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**DISMISSAL NO. 2440**
**Case No. 176/21/LRA**

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

**- and -**

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

**T.S.,**

**Applicant,**

**- and -**

**UNIFOR Local 191,**

**Respondent,**

**- and -**

**LORD SELKIRK SCHOOL DIVISION,**

**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

### A. Procedural History

1. On November 2, 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*"). In addition to accusing the bargaining agent of violating section 20, the Applicant named two individuals. The Board is satisfied that those two persons were acting on behalf of the Respondent and it is not necessary to name them personally in the style of cause.

2. On December 3, 2021, following an extension of time, the Employer, through counsel, filed its Reply, submitting that the Respondent met its duty of fair representation by filing a grievance and negotiating a settlement, of which the Applicant was aware at all times. The Employer requested that the Application be dismissed without a hearing, pursuant to section 30(3)(c) of the *Act* and section 5(5) of the *Manitoba Labour Board Rules of Procedure.*

3. On December 3, 2021, following an extension of time, the Respondent filed its Reply, submitting that the Applicant failed to allege facts that, if accepted as true, would constitute *a prima facie* breach of section 20(a) of the *Act*. In the alternative, the Respondent submitted that, even if a *prima facie* case is made out, the Applicant's complaint is without merit and should be dismissed on that basis. Accordingly, the Respondent requested that the Board exercise its discretion pursuant to subsections 30(3) and 140(8) of the *Act* to dismiss the Application.

4. On December 31, 2021, following an extension of time, the Applicant filed Responses to the Replies.

5. The Board is satisfied that this matter may be determined on the basis of the material filed and that a hearing is not necessary.

## B. Facts

6. On the basis of the documentation filed by the parties, the Board recites the following material facts.

7. The Applicant was employed by the Employer as a bus driver. Initially hired in late 2015, he later secured a permanent position on or about May 4, 2018.

8. The Respondent is the bargaining agent for a bargaining unit that includes school bus drivers employed by the Employer.

9. The Employer is a school division that encompasses schools in a geographic area that includes the City of Selkirk and several other communities.

10. On April 25, 2021, the Applicant engaged in off-duty conduct which the Employer determined was in violation of a Public Health Order, issued under *The Public Health Act*, when he participated in a large outdoor rally. At that time, the Public Health Order prohibited individuals from assembling in a gathering of more than 10 persons in an outdoor place. The Applicant posted about his participation on social media and included photos of himself in which he appears unmasked with other individuals at the rally from whom he was not socially distanced. He claims in his Response to

the Respondent's Reply that he has a medical mask exemption. At the time, the Applicant's social media profile indicated that he was a school bus driver for the Employer.

11. The following morning, April 26, 2021, the Applicant drove his regular bus route for the Employer.

12. As a consequence of the Applicant's social media posts, the Employer says that it received complaints from parents of students. After completing his morning route, the Applicant was interviewed by his manager on April 26, 2022. A shop steward also attended the meeting. The Employer determined that the Applicant was unapologetic and had challenged his direct supervisor during the interview.

13. The Employer placed the Applicant on administrative leave pending an investigation. In response to being placed on leave, the Applicant posted on social media that the Employer had "suspended" him and defiantly stated: "What I do on my own time is my business."

14. As a result of his conduct on April 25 and 26, 2021, the Employer terminated the Applicant for cause on May 6, 2021.

15. On May 11, 2021, the Respondent filed a timely grievance on behalf of the Applicant in which it sought certain remedies including reinstatement.

16. The parties met on May 26, 2021 to discuss the grievance at which meeting the Applicant was represented by a Staff Representative employed by the Respondent. During the meeting, the Respondent argued for the Applicant's reinstatement. The Employer indicated that it was not prepared to do so.

17. By letter dated May 28, 2021, the Employer made a without prejudice offer to settle the grievance by offering the equivalent of 6 weeks' pay in lieu of notice on condition that a memorandum of settlement be entered into which provided for, *inter alia*, confidentiality of the settlement terms.

18. Shortly thereafter, the Respondent had a lengthy meeting with the Applicant to discuss the grievance and the Employer's offer. The Respondent's Staff Representative and its Area Director attended the meeting. The Applicant was advised that succeeding with the grievance would be "very problematic". The Applicant agreed that the Respondent would respond to the Employer's offer to resolve the grievance.

