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DISMISSAL NO. 2385
Case No. 157/20/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

M.D.,

Applicant,

- and -

Amalgamated Transit Union Local 1505,

Bargaining Agent/Respondent,

- and -

CITY OF WINNIPEG,

Employer.

BEFORE: K. Pelletier, Vice-Chairperson

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

SUBSTANTIVE ORDER

Introduction

1. The Applicant filed an application with the Manitoba Labour Board (the "Board") on October 9, 2020, seeking a remedy for an unfair labour practice contrary to section 20 of *The Labour Relations Act* (the "*Act*"). In his Application, the Applicant alleges that the Union has violated the *Act* by failing to file a grievance regarding a recent City policy change relating to the provision of retirement notices to the Employer. As remedy, the Applicant seeks a "statement in writing from the Employer to the Union that retirement will never be toyed around with and there should always be transparency and discussion before any change is made."

2. In its Reply, the Union raises two preliminary objections. The first preliminary objection is prematurity. The second preliminary objection is the alleged failure of the Applicant to plead a *prima facie* case.

3. In his Response to the Reply, the Applicant advises that he has an example of an individual who provided his retirement notice and was advised by the Employer of the change in policy. The Applicant advises that he is seeking clarification of the Employer's policy and wishes to confirm how long the parties will remain in discussions regarding the issue of providing retirement notices.

4. The Employer has advised that it would not be filing a Reply.

5. The Board has determined that the matter can be addressed on the basis of the documents filed. The Board summarily dismisses the Application for the reasons set out below.

Background

6. The Applicant is an employee of the City of Winnipeg and a member of the bargaining unit represented by the Union.

7. On or about January 30, 2020, a Human Resources Bulletin was posted relating to retirement notice requirements.

8. In its Reply, the Union notes that this is a unilateral policy introduced by the City and that the Collective Agreement does not contain any general requirement to provide notice of retirement to the Employer. However, there is an obligation for employees to provide thirty days' notice of retirement to the Winnipeg Civic Employees' Benefits Program for the purpose of commencing pension benefits.

9. The Applicant alleges that he has raised the issue of the unilateral and arbitrary imposition of the policy with the Union, to no avail. As of the date of the Application, no grievance has been filed and the Applicant claims that his requests for further information have been ignored. Further, as the Union is no longer conducting general meetings as a result of the pandemic, the Applicant claims that the members are unable to raise these types of issues on the record and in an open forum.

10. The Applicant further claims that, if the Employer wished to introduce these types of changes, it should have done so in bargaining.

11. Conversely, the Union advises that it has been in ongoing communication with various City officials, and has expressed its concerns with the policy. The Union contends that the most recent communication occurred on September 9, 2020. The Union further advises that, to its knowledge, the City has not been implementing

the policy against members. This was communicated to the Applicant in an email on July 13, 2020.

12. The Union further claims that no member has been adversely impacted by the policy, to its knowledge. If a member were to raise the issue with the Union, it would likely address it by filing a grievance.

13. As a result, the Union contends that the Application is premature and requests that it be dismissed in accordance with sections 30(3)(c) and 140(8) of the *Act* and Rule 4(4) of the Rules of Procedure.

14. Alternatively, the Union submits that the Application should be dismissed for failing to establish a *prima facie* breach of the *Act*.

The Law

15. Section 20 of the *Act* describes the duty of fair representation as follows:

> 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.

16. 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 [sic] 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.

