**Manitoba Labour Board**
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**DISMISSAL NO. 2222**
**Case No. 115/16/LRA**

**IN THE MATTER OF: *THE LABOUR RELATIONS ACT***

**- and -**

**IN THE MATTER OF: An Application by**

**K.X.S.,**

**Applicant,**

**- and -**

**Amalgamated Transit Union, Local 1505,**

**Bargaining Agent/Respondent,**

**- and -**

**WINNIPEG TRANSIT / THE CITY OF WINNIPEG,**

**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 June 7, 2016, the Applicant filed an application (the "Application") with the Manitoba Labour Board (the "Board") seeking remedy for an Alleged Unfair Labour Practice contrary to section 20 of *The Labour Relations Act* (the "*Act*").

2. On June 23, 2016, following an extension of time, two separate Replies were filed on behalf of the Respondent (the "Union").

3. On June 23, 2016, counsel for the Employer advised the Board that it did not intend to file a Reply.

4. On July 4, 2016, the Applicant filed a Response to the Union's Replies.

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

   a) The Applicant was employed as a Bus Operator with the Employer.

   b) On August 27, 2014, the Applicant had an altercation with a motorist which resulted in an investigation being conducted by the Employer. The Employer concluded that the Applicant's conduct warranted termination. The Union provided representation to the Applicant at that time. Rather than terminate the Applicant, a Continued Employment Agreement was executed by the Applicant, the Union and the Employer. That Agreement provided, amongst other things, that the Applicant would serve a six-day suspension without pay and would sign a letter of resignation that could be invoked by the Employer if the Applicant was involved in "any incident that would normally result in a movement in the Counsel and Guidance Program in any category". The Continued Employment Agreement was to remain in effect for a period of two years "of actual driving time from September 5, 2014".

   c) Following the execution of the Continued Employment Agreement, the Applicant was involved in a number of further incidents, including collisions, prior to January of 2016. Again the Union provided representation to the Applicant and the Employer agreed not to invoke the letter of resignation as a result of the alleged incidents. Notwithstanding those decisions, the Employer continued to warn the Applicant that his employment was in jeopardy if further breaches occurred.

   d) In January of 2016, the Applicant was involved in another collision. The Employer conducted an investigation and concluded that the collision was preventable and that the Applicant had submitted an inaccurate report regarding what had occurred. The Employer further concluded that the conduct of the Applicant constituted a breach of the Continued Employment Agreement.

   e) On February 5, 2016, the Applicant's employment ended when the Employer invoked the letter of resignation referred to in the Continued Employment Agreement.

   f) The Union again provided representation to the Applicant and attempted to convince the Employer not to invoke the letter of resignation. The Employer maintained that a breach of the Continued Employment Agreement had occurred which allowed it to effectively terminate the Applicant.

   g) The Continued Employment Agreement contains the following provision:

> Any breach by the employee of the above condition will result in the signed resignation being invoked and neither the employee nor the union will initiate a grievance against the resignation, except to challenge whether the breach did in fact occur.

h) Notwithstanding the aforementioned provision, the Union filed a grievance on behalf of the Applicant, dated February 18, 2016, which requested that he be reinstated with full back pay. The Union also represented the Applicant during the grievance procedure. The Employer denied the grievance by letter dated March 21, 2016. That letter notes that the Applicant agreed that the January 21, 2016 accident was preventable.

i) The Union sought a legal opinion regarding the merits of proceeding to arbitration with the grievance. Counsel for the Union, Mr. Garth Smorang, Q.C., provided a written legal opinion dated May 2, 2016. The opinion reviewed the circumstances and considered what arguments could be advanced in support of the grievance. Counsel ultimately concluded as follows:

> Given the efforts by the union to keep this man employed beyond when he could rightly have been terminated by way of the resignation letter being invoked, and the future damage that would be done to the relationship between the union and the City if the union now tried to rely on its success in extending the City's patience for this man's behaviour at work, it is entirely reasonable for the union to take the position that [the Applicant] was given more than enough opportunities to keep his work record unblemished and, for a variety of reasons was unable to do so.
>
> In all of the circumstances, it is reasonably open to the union to conclude that this grievance should not proceed to arbitration. In my view, it would be unlikely that an arbitrator would reinstate [the Applicant] given his work record after September 2014.

j) During a general membership meeting, the Union informed those in attendance of legal counsel's conclusion with respect to the Applicant's grievance. The Union elected not to proceed to arbitration in accordance with counsel's opinion. The Applicant was informed of the Union's decision.