19. By letter dated June 4, 2021, the Respondent's Staff Representative sent a 4-page response to the Employer's offer in which she marshalled arguments in support of

the Applicant's position that included reference to leading labour law texts and arbitral jurisprudence. The Respondent continued to press for reinstatement of the Applicant. In the event that the Employer was not prepared to reinstate the Applicant, the Respondent requested a financial settlement which included the payment of damages for interference with his human rights and substitution of a resignation for the termination.

20. By letter dated June 8, 2021, the Employer provided a detailed response contesting the Respondent's position. However, the letter concluded with a substantially increased counteroffer to resolve the grievance.

21. On June 10, 2021, the Respondent discussed the revised offer with the Applicant. Following that discussion, by letter dated June 11, 2021, the Respondent replied to the Employer's offer. In that reply, the Respondent attempted to distinguish the case law relied upon by the Employer in its previous correspondence and made a counteroffer on behalf of the Applicant.

22. The Employer responded by letter dated June 14, 2021. The response included a further offer to settle which included an increased payment to the Applicant in exchange for withdrawal of the grievance and provision of a full and final release by the Applicant in a form satisfactory to the Employer.

23. The Respondent discussed the Employer's offer with the Applicant on June 21, 2021. In its Reply, the Respondent stated that at that time it advised the Applicant that his case "would not be pursued at arbitration and this offer was a fair settlement".

24. The Respondent's conclusion respecting the fairness of the settlement was based upon the Area Director's assessment that the grievance would not likely be upheld at arbitration. In its Reply, the Respondent notes that in arriving at this conclusion, a number of factors were considered including, but not limited to: "the relevant facts of the termination, the language of the collective agreement between the parties, the Public Health Orders in force at the time, the continuing devastating impact of the COVID-19 pandemic on Canada and the province, the legal obligations of the Employer to keep students and staff safe, the likelihood the Applicant might re-offend, the Applicant's credibility as a witness if the Union proceeded to arbitration, and the developing case law on COVID-19". The Respondent's Area Director provided the Respondent with a memorandum which reviewed the relevant facts and case law in providing his assessment of the grievance.

25. In light of the Respondent's view that succeeding with the grievance would be "very problematic" and its further conclusion that the settlement proposed by the Employer was fair, the Respondent wrote to the Employer on June 22, 2021 and accepted the

offer, noting that the termination would be removed from the Applicant's records and that he would supply a resignation letter. The Respondent also requested that the Employer provide it with "all necessary waivers and settlement documentation".

26. In response to that request, the Employer prepared a draft Memorandum of Settlement and sent it to the Respondent for review and comment. The Respondent proposed several changes and comments in response. Ultimately, the wording of the Memorandum of Settlement was finalized on or about July 15, 2021.

27. On July 15, 2021, the Respondent phoned the Applicant and left him a voicemail message. The same day it sent the Applicant a copy of the Memorandum of Settlement via email and asked for his response.

28. The Memorandum of Settlement included a confidentiality provision relating to its terms and a non-disparagement provision.

29. Between July 16, 2021 and August 22, 2021, the Respondent attempted to obtain the Applicant's response to the Memorandum of Settlement. During this period, the Respondent made phone calls and sent correspondence to the Applicant via email and through Canada Post. The Applicant complained in his Response to the Respondent's Reply that he received "repeated and unwanted communications" from the Respondent at this time. On August 22, 2021, the Applicant finally provided a form of response to the Respondent stating, in part, as follows:

> As I have informed you on several occasions, I am waiting on my lawyer. Until I hear from him, and get his advice, you will also need to just wait patiently. You may consider this my written response that you required and you will await my decision.

30. The Final Release and Indemnity appended to the Memorandum of Settlement provides that the Applicant was "afforded the opportunity to obtain independent legal advice with respect to the details of the settlement evidenced by this Final Release and Indemnity".

31. On August 23, 2021, the Respondent's Staff Representative phoned the Applicant and, following the call, sent him an email stating, in part, as follows:

> During this discussion you were unable to provide me any estimate on when you will be able to confirm your final position. While I understand you are seeking independent legal counsel, you have been provided with more than sufficient time to do so, as you have been in possession of the MOS for over a month. I advised you today that the Division is not obligated to hold this settlement and is therefore free to withdraw it at any point prior to it being

> signed. If this were to occur, the Union will not be pursuing any further action with the grievance. The Union cannot leave this matter outstanding indefinitely.
>
> I also mentioned that up until yesterday's email I had received no communication from you after July 15, 2021, despite the below claim that you had informed me you were waiting on your lawyer. I have provided all my contact information for you again at the bottom of this email to ensure that you can remain in contact. Please update me as soon as possible.

