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DISMISSAL NO. 2361
Case No. 247/19/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

D.G.,

Applicant,

- and -

Manitoba Nurses Union,

Bargaining Agent/Respondent,

- and -

MISERICORDIA HEALTH CENTRE,

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 December 6, 2019, the Applicant filed an 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 December 20, 2019, following an extension of time, the Respondent, through counsel, filed its Reply taking the position that it has not violated its representational

duties and obligations set out in section 20(b) of the *Act.* The Respondent requested that the Application be dismissed without a hearing pursuant to subsections 30(2), 30(3)(c) and 140(8) of the *Act.*

3. On December 23, 2019, following an extension of time, the Employer, through counsel, filed correspondence indicating that the Employer did not intend to file a formal Reply to the Application or specifically address the statements contained therein, but that this was not indicative of the Employer agreeing with the accuracy or relevance of the statements made in the Application.

4. On January 27, 2020, following an extension of time, the Applicant filed a Response to the Respondent's Reply.

II. Submissions

5. The Applicant claims that the Respondent failed to take reasonable care in representing her by accepting a settlement that it negotiated on her behalf despite the fact that HEB Manitoba subsequently indicated its intention to clawback a substantial portion of the amount that the Employer agreed to pay to her pursuant to the terms of a settlement agreement. She further complained that the Respondent acted unfairly and discriminatorily by suggesting that her failure to provide a waiver justified its acceptance of the terms of settlement despite her objection. The Applicant also contends that the Respondent should not have accepted the opinion of their legal counsel that the terms of settlement were acceptable even with a significant clawback of the proceeds. In the circumstances, the Applicant submits that the Respondent's decision to accept the settlement despite her objections is arbitrary, discriminatory, and motivated by bad faith.

6. The Applicant requests that a hearing be conducted and that the Board grant her remedial requests including: an order that the Employer "reinstate" her; an order that the Respondent and Employer enter into a new settlement agreement; and any other order that is necessary and appropriate to ensure compliance with, and enforcement of, the *Act*.

7. The Respondent denied that it committed an unfair labour practice, maintaining that it has diligently and carefully represented the Applicant throughout a very complex and lengthy history of work-related issues. In response to the Applicant's assertion that it failed to take reasonable care to represent her, the Respondent replies that the Applicant has not been dismissed and, as such, the standard of reasonable care set out in clause (ii) of subsection 20(a) of the *Act* does not apply. The Respondent maintains that the Applicant has failed to establish a *prima facie* case. In particular, the Respondent submits: that the Applicant has not explained how the attachments to her Application support the finding of an unfair labour practice; that she has failed

to provide particulars or details underpinning her complaint; and that she did not establish any nexus between her allegations and how, even if proven, they would amount to a violation of subsection 20(b) of the *Act*. Finally, the Respondent asserts that the current Application "continues to repeat and revisit old allegations which have been the subject of rulings by the Board".

III. Material Facts

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

   a) This is the third unfair labour practice application filed by the Applicant against the Respondent regarding its representation of her with respect to certain workplace issues and grievances.

   b) As the Board has reviewed the facts respecting those workplace issues and grievances in Dismissal No. 2324 and Dismissal No. 2331, it is not necessary to review those contextual facts at length again in this decision.

   c) The present Application principally relates to a Settlement Agreement (the "Agreement") reached by the Respondent and the Employer in September of 2018. That Agreement, negotiated with the assistance of an experienced mediator, provided that the Employer, Respondent and the Applicant "have negotiated terms of resolution regarding all issues related to the Grievance and [the Applicant's] employment" with the Employer. The Grievance referred to in the Agreement was filed on July 5, 2016 by the Respondent on behalf of the Applicant and contained allegations that included, but were not limited to, constructive dismissal, harassment, and various violations of the collective agreement. The Applicant was represented by legal counsel during the negotiation of the Agreement. However, the Applicant takes the position that the Agreement is not in her best interests and has since refused to execute the Agreement or the Release and Indemnity document referred to therein. Indeed, in her Application, the Applicant submitted that: "The settlement is unreasonable. It does not benefit me in any way."

   d) The Agreement provides for the termination of the Applicant's employment without cause for "innocent absenteeism resulting from ongoing medical leave with no anticipated ability to return to work in the near future".