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

**Duty of fair representation**
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.

**Disposition of complaint**
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**
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. The legal principles applied by the Board in respect of section 20 applications are as follows:

a) Section 20 of the *Act* establishes what is commonly referred to as the duty of fair representation.

b) The onus of establishing that a bargaining agent has violated section 20 of the *Act* rests with the applicant.

c) The applicable standard of care set out in the legislation depends upon the context. In cases concerning the dismissal of an employee, Section 20(a) of the *Act* provides that a bargaining agent must not act in a manner which is arbitrary, discriminatory or in bad

faith, nor fail to take reasonable care to represent the interests of the employee. In any other case, the obligation imposed upon the bargaining agent under Section 20(b) is limited to not acting in a manner which is arbitrary, discriminatory or in bad faith.

d) The standard of care under Section 20(b) of the *Act* is expressed in the negative. Bargaining agents must not represent employees in a manner that is arbitrary, discriminatory or in bad faith. The Board's inquiry in such cases is limited to determining whether an applicant has demonstrated that his or her bargaining agent has acted in a manner prohibited by the section. If the bargaining agent has represented the employee in a manner which is free from the three prohibited elements, then there is no violation of subsection 20(b) of the *Act*, and no remedy is available to the employee.

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 knowing 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 Board has defined "reasonable care", as that term is used in Section 20(a), to mean the degree of care which a person of ordinary prudence and competence would exercise in the same or similar circumstances.

g) The fact that a union has committed an error or that the Board concludes that, with the benefit of hindsight, it might have acted differently in a particular circumstance is not sufficient to sustain a violation of Section 20 of the *Act*.

h) The Board has previously noted that it would be unreasonable to impose upon trade unions a standard analogous to that expected of the professions, or to second-guess excessively the multi-polar decision-making in which they must engage. While it is

expected that the decisions of unions in representing the rights of employees under a collective agreement will be made honestly, conscientiously and without discrimination, 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. The Board has consistently indicated that a complaint will not be allowed merely because the union was wrong, could have given better representation or did not do what the member wanted.

i) Unions have the discretion to determine whether a grievance shall be filed, referred to arbitration, withdrawn, or settled with or without the consent of the employee concerned. Provided that its discretion is exercised in a manner which is not inconsistent with the union's obligations under the *Act*, the Board does not interfere with such decisions. The decision-making process regarding whether to file, or to proceed to arbitration with, a grievance often involves the union securing an opinion from legal counsel as to the merits and likelihood of success. Reliance upon legal advice to justify a union's refusal to proceed with a grievance has consistently been found by this Board to constitute a potent defence to a duty of fair representation complaint.

j) The *Act* provides that the Board has the discretion to: a) refuse to accept an application if an individual has unduly delayed in filing the complaint, b) decline to take further action on a complaint, or c) dismiss a request, application or complaint at any time.

k) Undue delay has been interpreted by the Board to mean periods of as little as six months in duration. In the leading case of *Kepron v. Brandon University Faculty Association* (2004), 103 C.L.R.B.R. (2d) 102, the Board comprehensively reviewed subsection 30(2) of the *Act* and a number of the Board's decisions relating thereto. The principles enunciated in *Kepron* have been consistently applied by the Board in subsequent decisions.