32. The Applicant filed a complaint against the Employer with the Manitoba Human Rights Commission on or about August 29, 2021.

33. On or about September 9, 2021, the Applicant posted a video on YouTube. The Employer asserts that the video was disparaging of it. In response, on September 10, 2021, the Employer's legal counsel sent a cease and desist letter to the Applicant and requested removal of the video. The cease and desist letter warned the Applicant of potential legal action should he fail to comply. The Applicant replied to the cease and desist letter.

34. By October 20, 2021, the Respondent had still not received the Applicant's response regarding the Memorandum of Settlement. It was also concerned that the Applicant's complaint to the Human Rights Commission and the posting of the video on YouTube violated the terms of the Memorandum of Settlement. As noted in its Reply, the Employer shares the view that the Applicant breached the terms of the Memorandum of Settlement by allegedly disclosing the terms of the settlement and publically disparaging the Employer.

35. Given the Applicant's failure to provide it with a final response, the Respondent proceeded to accept the terms of the Memorandum of Settlement (which was signed by it and the Employer on October 20, 2021) and closed its file. In its Reply, the Respondent stated that it took this step to protect the interests of the Applicant having concluded that his grievance would likely fail at arbitration and that settlement was the best option. This action was justified in the circumstances, according to the Respondent, because: "Continued delay on the part of the Applicant, coupled with his conduct that violated the terms of the MOS, required the Union to act on his behalf."

36. The Respondent sent the Applicant a letter on October 21, 2021 advising that it considered the matter settled and provided details for its reasons for doing so which included the Applicant's failure to provide a response to the Memorandum of Settlement for more than 3 months.

37. The Applicant personally corresponded with the Employer's legal counsel and made threats to proceed with "arranged media interviews" unless a settlement agreeable to him was arranged by October 27, 2021. On October 26, 2021, the Employer's counsel emailed the Applicant indicating, in part, the following:

> We can advise that the Division is prepared to have you execute the enclosed Memorandum of Settlement, along with a Final Release and Letter of Resignation. It is the Division's position that the terms of agreement were reached in July of 2021. Upon receipt of the original signed Memorandum of Settlement, including the original Final Release and Letter of Resignation, the Division will undertake to make the payment contemplated in paragraph 2 of the Memorandum of Settlement.

38. Although the Applicant acknowledged receipt of counsel's email and advised that he would be following up "in the next few days", he failed to do so and, instead, filed the present Application.

## C. Positions of the Parties

*Applicant*

39. The Applicant contends that he was "not properly represented" and that the Respondent violated section 20 of the *Act*.

40. He asserts that the Respondent did not treat him honestly and in a manner that was free of personal animosity. It is his position that his views on masks, public health mandates, his personal mask exemption, COVID-19 vaccination and testing, as well as his political views and affiliation all biased the view of the representatives of the Respondent handling his issues. It is his further contention that the Respondent conceded to all of the Employer's demands, failed to consider relevant evidence, and was generally disinterested in acting on his behalf.

41. The Applicant also submitted that the Respondent improperly agreed to settle his grievance without consulting with him or obtaining his consent. Moreover, he complained that the Respondent agreed to, and executed, the Memorandum of Settlement, without first obtaining his agreement. His complaint notes that the Respondent ultimately closed his file "without consulting me".

42. According to the Applicant, the Respondent should have consulted with legal counsel to obtain advice regarding his grievance and its failure to do so suggests that it did not take reasonable care to represent his interests.

43. With respect to remedy, the Applicant stated that he wished to settle the matter and was prepared to accept "the original offer stated as fair by the union itself". In addition, he asked the Board to order the Respondent to refund all of the union dues which he had paid.

*Respondent*

44. The Respondent submits that the Applicant has failed to allege facts which, if proven, disclose a *prima facie* violation of section 20(a) of the *Act*. Specifically, it maintains that, assuming all of the facts set out in the Application are proven, neither any fact nor the circumstances as a whole demonstrate that the Respondent acted in a manner that would constitute arbitrary, discriminatory or bad faith conduct or a failure to take reasonable care in representing the interests of the Applicant. It further submitted that the remedies sought by the Applicant are inappropriate and unavailable at law.

45. In the alternative, the Respondent maintains that even if a *prima facie* case is made out by Applicant – which was expressly denied – the Applicant's complaint is without merit and should be dismissed on that basis.