   e) The Agreement also includes a clause providing that within 30 days of the execution of the Agreement by all parties (including the Applicant) and the Release and Indemnity document by the Applicant, the Employer would pay to the Applicant a sum of money. The contemplated payment to the Applicant was

allocated as follows: 1) 60% as damages for injury to dignity, self-respect and feelings (as contemplated by *The Human Rights Code*; 2) 30% as general damages; and 3) 10% as compensation in lieu of reinstatement. The Agreement also provided that the Applicant would receive a Letter of Reference and a written apology (the wording of each was negotiated and set forth in separate Schedules to the Agreement). Furthermore, the Agreement provided the Applicant with an opportunity to review her personnel file and obligated the Employer to "remove and destroy from its personnel file for [the Applicant] any specific documents that are disparaging or contain negative comments about" her.

f) The Agreement further contemplated that, in addition to executing the Release and Indemnity, the Applicant would acknowledge that the payment to her under the Agreement would constitute "full satisfaction of all claims that she may have had, now has or may in the future have in regard to the matters and claims described in the Grievance and any issues and all claims related to her employment with [the Employer]". The Agreement and all circumstances surrounding it were to be held in strict confidence except as expressly stipulated. Furthermore, the Agreement provided that the Applicant agreed not to make any written or verbal comments to anyone that may be considered to disparage or lessen the public regard for the Employer or its officers, directors, or employees (current or former).

g) As the Applicant has been off work from her position [redacted] since November of 2014, HEB Manitoba became involved in matters arising from the Agreement. In its Reply to the Application, the Respondent attached a letter which it sent to the Chief Executive Officer of HEB Manitoba dated January 2, 2018 (the letter appears to be misdated and should read January 2, 2019). That letter relates to the Agreement and HEB Manitoba's contemplated action with respect to the settlement proceeds. The letter provides that: "This settlement was finalized on September 6, 2018 and at the urging of the [Applicant] (who had spoken to her claims adjudicator), a draft was provided to HEB for comment." HEB Manitoba took the position that "70% of the agreed upon settlement would be deemed a 'Net Proceed(s) of a Third Party Claim' and be a 'direct offset to [the Applicant's] [redacted] benefits for the life of the claim". This percentage is the "clawback" to which the Applicant refers in her Application.

h) The Respondent attempted to negotiate with HEB Manitoba regarding the clawback and to appeal that decision. In the Respondent's Reply, it notes that "HEB has always required a signed Waiver from the Applicant in order to allow MNU to liaise directly with HEB about the issue of clawbacks based on payments she would receive from the Settlement Agreement". The Applicant provided three Waivers to the Respondent to permit it to communicate with HEB Manitoba. However, she imposed a time limit of one week for each of these Waivers. The

Respondent indicates that the limited duration of the Waivers provided by the Applicant created difficulties for it in representing her in discussions with HEB Manitoba. The Applicant initially refused to sign the fourth Waiver, but, after a delay of approximately 5 months, she signed the fourth Waiver on March 6, 2019.

i) During the period when the Applicant refused to provide the Respondent with the fourth Waiver, the Respondent advised her that it had instructed its legal counsel to provide it with a "legal opinion as to whether the Union should accept the Settlement Agreement in spite of HEB's intended clawbacks".

j) On January 28, 2019, legal counsel for the Respondent, Mr. Paul McKenna, provided his legal opinion that supported the acceptance of the Agreement as is, even with the amount of the clawbacks contemplated by HEB Manitoba.

k) The Respondent continued to communicate with HEB Manitoba respecting the clawback. The Employer was also supportive of the Respondent's efforts to challenge the decision of HEB Manitoba respecting the clawback and expressed its views directly to HEB Manitoba in a letter dated August 20, 2019.

l) On October 19, 2019, the Applicant withdrew the fourth Waiver. She also wrote to HEB Manitoba to indicate that she did not want the Waiver to be used any longer. The Respondent urged the Applicant to reconsider her position with respect to the Waiver and also advised that it remained committed to challenging the decision of HEB Manitoba respecting the clawbacks.

m) In emails dated October 28 and October 30, and November 5, 2019, the Applicant advised the Respondent of her view of the Agreement, claiming that:

- the Agreement was no longer legal;
- the Respondent should negotiate a new Settlement Agreement with the Employer and should also file an additional grievance on her behalf;
- the clawback was not the only problem with the Agreement from her perspective;
- signing the Agreement would cause her to live in fear for the rest of her life;
- she did not agree to the Agreement and took offence that the Respondent and Employer said otherwise; and
- she would not sign the Agreement and, if she did, it would be under coercion, stress, and threat.

n) In light of these statements by the Applicant, the Respondent sought a second legal opinion from Mr. McKenna. Mr. McKenna's opinion was received on November 14, 2019. In its Reply, the Respondent states that:

