



**Manitoba Labour Board**  
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**CORRECTED COPY**

**DISMISSAL NO. 2395**

**Case No. 9/21/LRA**

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

**- and -**

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

**F.H.,**

**Applicant,**

**- and -**

**Canadian Union of Public Employees, Local 204,**

**Bargaining Agent/Respondent,**

**- and -**

**WINNIPEG REGIONAL HEALTH AUTHORITY (HOME CARE),**

**Employer.**

**BEFORE: Michael D. Werier, Q.C., Vice-Chairperson**

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

**SUBSTANTIVE ORDER**

**Introduction**

1. On January 20, 2021, with additional documentation filed on January 22, 2021, 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"). As remedy, the Applicant requested the Board to order all of his grievances proceed to arbitration and for fair representation to answer for

terminating his almost 10 years of employment. He stated that asking any organization for equal opportunity should not terminate his employment.

2. On February 16, 2021, following an extension of time, the Union filed its Reply submitting that the Applicant had failed to establish a *prima facie* case and the Application should be dismissed without the need for a hearing.
3. On February 16, 2021, following an extension of time, the Employer filed its Reply, requesting that the Board dismiss the Application without a hearing, as the Application did not establish a *prima facie* case.
4. On March 3, 2021, following an extension of time, the Applicant filed a Response to the Replies.
5. The Board has determined that this matter can be decided by a review of the written material filed by the parties and that a hearing is not required.
6. The material facts can be summarized as follows:
  - (a) The Applicant was employed by the Employer as a Home Care Attendant from January 4, 2011 until the termination of his employment on July 23, 2019. At the time of his termination he held a permanent .6 EFT position.
  - (b) In 2018 and 2019 the Applicant received the following discipline:
    - (i) 5 day suspension on May 30, 2018;
    - (ii) 7 day suspension on July 9, 2019;
    - (iii) termination of employment on July 24, 2019.
  - (c) At the time of the imposition of all of the above discipline, the Applicant's Union was MGEU. The Respondent Union in this Application succeeded MGEU as the bargaining agent in January, 2020.
  - (d) The MGEU filed grievances regarding all the above discipline.
  - (e) Following the imposition of the 5 day suspension, MGEU and the Employer had a grievance hearing, and made certain attempts to settle the grievance, which were unsuccessful. The Employer states it advised the MGEU after not receiving responses from MGEU that it considered the grievance closed.
  - (f) Subsequently MGEU met with the Employer at a grievance meeting regarding the 7 day suspension and the termination. The Employer confirmed that the 5 day suspension grievance was closed and that they were denying the grievance of the 7 day suspension and the termination.

- (g) The Union took over conduct and in January, 2020, advised the Employer that they were referring the three grievances (including the 5 day suspension) to arbitration.
- (h) The parties agreed upon Arbitrator J. Korpesho and dates were set for the arbitration in January, 2021.
- (i) Arbitrator Korpesho issued an order that he did not have jurisdiction to arbitrate the 5 day suspension grievance based on the Employer's position that the grievance was closed, and he adjourned the January, 2021 hearing dates to allow the Applicant to seek redress from the Labour Board with respect to MGEU's handling of the 5 day suspension.
- (j) The Applicant set out a number of complaints. He stated that there was not just cause for discipline. He alleged that the Employer engaged in discriminatory conduct and did not allow him to advance in the organization and that his 5 day suspension was retaliation for speaking out at a staff meeting.
- (k) The Applicant also complained that both MGEU and the Respondent did not notify him promptly that the grievance concerning the 5 day suspension had been closed. He also alleges that the Respondent tried to settle the grievances against his own interests.
- (l) The Respondent submitted that the Applicant has failed to establish a *prima facie* case and denies that it failed to represent the Applicant in accordance with Section 20 of the *Act*. The Respondent states that its actions were not unreasonable, discriminatory or in bad faith.
- (m) The Respondent stated that the fundamental allegation relates to the 5 day suspension and the Applicant's desire that this grievance proceed to arbitration. The Respondent cannot proceed with it in light of MGEU closing the grievance in 2019 and in view of Arbitrator Korpesho's order. While the Respondent took steps to refer the grievances to arbitration and was prepared to take it to arbitration, it is unable to do so.
- (n) The Respondent maintains it took all available steps to act in the Applicant's best interests and denies the Applicant's allegations that it tried to settle the grievance in favour of the Employer.
- (o) In response to the Applicant's concerns that he was not told about the 5 day suspension being closed in a timely way, the Respondent acknowledges it could have done this earlier, but that it had no bearing on the grievance.

- (p) The Employer specifically denied all the allegations made by the Applicant against it, including that it discriminated against the Applicant and denied him opportunity to advance within the organization. The Employer also denied that the 5 day suspension was in retaliation for alleged comments made by the Applicant at a staff meeting.
- (q) The Employer stated that the Applicant's allegations were not appropriate for this Application and further that the Applicant has failed to adduce any particulars that the Union acted unreasonably, in a discriminatory fashion or in bad faith.

7. Section 20 is the relevant section of the *Act* dealing with a bargaining agent's duty of fair representation. Section 20 states:

**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.

...

- (b) in any other case, acts in a manner which is arbitrary, discriminatory or in bad faith;

commits an unfair labour practice.

8. 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".
9. As this case does not involve a dismissal, clause (b) of Section 20 of the *Act* is applicable. The onus is on the Applicant to establish a violation of Section 20 of the *Act*.
10. The terms "arbitrary", "discriminatory" and "bad faith" were defined in the seminal case of *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.”

11. The Applicant has not established a *prima facie* violation of the *Act* and has not provided any allegations which even if proven, would amount to arbitrary, discriminatory or bad faith conduct.
12. The Respondent was not involved in the closing of the grievance dealing with the 5 day suspension as it was not the bargaining agent at the time. It took all reasonable steps to refer the matter to arbitration and was precluded from doing so by Arbitrator Korpesho’s order.
13. The Respondent remains willing to take the outstanding grievances to arbitration and has acted fairly and reasonably and in a non-discriminatory manner with the Applicant’s complaints.
14. The Applicant’s complaints about the Employer are not relevant to his complaints against the Respondent under Section 20 of the *Act*.

Therefore, 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 F.H. on January 20, 2021.

**DATED** at **WINNIPEG, Manitoba** this 31<sup>st</sup> day of May, 2021, and signed on behalf of the Manitoba Labour Board by

*“Original signed by”*

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**Michael D. Werier, Q.C., Vice-Chairperson**