8. The Applicant submits that the Respondent has failed to comply with its obligations to him under Section 20 of the *Act*. He takes issue with the representation provided by the Union in 2014 when he entered into the Continued Employment Agreement and thereafter. The Applicant also expressed his dissatisfaction with the Union and its representatives for the manner in which the grievance into the termination of his employment was handled. His complaints in this regard include the alleged failure of the Union to obtain information from his file, the wording of the grievance, discussions by the Union of the matter with other members of the Union, and the decision not to proceed to arbitration. Clearly, the Applicant is not satisfied that he received capable and knowledgeable representation from the Union and believes that his employment was, allegedly, negatively affected as a result.

9. The Respondent replied that the Applicant entered into the Continued Employment Agreement in 2014 but thereafter failed to remain free of incidents of a nature which would allow the Employer to exercise its right under the Agreement to invoke the resignation letter which he provided. The Union stated that it successfully argued that incidents in 2015 should not result in the Applicant's career coming to an end. Following the last alleged incident in January of 2016, the Union again represented the Applicant by filing a grievance on his behalf, submitting arguments in support of that grievance, and retaining legal counsel to provide an opinion on the merits of the grievance. The Union says that its decision to not advance the grievance to arbitration is in accordance with the legal advice it obtained.

10. After considering the material facts, legislation, and principles distilled above, the Board has **DETERMINED** the following:

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

    b) The Applicant's complaints related to the Union's representation in 2014 are untimely as they relate to events that took place well over a year prior to the filing of the present Application. Accordingly, pursuant to subsection 30(3) of the *Act*, those complaints are dismissed.

    c) Moreover, even if those complaints had been timely, the Board is not satisfied that the Applicant has established a *prima facie* violation of section 20 of the *Act* with respect to those allegations. The context of those complaints is important. As a result of an altercation with a motorist in August of 2014, the Employer concluded that the Applicant's conduct warranted termination. Following the Union's intervention, the Employer reversed its decision to terminate the Applicant's employment based upon his agreement to the conditions set out in the Continued Employment Agreement that he, the Union and the Employer signed. His dissatisfaction with the advice he received from the Union at that time and/or his regret over having entered into the said Agreement does not constitute arbitrary, discriminatory or bad faith conduct by the Union.

    d) The Applicant's employment was ultimately terminated on February 5, 2016 when the Employer invoked the letter of resignation pursuant to the terms of the Continued Employment Agreement. Having regard to the context, the Board is satisfied that this action is properly characterized as a dismissal and, therefore, Section 20(a) of the *Act* applies.

e) It is well-established that the Board does not function as a surrogate arbitrator in Section 20 cases. Further, where a union relies on the legal opinion of experienced counsel when deciding whether to settle a case, to proceed to arbitration, or refuse to proceed to arbitration (as in the present case), considerable deference will be given to a legal opinion which is reasonably sustainable and not tainted by an improper motive. This perspective is important because if the opinion is reasonable then it provides a fulcrum for determining whether or not a union has met its obligations under Section 20, including whether the standard of "reasonable care" has been met, where appropriate.

f) The Application fails to disclose any facts upon which the Board could conclude that the Union and its representatives acted in an arbitrary or discriminatory manner; or that their actions were reflective of "bad faith". In the context of the provisions of the Continued Employment Agreement, the Board is further satisfied that the decision of the Union not to proceed to arbitration, based on the advice of its counsel, fulfilled the standard of "reasonable care." In this regard, the Board notes that counsel reviewed relevant facts, considered the provisions of the Continued Employment Agreement, explored the viability of arguments that could be advanced in support of the grievance, and came to an entirely reasonable conclusion.

g) For all the foregoing reasons, it follows that the Application will be dismissed pursuant to subsection 30(2), 30(3)(c), and 140(8) of the *Act* because the Applicant unduly delayed in filing the complaints related to events which are alleged to have occurred in 2014, and that the Application fails to establish a *prima facie* violation of Section 20 of the *Act.*

## T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by K.X.S. on June 7, 2016.

**DATED** at **WINNIPEG**, **Manitoba** this 29th day of September, 2016, and signed on behalf of the Manitoba Labour Board by

*"Original signed by"*
**C.S. Robinson, Chairperson**

CSR/acr/lo-s