> "Based on the correspondence from the Applicant, including her cancellation of Waiver #4 and her unequivocal statements about never signing the Settlement Agreement, Mr. McKenna's conclusion was that any further negotiations with HEB would be futile. Mr. McKenna advised MNU that it would be reasonable for MNU to provide a letter to the Applicant, indicating that MNU would now proceed to sign the Settlement Agreement".

o) The Respondent wrote to the Applicant on November 15, 2019 advising her that, in light of her position respecting the Agreement, it was futile to negotiate further with HEB Manitoba. In its letter, the Respondent further advised the Applicant as follows:

> "As of Monday, November 25, 2019, MNU shall advise [the Employer] that we are discontinuing what are now futile efforts to address the issue of clawbacks with HEB, and further that we intend to sign the Settlement Agreement.
>
> The likely result is that [the Employer] will also finalize the Settlement Agreement by signing it, but that it will remain in limbo because of your stated refusal to sign it. MNU is unsure how long [the Employer] will be prepared to wait for you to decide to sign it. However, what is certain is that you will receive no payments or any other advantages set out in the Settlement Agreement without signing it as well as the Release and Indemnity."

p) By letter dated November 15, 2019, HEB Manitoba denied the Respondent's request to meet with HEB's Board of Trustees to appeal the clawback decision.

q) On December 4, 2019, the Applicant wrote to the Respondent in which correspondence she made multiple declarations to the effect that she refused to sign the Agreement. In correspondence dated December 6, 2019, the Applicant reiterated her refusal to sign the Agreement and indicated that she would not be coerced or threatened to do so.

IV. Legislation

9. 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.

10. The Board may decide a matter without conducting a formal hearing pursuant to the provisions of section 30(3)(c) of the *Act* which states that it may "at any time decline to take further action on the complaint". Similarly, section 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".

V. Analysis and Decision

11. Based on a review of the Application and the Reply, in the context of the material facts recited above, and after consideration of the legal principles applied by the Board in respect of section 20 applications, as set out below, the Board has determined that an oral hearing is not required and that the Application should be dismissed.

12. In Dismissal No. 2324, issued by the Board on July 24, 2019 (which involved these same parties), the legal principles applied by the Board in respect of section 20 applications were summarized at paragraph 60 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. The Applicant remains an employee of the Employer. 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. Reliance upon legal advice to justify a union's refusal to proceed with a grievance or complaint has consistently been found by this Board to constitute a potent defense to a duty of fair representation complaint.

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) An employee's disability may be relevant from the perspective of evaluating whether a union has complied with section 20 of the *Act*. The duty of fair representation is contextual. Conduct by a union which may be compliant with the legislation in the case of an employee who is not disabled may be insufficient in the case of someone with a disability. Unions must be alert to an employee's disability and the employment interests at stake in cases concerning the application of human rights principles, including the duty to accommodate. A breach of section 20(b) of the *Act* will be established where the applicant demonstrates, on the balance of probabilities, that the union failed to direct its mind to and consider their disability, and the employment interests at stake, in a manner which may be characterized as arbitrary, discriminatory or bad faith.

k) 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.

13. In the present case, the parties have a disagreement with respect to whether clause (a) or (b) of section 20 of the *Act* is applicable. The Applicant contends that the Respondent failed to take reasonable care in representing her interests. The reasonable care standard is contained in clause (a) of section 20. As noted above, that clause applies only in the case of the dismissal of the employee. The Respondent submits that the Applicant has not been dismissed by the Employer and, therefore, clause (a) of section 20 has no application to the instant case.

14. The term "dismissal" is not defined in the statute. However, in *Kepron v. Brandon University Faculty Association* (2004), 103 C.L.R.B.R. (2d) 102, Vice-Chairperson Hamilton reflected upon the meaning of the term "dismissal" in the context of section 20(a) of the *Act*. In that case, the Board stated:

> [T]he word "dismissal" must be given its normal and ordinary meaning, as understood in the context of the employment and arbitral jurisprudence governing collective bargaining regimes. This normal and ordinary meaning is simply that an employer must have just cause to "fire" or "dismiss" an employee for (alleged) culpable conduct which the employer claims is in breach of one or more employment obligations. In our view, it is this normally accepted meaning of "dismissal" which the Legislature intended to cover when it adopted the criterion of "reasonable care" for "dismissals" and chose to distinguish that standard from good faith, discrimination and arbitrariness "... in any other case." Indeed, there are many "... other case(s)" where the result can result in a termination of employment, one example being the decision of an employer to "lay off" an employee which can result in the termination of the employment relationship if the employee is not "recalled" within a pre-determined and negotiated recall period. The jurisprudence is clear that an (improper) lay-off is not a "dismissal" under section 20(a).