46. The Respondent argues that the Applicant's allegations are broad and unsubstantiated, lacking the specifics that would be required to find a *prima facie* breach of section 20 of the *Act*. To that point, the Respondent notes that the onus is on an applicant to establish a violation of section 20(a) of the *Act* and that this Applicant has failed to meet that onus. It is the position of the Respondent that the Application includes bare allegations which are unsupported by any reliable or plausible factual underpinning.

47. The Respondent suggests that the substance of the Applicant's complaint is a disagreement over the amount of the settlement negotiated on his behalf and that he merely disputes the conclusions reached by the Respondent with respect to his grievance. However, the Respondent says that the conclusions it reached were, in context, reasonable and beneficial to the interests of the Applicant.

48. The Respondent further notes that it is not a breach of section 20 of the *Act* for a bargaining agent to settle a grievance without an employee's agreement provided that it does not thereby act in a manner which is arbitrary, discriminatory or acting in bad faith, or in the case of a termination, which fails to take reasonable care to represent the employee's interests.

49. The Respondent provided details of the efforts made to represent the Applicant. These efforts included, but were not limited to, filing a grievance, advocating on the

Applicant's behalf, evaluating the merits of the grievance and the settlement offers presented by the Employer, and advancing counteroffers. Although it advocated for reinstatement of the Applicant, the Respondent submitted that when it became apparent this was an unlikely outcome, it negotiated to nearly triple the original monetary offer from the Employer as well as the removal of the termination from the Applicant's record. It further states that it provided a generous amount of time to the Applicant to respond to the Memorandum of Settlement and decided to finalize the settlement only after months of waiting in order to protect his interests. The Respondent specifically denied any suggestion that it, or the persons acting on its behalf, acted in a discriminatory manner or exhibited any malice, ill-will or hostility towards the Applicant for any reason including his political beliefs or opinions about masking or vaccination.

*Employer*

50. It is the Employer's position that the Respondent met its obligations under section 20 of the *Act* by filing a grievance and negotiating a settlement on behalf of the Applicant. The Employer notes that the Respondent had the discretion to settle the grievance and, in doing so, it took reasonable care to represent the Applicant's interest and did not act in a manner which was arbitrary, discriminatory or in bad faith.

51. The Employer further submitted that the Applicant failed to take appropriate steps to protect his own interests and failed to cooperate with the Respondent.

52. The Employer added that it relied on the settlement reached and will suffer prejudice if the Application is granted.

## D. Legislation

53. The Application alleges a breach of Section 20 of the *Act*. That provision reads as follows:

> **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.

54. Subsection 140(8) of the *Act* provides that if the Board is satisfied that an application is without merit, it may dismiss it at any time. In addition, subsection 30(3)(c) of the *Act* permits the Board to decline to take further action on an unfair labour practice complaint. The Board has consistently found that an application that does not establish a *prima facie* case should be dismissed without a hearing in accordance with those provisions.

## E. Analysis

55. As this case concerns the dismissal of the Applicant, clause (a) of section 20 of the *Act* applies. The issue to be determined in this case is whether the Respondent violated section 20 of the *Act* by representing the rights of the Applicant under the collective agreement in a manner which was arbitrary, discriminatory or in bad faith and, additionally, whether it failed to take reasonable care to represent his interests.

56. It is not the function of the Board to assume the role of a surrogate arbitrator under a collective agreement and decide whether an applicant would have succeeded on a grievance or potential grievance at arbitration.

57. The legal principles applied by the Board in respect of section 20 applications are well-established and may be summarized as follows:

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

b) Section 20(a) of the *Act* provides that in cases of dismissal from employment the bargaining agent must exercise “reasonable care” in representing the interests of the employee in addition to not acting in a manner which is arbitrary, discriminatory or in bad faith.

c) The applicable standard of care under section 20(a) of the *Act* is expressed in the negative, i.e. failing to take reasonable care, or acting in a manner which 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 this section. If the bargaining agent has taken reasonable care to represent the interests of the

employee in the case of a dismissal and has represented the employee in a manner which is free from the other three prohibited elements outlined in the section, then there is no violation of section 20(a) of the *Act* and no remedy is available to the applicant employee.

d) The term "reasonable care" in section 20(a) of the *Act* has been defined by the Board to mean the degree of care which a person of ordinary prudence and competence would exercise in the same or similar circumstances.

