Manitoba Labour Board
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DISMISSAL NO. 2476
Case No. 116/22/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

B.O.,

Applicant,

- and -

Canadian Union of Public Employees, Local 2348,
Sheree Capar,

Respondents,

- and -

WILLOW PLACE,

Employer.

BEFORE: K.L. Gibson, Vice-Chairperson

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

SUBSTANTIVE ORDER

WHEREAS:

1. On May 10, 2022, 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*"). The Applicant filed a detailed statement in support of that Application.

2. On June 7, 2022, following an extension of time, the Employer, through counsel, filed its Reply requesting that the Application be dismissed without a hearing, and alternatively that the Board order a narrowing of the issues.

3. On June 7, 2022, following an extension of time, the Respondent, through counsel, filed its Reply requesting that the Board declare that the Applicant had failed to establish a *prima facie* complaint under section 20 of the *Act* and therefore dismiss the Application pursuant to section 30(3) without the necessity of a hearing.

4. On June 9, 2022, the Applicant filed a detailed Response to both Replies.

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

    a. The Applicant was employed by the Employer (and a predecessor employer) as a casual employee from September 28, 2010 until she was the successful applicant for a part time term position of counsellor on the midnight rotation, effective January 4, 2016. This term position was contemplated to continue only until the return of the full time counsellor from medical leave, which event occurred on June 27, 2016. At all material times the Applicant's employment was under the terms and conditions of a collective agreement entered into between the Respondent and the Employer;

    b. While in the term position a number of issues arose between the Applicant and her co-workers, which the Employer undertook to investigate on a non-disciplinary basis. On June 3, 2016, the Applicant was placed on a paid administrative leave pending investigation into the workplace issues. A meeting with the Applicant and her union representative was scheduled for July 5, 2016, but did not take place as the Applicant's doctor advised she was not medically fit to attend;

    c. On June 23, 2016, the Applicant filed a Human Rights Complaint against the Employer alleging discrimination on the basis of disability. This Complaint was dismissed by the Human Rights Commission on May 23, 2018;

    d. On July 19, 2016, the Respondent filed two grievances on behalf of the Applicant, which were held in abeyance pending the Applicant's anticipated recovery from the medical issues identified by her doctor;

    e. There was no contact between the Applicant and the Respondent from the fall of 2016 until approximately the fall of 2019;

    f. The Employer and the Respondent met to discuss the Applicant's issues, including her grievances, on September 26, 2019;

g. On November 20, 2019, the Employer dismissed the grievances both on the merits and because they had not been proceeded with on a timely basis;

h. On February 4, 2020, bargaining agent representative Sheree Capar ("Capar") and the Applicant met with the Employer, at which time the Applicant agreed to provide further information from her doctor, as well as particulars of her mitigation efforts subsequent to July 2, 2016;

i. On March 3, 2020, the Employer, through counsel, made written requests to both the Applicant's doctor and the Respondent for the information discussed on February 4, 2020. No responses were received to either request;

j. Following the dismissal of the grievances, the Applicant requested that the Respondent attempt to negotiate a severance payment on her behalf in exchange for her not returning to work. This was attempted but was not successful.

k. The Applicant then insisted that the Respondent proceed with her grievances. Capar determined that the grievances were unlikely to be successful and advised the Applicant of this opinion. The Applicant appealed Capar's decision to the Executive of the Respondent, which decided to refer the matter for a legal opinion.

l. External counsel reviewed the relevant documents, interviewed the Applicant and other witnesses, and provided a formal legal opinion to the Respondent that the grievances lacked merit.

6. Based on a review of the Application and the Replies, 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, as set out below, the Board has **DETERMINED** the following:

a. An oral hearing is not necessary as this matter can be determined on the basis of the written material filed by the parties. The written material does not disclose any substantial disagreement between the Applicant and the Respondent on the material, relevant facts;

b. The onus is also on the Applicant to establish a violation of either section 20(a) or (b) of the *Act*;

c. Section 20 of the *Act* establishes the duty of fair representation. As is well established by prior Board decisions, section 20(a) applies only to terminations of employment in the culpable or without just cause sense commonly understood in collective bargaining relationships. All parties agree that although

the Applicant has not returned to work with the Employer since June of 2016 her employment was not terminated in the sense required by section 20(a). Accordingly, this matter must be considered under section 20(b);

d. As the Board noted in *V.S. v. Manitoba Government and General Employees' Union* (2010) 190 C.L.R.B.R. (2d) 184, section 20(b) of the *Act* makes it an unfair labour practice for a bargaining agent, and persons acting on behalf of a bargaining agent, to act in a manner which is arbitrary, discriminatory or in bad faith in representing the rights of an employee under the collective agreement. The applicable standard of care under section 20(b) of the *Act* is expressed in the negative. 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 applicant employee;

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 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. The Board has consistently approached the determination of whether a *prima facie* case has been established by an applicant on the basis of the material facts set out by the Applicant. In many cases, as in this matter, the Applicant has provided voluminous material collateral to the duty required of a bargaining agent by Section 20. The Board in *M.T., Winnipeg Police Association, and Winnipeg Police Service,* Dismissal no. 2430, dated April 22, 2022 said the following at paragraphs 19 and 20:

> Unions have the discretion to determine whether a grievance or complaint shall be filed, referred to arbitration, or settled with or without the consent of the employee(s) concerned. Any breach of the duty of fair representation arises not from the fact that the union elects (or not) to file a grievance, but the reasons for and the manner in which the choice was made. It is this decision making process that the Board will consider in determining whether there has been a violation of the Act.
>
> When a bargaining agent secures an opinion from legal counsel as to the merits and likelihood of success as part of the decision making process, the Board has consistently held that following the advice of legal counsel is a potent defence to a duty of fair representation complaint.

g. The Board has the authority under section 30(3)(c) of the *Act* to decline to take further action on any complaint. In addition, pursuant to section 140(8) of the *Act* the Board may dismiss any application or complaint at any time where, in the opinion of the Board, the application or complaint is "without merit".

h. The Applicant has not established a *prima facie* violation by the Respondent of section 20(b). The Application does not disclose an arguable position that the Application will succeed, assuming that all of the facts set forth are proven. Specifically, there are no facts asserted in the Application which constitute arbitrary, discriminatory or bad faith conduct on the part of the Respondent as those duties have been defined by the Board. The delay which is referenced by the Applicant arises almost entirely from the fact that she was on a lengthy medical leave during most of which time she was not in contact with either the Employer or the Respondent, and more recently has neglected to provide requested updated medical information. It is apparent that the Respondent has made ongoing reasonable efforts to represent the Applicant including seeking a formal legal opinion upon which to base its' decision not to proceed further with the Applicant's grievances.

i. The Application is therefore dismissed as it does not establish a violation of section 20(b) and is therefore dismissed pursuant to section 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 B.O. on May 10, 2022.

DATED at **WINNIPEG**, **Manitoba**, this 23rd day of August, 2022, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

K.L. Gibson, Vice-Chairperson

KLG/dh/acr/rp-s