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DISMISSAL NO. 2338
Case No. 132/19/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

N.T.,

Applicant,

- and -

Manitoba Government and General Employees' Union (MGEU),

Bargaining Agent/Respondent,

- and -

PROVINCE OF MANITOBA / HEALTH, SENIORS AND ACTIVE LIVING, TRANSITION DIVISION, c/o CIVIL SERVICE COMMISSION (CSC), LABOUR RELATIONS,

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

I. Procedural History

1. On July 11, 2019, the Applicant filed an Application (the "Application") with the Manitoba Labour Board (the "Board") seeking a remedy for an alleged unfair labour practice contrary to section 20 of *The Labour Relations Act* (the "*Act*").

2. On July 29, 2019, following an extension of time, the Respondent, through counsel, filed its Reply requesting that the Board dismiss the Application without a hearing,

stating that the Applicant unduly delayed in filing the Application and failed to establish a *prima facie* violation of the *Act*.

3. The Employer did not file a Reply.

4. On August 2, 2019, the Applicant filed a response to the Reply.

II. Material Facts

5. The Board, following consideration of the documentation filed by the parties, recites the following material facts:

   a) The Applicant is an employee of the Province of Manitoba. She is a member of the Respondent and the terms and conditions of her employment are set forth in a Collective Agreement between the Respondent and the Employer known as the Government Employees' Master Agreement ("GEMA").

   b) The Applicant contends that her past service as an employee of the provincial civil service and with the Winnipeg Regional Health Authority should have been recognized by the Employer for the purposes of calculating her entitlement to a Long Service Step under the GEMA. The Applicant alleges that the Respondent has failed to comply with section 20 of the *Act* by not filing or otherwise pursuing a grievance on her behalf with respect to that issue. In support of her allegation, the Applicant filed documentation which has been considered by the Board.

   c) By email dated November 18, 2014, the Applicant was advised by the Employer that she did not qualify for the Long Service Step.

   d) The Applicant states that she contacted one of the Respondent's Staff Representatives regarding the issue in December of 2014. She claims that she provided the Staff Representative with documentation respecting the matter but he failed to follow up as allegedly promised and ignored her concerns despite many communications on her part. In support of that claim, the Applicant attached an email to the Staff Representative dated December 8, 2014. The Staff Representative has since retired and the Respondent states that any documentation or information provided by the Applicant to him was misfiled or destroyed.

   e) The Applicant states that she followed up with another Staff Representative of the Respondent regarding the Long Service Step issue in 2016. That Staff Representative sent an email to the Applicant on March 6, 2017 in which she states that "We will be proceeding with a grievance on your matter". The Staff Representative further indicated that she would provide the Applicant with a draft of the grievance "in the next few days". In a subsequent email dated June 30,

2017, the Staff Representative provided the Applicant with the wording of the intended grievance as promised.

f) Prior to filing the intended grievance, a representative of the Employer contacted the Staff Representative. Having heard that the Respondent intended upon filing a number of grievances relating to the Long Service Step, the Employer's representative advised that the Employer would decline to accept the grievances on the basis of an Agreement entered into between the Respondent and the Employer in 2012.

g) Representatives of the Respondent met with the Employer in July of 2017 to discuss the issues and the intended grievances. According to the Reply of the Respondent, the Employer took the position that the intended grievances were not arbitrable having regard to the 2012 Agreement.

h) Following that meeting, counsel for the Respondent reviewed the 2012 Agreement and considered the matter further. Counsel determined that the Respondent "would be precluded from advancing grievances filed on behalf of the Applicant and others".

i) Counsel for the Respondent wrote to the Applicant on December 5, 2017 to explain her legal opinion and to advise that the Respondent, on the basis of that opinion, would not be proceeding to file a grievance. The letter explained that, in light of the 2012 Agreement entered into between the Respondent and the Employer, it "would be tantamount to bad faith" for the Respondent to proceed with the grievance on behalf of the Applicant. The Applicant was invited to contact the Respondent's counsel to discuss the matter further if she wished.

j) The Applicant spoke with counsel for the Respondent in early 2018. Although she maintained her legal opinion, counsel agreed to once again raise the Applicant's position respecting the issue with the Employer.

k) Counsel for the Respondent communicated with a representative of the Employer regarding the issue in March and April of 2018. Counsel provided the Employer with copies of relevant documents as part of those communications.

l) Notwithstanding those communications, the Employer maintained its position and refused to recognize the Applicant's prior service.

m) On April 18, 2018, the Respondent's counsel advised the Applicant of the Employer's response and confirmed to the Applicant that the Respondent would not proceed with a grievance on her behalf. Counsel sent an email to the Applicant on April 19, 2018 confirming the details of the conversation.

n) On October 15, 2018, the Applicant sent an email to counsel for the Respondent in which she took issue with the representation she had received. The Applicant requested, amongst other things, that the Respondent reconsider its decision and advocate on her behalf.

o) Counsel for the Respondent forwarded the Applicant's email to the Respondent's Director of Member Services in order to seek instructions.

p) By email dated January 14, 2019, the Director of Member Services again confirmed to the Applicant that, for the reasons set forth in counsel's letter to her dated December 5, 2017, the Respondent would not proceed with a grievance on her behalf.