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) Perfection is not the standard established by the Legislature under section 20 of the *Act*. 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 the provision. The Board has previously noted that it would be unreasonable to impose upon 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(s) wanted.

g) 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.

h) The decision-making process regarding whether to file, or to proceed to arbitration with, a grievance or complaint may involve the union securing an opinion from legal counsel as to the merits and likelihood of success. The Board has consistently held that following the advice of legal counsel is a potent defence to a duty of fair representation complaint. That said, it is not necessary for a union to obtain legal advice in order to meet in obligations under section 20 of the *Act* in every case.

i) 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.

j) When assessing the merits of a duty of fair representation complaint, the Board may also consider whether an employee has taken appropriate steps in protecting their own interests. Employees have a vital role in assisting bargaining agents in representing their rights under the collective agreement. Employees must cooperate with their bargaining agent, and its representatives, and conduct themselves appropriately. Respectful communication and conduct between the bargaining agent and the employee is important for effective representation and that respect must go both ways. Employees should, for example, appropriately and expeditiously respond to the bargaining agent's requests for relevant information, follow the advice its representatives provide, and mitigate their damages. If the employee's conduct negatively affects the representation that the bargaining agent is able to provide, the Board will consider that conduct when assessing whether there has been a breach of section 20 of the *Act*.

58. The Applicant has failed to establish a *prima facie* violation of section 20 of the *Act*. Although he is dissatisfied with the representation he received and advanced several complaints, the Board has consistently held that, when assessing whether a *prima facie* case exists in respect of a particular statutory provision there must be more than a bare allegation or assertion. Rather, there must be a sufficient factual foundation in the Application in order to enable the Board to draw reasonable conclusions therefrom, which, at a minimum, would call for an answer from a respondent. Unsupported allegations, without sufficient factual underpinnings, entitle the Board to conclude that a *prima facie* case has not been established. As shall be explained

below, it is plain and obvious that this Application has no reasonable chance of succeeding and it is, therefore, without merit as that term is used in subsection 140(8) of the *Act*.

59. As noted above, the Board does not assume the role of an arbitrator under a collective agreement to decide whether an applicant would have succeeded on a grievance or potential grievance at arbitration. That being said, it is useful to note the context in which the representation of the Applicant arose. The Applicant was terminated by the Employer for reasons that included engaging in off-duty conduct that violated a Public Health Order during a pandemic. He posted about his participation in that activity and the Employer's decision to "suspend" him on social media. When questioned about his actions, he failed to take responsibility and expressed the (erroneous) view that what he did on his own time was his own business. The Employer notes that it received complaints from parents and the Applicant's conduct became the subject of significant public attention in social media and the news media. It is a well-established principle in labour law that employers may have just cause to discipline employees for off-duty-conduct in circumstances where the conduct of the employee harms the employer's reputation. Where off-duty conduct involves illegal or immoral conduct by an employee, employers may rely upon that fact to establish that the conduct was injurious to its general reputation. The additional context, which is certainly relevant to this case, is that the Employer based the termination, in part, on the Applicant's "lack of judgement" and maintained that he "knew or ought to have known that your actions were not only violating Public Health Orders, but also increasing the risk for the students in your care, their families, and fellow LSSD staff".

60. The Applicant asserts that the Respondent did not treat him honestly and in a manner that was free of personal animosity. He states that persons acting on behalf of the Respondent considered him to be against masks and vaccines and "[t]here was also much attempt to argue over my exemption, masking and vaccination, which was all irrelevant to the situation". However, as the Respondent points out in its Reply, issues regarding masking and vaccination were certainly relevant to the grievance given the Employer's position that the Applicant's conduct jeopardized the health and safety of students, their families, and other employees. The discussion of these issues by the Respondent did not occur in a vacuum; it was clearly relevant to its investigation of the grievance. The suggestion that the Respondent, or the individuals acting on its behalf, were biased against the Applicant, or treated him dishonestly or with personal animosity, is not supported by sufficient factual foundation. Indeed, in reviewing the correspondence sent by the Respondent to the Employer and the Applicant, there is absolutely no indication of any conduct by it that could reasonably be viewed as violating section 20 of the *Act*. To the contrary, the

correspondence prepared by persons acting on behalf of the Respondent (which was attached to the pleadings in this case) is thoughtful, thorough, and professional.

61. The Applicant contends that the Respondent settled his grievance and entered into a Memorandum of Settlement with the Employer without consulting with him or obtaining his consent and that it ultimately closed his file. The duty of fair representation established under section 20 of the *Act* does not give an employee the absolute right to have a grievance filed or taken to arbitration. Unions are not required to proceed to file or arbitrate grievances that, in their judgement, are not likely to succeed. Decisions respecting the filing or withdrawal of grievances and whether or not they will be advanced to arbitration are within the discretion of the union as the exclusive bargaining agent. Furthermore, those decisions may be made with or without the consent of the employee concerned. As noted above, provided that this 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.