15. The Board, in that case, added that the term "dismissal" must be interpreted in the context of the just cause provision set out in section 79 of the *Act*, which provides that every collective agreement must contain a provision requiring that the employer have just cause for disciplining or dismissing any employee in the bargaining unit. The Board explained that the phrase "just cause for disciplining or dismissing any employee" refers to "conduct on the part of an employee which is culpable or in breach of an employment obligation and exposes that employee to the disciplinary reach of the employer" and would "also encompass the dismissal of an employee

under the two-pronged test for "innocent absenteeism". Following its distillation of the relevant principles, the Board concluded that "the word 'dismissal' in section 20(a) means a dismissal in the culpable or 'no just cause' sense commonly understood in collective bargaining relationships, academic or otherwise".

16. In the present case, the Applicant has not been dismissed. Accordingly, the Board is satisfied that clause (b) of section 20 of the *Act* is applicable to this matter.

17. The Board appreciates that the Grievance referred to in the Agreement is all-encompassing and refers to "constructive dismissal". In addition, the Agreement which the Applicant has refused to sign does contemplate the termination of the Applicant's employment without cause for "innocent absenteeism resulting from ongoing medical leave with no anticipated ability to return to work in the near future". Given those facts, the Board will also evaluate the Application on the basis that clause (a) of section 20 applies in the event that our determination set forth in paragraph 16 is not correct. Section 20(a) provides that a bargaining agent must not only refrain from acting in a manner which is arbitrary, discriminatory or in bad faith, but must also exercise "reasonable care" in representing the interests of the employee under the collective agreement. The Board has consistently held that "reasonable care" is the degree of care which a person of ordinary prudence and competence would exercise in the same or similar circumstances.

18. The Applicant asserts that the Respondent failed to take reasonable care by accepting the Agreement with the clawback that HEB Manitoba has determined shall apply to the settlement proceeds. The Applicant further suggested that the Respondent should have been aware of the clawback issue and insisted on the negotiation of a new settlement on her behalf.

19. The Applicant also submitted that the Respondent acted in a manner that was arbitrary, discriminatory, and in bad faith by accepting the Agreement which, in her view, does not benefit her in any way. She also claims that the Respondent should be "held accountable" for accepting the legal opinion of its legal counsel who supported the acceptance of the Agreement as is, even with the amount of the clawbacks contemplated by HEB Manitoba.

20. The Application does not contain any facts which, even if true, would constitute arbitrary, discriminatory or bad faith conduct by the Respondent. The Respondent filed the July 5, 2016 grievance on behalf of the Applicant, it retained an experienced labour lawyer to assist it and the Applicant with her workplace issues, participated in mediation on behalf of the Applicant, and agreed to the terms set out in the Agreement in good faith. The Respondent also made very significant attempts to try to convince HEB Manitoba to reconsider its position with respect to the clawback issue. The fact that the Respondent was not successful in having that decision

changed does not amount to a breach of section 20 of the *Act*. Nor does any of its representation of her amount to arbitrary, discriminatory or bad faith conduct as those terms have been consistently interpreted by this Board.

21. The Applicant is clearly opposed to the Agreement and refuses to sign it. Faced with this opposition, the Respondent took the prudent action of obtaining two legal opinions from its legal counsel. The legal opinions supported the acceptance of the Agreement notwithstanding the clawbacks contemplated by HEB Manitoba and the Applicant's determination that the Agreement would not benefit her and her refusal to sign it.

22. The Respondent advised the Applicant of the legal opinion and indicated to her that it would be following the advice of its counsel. Reliance upon legal advice to justify a decision not to proceed with a grievance or complaint is a potent defense to a duty of fair representation complaint. The fact that the Applicant does not agree with that advice or the actions of the Respondent does not establish a *prima facie* violation of section 20 of the *Act*.

23. As noted above, the Board has determined that clause (b) of section 20 of the *Act* is applicable in this case. However, even if the more onerous standard set out in clause (a) of section 20 was applicable, we are satisfied that the Application does not establish a *prima facie* case that the Respondent failed to exercise reasonable care.

24. For all the foregoing reasons, the Board has determined that the Application is without merit as it fails to establish a *prima facie* violation of section 20 of the *Act.* As such, the Application is 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 D.G. on December 6, 2019.

DATED at **WINNIPEG**, Manitoba this 24th day of April, 2020, and signed on behalf of the Manitoba Labour Board by

"Original siged by"

C.S.Robinson, Chairperson

CSR/lo/lo-s