purposes. A misrepresentation may constitute bad faith, as may concealing matters from the employee. The term "discriminatory" encompasses cases where the union distinguishes among its members without cogent reasons.

f) The Applicant has not established a *prima facie* violation of Section 20 in the present case. The application does not advance facts that would support a conclusion that the Respondent acted in a manner which was arbitrary, discriminatory or in bad faith.

g) The Union turned its mind to the Applicant's concerns, provided her with advice, attended meetings with her, participated in the mediation process, and negotiated on her behalf with the Employer. Despite the fact that the Applicant is clearly dissatisfied with the Union's representation and the results that have been achieved with respect to her issues, there is no factual foundation for the Board to conclude that the Union has conducted itself in a manner that violates Section 20(b) of the *Act*. Moreover, any alleged delay with respect to the Applicant's return to work is a function of the fact that she has not been medically certified to return to work and not any failure of the Union to comply with its statutory obligations to her pursuant to Section 20(b) of the *Act*.

h) With respect to the Applicant's allegation that the Union discriminated against her on the basis of her age, and the claim that the Union displayed a preference for another member who held a position with it, no facts were advanced to support that assertion. This Board has consistently held that, when assessing whether a *prima facie* case exists in respect of a particular statutory provision there must be more than a bare allegation or assertion. Rather, there must be a sufficient factual foundation evident in the Application in order to enable the Board to draw reasonable conclusions therefrom, which, at a minimum, would call for an answer from a respondent. Unsupported allegations, without any factual underpinnings, entitle the Board to conclude that a *prima facie* case has not been established.

i) In addition, several of the Applicant's allegations concern conduct by the Union which occurred more than six months prior to the filing of the application. Section 30(2) of the *Act* provides that the Board may refuse to accept a complaint where its filing has been unduly delayed. Undue delay has been interpreted by the Board to mean periods of as little as six months in duration. The complaints that arise out of allegations of conduct that occurred more than six month prior to the filing of the application are dismissed due to the Applicant's undue delay.

i) The Application is therefore dismissed pursuant to Sections 30(2), 30(3)(c), 140(7) and 140(8) of the *Act*.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application Seeking Remedy for Alleged Unfair Labour Practice filed by C.C. on August 7, 2013.

DATED at **WINNIPEG**, **Manitoba** this 28th day of October, 2013, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

C.S. Robinson, Chairperson

JD/lo/lo-s