62. In the present case, the Applicant knew that efforts to resolve the case were being made by the Respondent and, further, that the Respondent believed that succeeding with his case was "very problematic". This was not a situation in which an employee was not aware that settlement discussions were taking place. Following a series of offers and counteroffers, the Respondent determined that the Employer's offer was fair having regard to its good faith and reasonable assessment that the grievance would not likely be upheld at arbitration. On that basis, the Respondent decided to accept the Employer's offer and proceeded to conclude a Memorandum of Settlement. The Respondent's decision to resolve the grievance was made having seriously turned its mind to the matter and followed proper consideration of the circumstances, including the legal context. The fact that the Applicant did not agree with the Respondent resolving the grievance in the manner that it did does not establish a *prima facie* violation of section 20 of the *Act*.

63. The Applicant further maintained that the Respondent should have consulted with legal counsel to obtain advice regarding his grievance and that its failure to do so suggests it did not take reasonable care to represent his interests. While obtaining legal advice is well-established as providing a defence to a duty of fair representation complaint, neither the legislation nor the Board's jurisprudence provide that a union has an obligation to obtain legal advice in all cases. Frankly, the grievance filed on behalf of the Applicant was a very basic one involving discipline meted out for reasons including, but not limited to, the Applicant's off-duty conduct. There was nothing overwhelmingly complex about the facts or the law involved. It is unsurprising that the Respondent did not feel it necessary to involve legal counsel. The fact that legal counsel was not engaged by the Respondent does not constitute a *prima facie* violation of section 20 of the *Act*. The Respondent's Staff Representative consulted

with the Area Director who, following a review of relevant factors, determined that the grievance was unlikely to succeed. The Board does not assess the correctness of a union's assessment of whether a grievance will ultimately be successful or not. However, in the present case, there is certainly no evidence that the Respondent's assessment of the grievance was based upon improper considerations or that, in arriving at its conclusions, it failed to take reasonable care to represent the Applicant's interests. The Respondent's assessment of the grievance's viability was undoubtedly reasonable.

64. As the Board has consistently stated, employees must take appropriate steps in protecting their own interests and they have a vital role in assisting bargaining agents in representing their rights under the collective agreement. In this case, the Applicant failed to cooperate with the Respondent. His excessive delay in responding to the Respondent's request for his position regarding the Memorandum of Settlement was unreasonable. While it is understandable that he attempted to obtain legal advice, the Board agrees that his failure to provide his position to the Respondent in a timely manner was unreasonable. In that context, the Respondent's decision to execute the Memorandum of Settlement, which it reasonably believed was in the best interests of the Applicant, did not violate section 20 of the *Act*.

65. The Applicant also suggested that the Respondent was not on his side, did nothing to help him, and pandered to the Employer. Those assertions are not supported by any proper factual underpinning. What is clear (and uncontested) from the documentation filed by the parties is that the Respondent provided the Applicant with representation, filed a grievance on his behalf seeking remedies including reinstatement, communicated with him about the facts and issues, and made submissions on his behalf. The Respondent considered offers, made counteroffers, and ultimately agreed to a settlement which it considered fair given its conclusion that the grievance was not likely to be successful. The Applicant's suggestion that the Respondent did nothing to help him and was not on his side is contradicted by the facts which indicate the significant efforts made by the Respondent to represent him.

66. The Board is satisfied that the Applicant has failed to discharge the onus to establish a *prima facie* violation of section 20 of the *Act*. Rather, it is clear that the Respondent took reasonable care to represent the Applicant and that did not act in an arbitrary, discriminatory or bad faith manner. In the context of the allegations advanced by the Employer which led to the Applicant's termination, the fact that he received such significant offers to settle is a testament to the effectiveness and diligence of the Respondent and the persons acting on its behalf.

67. For these reasons, the Application is dismissed pursuant to subsection 30(3)(c) and 140(8) of the *Act*.

**THEREFORE**

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by T.S. on November 2, 2021.

**DATED** at **WINNIPEG**, **Manitoba** this 6th day of May, 2022, and signed on behalf of the Manitoba Labour Board by

*"Original signed by"*

**C.S. Robinson, Chairperson**

CSR/st/lo/lo-s