17. The law surrounding the duty of fair representation under section 20 is well established. As this matter does not involve a termination of employment, section 20(b) of the *Act* applies. In such cases, the Board's role is to consider and decide whether the union represented the employee without discrimination, arbitrariness or bad faith. The Board's website is replete with awards addressing the duty of fair representation. The principles that apply to a section 20(b) application can be succinctly summarized as follows:

    - the Applicant has the onus of establishing that the Union has breached section 20 of the *Act*;

    - the obligation imposed on trade unions under section 20 of the *Act* does not require a union to pursue every grievance to arbitration. 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 has consistently indicated that a complaint will not be allowed merely because the union was wrong, could have provided better representation, or did not do what the member wanted;

    - 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. [*DC* v. *Winnipeg Fire Paramedic Service* (Man, L.B., Case No. 414/06/LRA)];

    - it is 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 Unions must engage [*N.P. v. C.U.P.E., Local 500 and City of Winnipeg Handi Transit* (Man. L.B., Case No. 93/17/LRA)];

- the Board's inquiry will focus on the Union's conduct and considerations in representing the employee under the terms of a collective agreement, rather than on the merits of the grievance, which is a question an arbitrator would answer;

- the Board does not examine concerns expressed about the employer, as employers do not have duties under section 20;

- the Union must communicate fairly with the employee about its representation. However, the Union is not required to take direction from the employee or to answer all of their queries to the employee's satisfaction [*K.C.S*. v *Hylife Foods LP* (Man. L.B., Case No. 209/18/LRA)]; and

- 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 may consider 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.

18. The Board's Information Bulletin #14 provides a good outline of the issues to be addressed in reviewing a Union's conduct with respect to the duty of fair representation. The most relevant portions of Information Bulletin #14 for this complaint are:

> The focus of the Board in evaluating a duty of fair representation complaint is the process used by the bargaining agent in representing the employee's rights under the collective agreement. The Board generally does not second guess the actual decision made by the bargaining agent, so long as the decision is made in compliance with the principles set out in Section 20 of the *Act*. The Board may also consider degree to which the employee cooperated with the bargaining agent in dealing with his or her issue(s) in making its conclusions regarding the Application.

Analysis

19. With these principles in mind, the Board is satisfied on the basis of the information provided that the Application is premature as the Union is actively engaged in ongoing discussions with the Employer on matters surrounding the policy. From the Board's perspective, an applicant should continue to work with their union and only seek the assistance of the Board once a union has had the opportunity to conclude its representation, or until such time as no further action may be taken by the union on a matter.

20. These are not the facts here. While the Applicant noted in his Reply that he is aware of one instance where an individual was advised of his need to comply with the policy, he has not been directly impacted by the policy, and the Union has advised that no member has raised the issue. Until such time as the Union is aware that the City is enforcing its policy or that an employee complains that they have been negatively impacted, the Board agrees with the Union that it would be premature for the Board to get involved during this active stage of representation. The Board's conclusion is that this Application is premature because the Union is still actively involved in the issues raised.

Prima Facie

21. In addition to taking the position that the Application was premature, the Union also submitted that the Applicant had not established conduct on the part of the Union contrary to section 20 of the *Act*. In light of the Board's finding that the Application is premature, it is not necessary to address this second substantive ground relied upon by the Union. However, in the interest of completeness, the Board has also turned its mind to the allegations contained it the Application to determine if they establish a *prima facie* breach of the *Act*.

22. There is nothing in the Application to support the claim that the Union has, in this case, breached its duty of fair representation. Nor is there any substantive basis provided by the Applicant for alleging that the Union acted in bad faith, arbitrarily or discriminatorily, in addressing the issue raised by the Applicant. While the Applicant may be dissatisfied with the manner in which the Union has engaged with the Employer, or he may be frustrated with the speed at which the matter is being discussed, there is no factual basis for the Board to conclude that the Union has acted in way that would constitute a violation of the *Act*.

23. Simply put, there are no allegations in the Application, assuming everything the Applicant claims is true, that suggest that the Union has acted contrary to section 20 of the *Act*. As a result, the Board concludes that the Applicant has failed to make out a *prima facie* case against the Union.

24. The Application is dismissed in accordance with sections 30(3)(c) and 140(8) of the *Act* and Rule 5(5) of the *Manitoba Labour Board Rules of Procedure*.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by M.D. on October 9, 2020.

DATED at **WINNIPEG**, **Manitoba** this 9th day of February, 2021, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

K. Pelletier, Vice-Chairperson

KP/st/acr/lo-s