III. Legislation

6. Section 20 of the *Act* establishes the duty of fair representation:

> **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.

7. The Board may decide a matter without conducting a formal hearing pursuant to the provisions of subsection 30(3)(c) of the *Act* which states that it may "at any time decline to take further action on the complaint". Similarly, subsection 140(8) of the *Act* permits the Board to dismiss a complaint at any time if it is of the opinion that the complaint is "without merit or beyond the jurisdiction of the board".

IV. Analysis and Decision

8. The legal principles applied by the Board in respect of section 20 applications may be summarized as follows:

   a) The onus is on the applicant to establish a violation of section 20 of the *Act*.

   b) Clause (a) of section 20 only applies in the case of the dismissal of an employee. This case does not concern a dismissal. Therefore, section 20(b) of the *Act* applies.

   c) 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 section 20(b) of the *Act*, and no remedy is available to the employee.

   d) 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.

   e) 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(b) of the *Act*.

f) Unions have the discretion to determine whether a grievance or complaint 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.

g) The decision-making process regarding whether to file, or to proceed to arbitration with, a grievance or complaint often involves the union securing an opinion from legal counsel as to the merits and likelihood of success.

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 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) Employees have an important role to play in assisting the bargaining agent in representing their rights under a collective agreement. In assessing the merits of a duty of fair representation complaint, the Board has considered whether employees have taken appropriate steps to protect their own interests, cooperated with the union and its officials, notified the union that they wish to have a grievance filed, followed the union's advice, and mitigated their damages.

j) Section 20 of the *Act* relates to the obligations of unions in representing the rights of any employee under the collective agreement. A section 20 application is not an appropriate avenue for employees to advance complaints about their employer, members of management, or fellow employees.

9. In the context of the material facts recited above, and after considering the legal principles applied by the Board in respect of section 20 applications, the Board has determined that a hearing into the merits is not necessary as this matter can be determined on the basis of the material filed by the parties.

10. The Applicant alleges that the Respondent failed to comply with section 20 of the *Act* in representing her regarding her alleged entitlement to the Long Service Step. It is the position of the Applicant that the Respondent acted in an arbitrary, discriminatory and bad faith manner in representing her rights under the Collective Agreement.

11. The Respondent takes the position that the Applicant unduly delayed in advancing her complaint to the Board. Under section 30(2) of the *Act*, the Board retains a discretion to refuse to accept a complaint if it is of the opinion that the Applicant has unduly delayed the filing of the application following the occurrence or the last occurrence of an alleged unfair labour practice. The Board has consistently held that delay of approximately six months or greater constitutes undue delay.

12. The Applicant was aware of some of the facts upon which she relies upon in her application as early as 2014. Furthermore, she was clearly advised in December of 2017 and again in April of 2018 that the Respondent would not proceed with her grievance. Her request for reconsideration was refused on January 14, 2019. However, the Applicant did not file the present Application until July 11, 2019. The Board agrees with the position of the Respondent that the Applicant has unduly delayed in filing the Application and it is dismissed on that basis pursuant to section 30(2) of the *Act*.

13. The Respondent further submitted that the Applicant failed to establish a *prima facie* violation of the section 20 of the *Act*.

14. The Respondent's decision to refuse to advance a grievance on behalf of the Applicant was made on the basis of legal advice. The Respondent clearly turned its mind to the relevant issues respecting the Applicant's circumstances and the relevant documentation and agreements to which it was a party with the Employer. The actions of the Respondent were not arbitrary, discriminatory, or tainted by bad faith. The Application does not include any facts which, if true, would constitute a violation of section 20 of the *Act.* Accordingly, the Applicant has failed to establish a *prima facie* violation of the legislation and the Application is also dismissed pursuant to subsections 30(3)(c) and 140(8) of the *Act*.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by N.T. on July 11, 2019.

DATED at **WINNIPEG**, **Manitoba** this 25th day of October, 2019, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

C.S.. Robinson, Chairperson

CSR/dh/lo/lo-s