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DISMISSAL NO. 2597
Case No. 49/24/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

P.T.,

Applicant,

- and -

Canadian Union of Public Employees, Local 5546,
Salem Home Support Association, R.O.,

Respondents,

- and -

SALEM HOME INC.,

Employer.

BEFORE: H. Krahn, Vice-Chairperson

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

SUBSTANTIVE ORDER

I. Introduction

1. The Employer is a personal care home in Winkler, Manitoba. The Applicant was an employee working in the laundry department.

2. On March 8, 2024, 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 alleged that the Respondent Salem Home Support Association ("SHSA") and R.O. had

failed to represent her appropriately as it related to non-selection for a position by not filing a grievance in a timely manner or taking any appropriate action to that grievance, in addition to respectful workplace issues.

3. On April 5, 2024, following an extension of time, the Employer, through counsel, filed its Reply. The Employer requested the Board dismiss the Application without a hearing, as the Application had failed to establish a *prima facie* case. In the alternative, given the Applicant's resignation, the Employer asked the Board to find the Application was moot.

4. On April 5, 2024, the SHSA filed its Reply in which it submitted the Application does not raise a *prima facie* case and that the Board ought to dismiss the Application without the necessity of holding a hearing.

5. The Respondent Canadian Union of Public Employees, Local 5546 ("CUPE") filed a Reply April 5, 2024 submitting SHSA ought to be removed as a party to the Application since CUPE became the bargaining agent pursuant to a Board Order on February 22, 2024, effective November 9, 2023. CUPE responded that the Application ought to be dismissed as premature but given the Employer's objection of timeliness to the Applicant's grievance, the Application ought to proceed as the Board determines.

6. For the reasons set out below, the Board has concluded that the matter should be dismissed as being premature.

II. Background

7. The Applicant was an employee of the Employer and a member of SHSA. She filed a series of text messages between herself and then President of SHSA, R.O., as evidence in support of this Application. It was her position that she had not been represented properly throughout her dealings with SHSA and R.O.

8. The text messages which begin on September 29, 2023 indicate she was concerned about her treatment in the laundry department and secondly, not being selected for a .58 FTE in the laundry department. The text messages do not specifically request that a grievance be filed but on October 5, 2023, the Applicant asked when they would talk to the lawyers about the grievance that was filed.

9. R.O. then advised that a grievance had not been filed but that the proper process was being followed by bringing "it forth to management," and if not resolved, a grievance would be filed.

10. Conversations continued between the Applicant and R.O. On October 20, 2023 the Applicant wrote, "At this point I want to file a grievance against management. They are purposely delaying the associations (sic) job to investigate" citing Article 31 Special Provisions – Casual Employees. R.O. texted the Applicant on October 25, 2023 following a meeting and told the Applicant she would let her know what happens with the paperwork and if they would go ahead with a grievance.

11. In addition to the selection issue, the Applicant continued to text R.O. with respect to the respectful workplace issues in the laundry department.

12. On November 1, 2023, the Applicant asked if and when the grievances would move forward to which R.O. replied they had to wait for Marge to "correct or change what's happening" in the laundry department. On November 13, 2023, the Applicant asked about filing a grievance for the selection issue to which R.O. replied on the same day that "we can absolutely file a grievance for you."

13. On November 21, 2023, the Applicant asked for an update on the grievance. R.O. replied that she would set up a meeting with their lawyer and that she had wanted to resolve the issues without having to file a grievance.

14. On November 22, 2023, R.O. texted the Applicant she had grieved the selection issue but nothing else. On December 2, R.O. told the Applicant she had talked to their lawyer the day before and he said that "what we have" is not grievable. It is unclear as to which issue she referred.

15. Subsequently, she texted on December 6, 2023, "Just letting you know that I had a meeting with our lawyer this morning. We will be filing another grievance regarding the position that was awarded to B.! I will file it and submit it today". When she was asked how the grievance was going, she replied that it was nearly done and would be submitted tomorrow, meaning December 12, 2023.

16. The grievance dated December 9, 2023, was in fact filed on December 12, 2023. A grievance hearing was to take place December 15, 2023 but was ultimately cancelled and the Employer denied the grievance on December 19, 2023.

17. On December 22, 2023, R.O. texted L.P., Vice-President of SHSA about the grievance so she could assume conduct given R.O. term as President was coming to an end. Ms. L.P. continued to advance the grievance with the Employer.

18. On January 8, 2024, the Applicant texted R.O. and said she did not know the December 15th meeting had been a grievance hearing whereas R.O. maintained she had explained that it would be, and since the Applicant had chosen not to attend, the meeting was cancelled.

19. After February 22, 2024 CUPE replaced SHSA as the bargaining agent. The Applicant contacted CUPE on March 14, 2024 about her grievance and CUPE advanced the grievance to Step 2. The grievance was denied by the Employer as it considered the grievance to have been abandoned.

20. Notwithstanding, CUPE referred the grievance to arbitration on March 28, 2024 as well as filed a grievance with respect to the Applicant's resignation on February 27, 2024 alleging it had been given under duress.

III. Positions of the Parties

Applicant

21. The Applicant submitted that SHSA had not represented her properly at any point. She asked by way of remedy for the Board to investigate "all of the parties involved" and ideally wanted her job back under improved working conditions.

22. In her Response, the Applicant focused on the selection grievance and how she had been misled by R.O. in terms of when the grievance was filed, setting up meetings with their lawyer and Applicant, which never took place, and not telling her that the meeting on December 15 was a grievance hearing. When the Applicant was called into a meeting by the Employer on February 22, 2024 concerning a respectful workplace complaint against her filed by the incumbent in the disputed position, she submitted her resignation effective February 27, 2024, which she said was given under duress.

Respondent SHSA

23. Pursuant to MLB Order No. 1730, dated February 22, 2024, a merger or amalgamation occurred between SHSA and CUPE and the latter became the successor bargaining agent effective November 9, 2023. As such, SHSA ought to be removed as a party to this Application.

24. SHSA also submitted that the text messages filed in support of the Application do not establish a *prima facie* case and the Application ought to be dismissed. The Applicant raised a "Respectful/Workplace Concern" but did not ask for this to be grieved as the Employer was following its obligations under the collective agreement. With respect to the "Selection Concern", a number of meetings had taken place including on October 25, 2023 with the Applicant present, where it was discussed that seniority was not a governing factor as the incumbent had scored higher.

25. A selection grievance was filed and a meeting was arranged for December 15th and the Applicant elected not to attend and the Employer denied the grievance on

December 19, 2023. R.O. turned matters over to L.P. as of December 22, 2023 as it related to the selection grievance. R.O. ended her role effective December 31, 2023 and has no personal knowledge of what transpired thereafter.

Respondent CUPE

26. Similarly, CUPE submitted that SHSA should be removed as a party to this Application given the merger agreement of November 9, 2023 and subsequent Board Order.

27. CUPE submitted that they first became aware of the Applicant when L.P. contacted them in mid-December 2023 seeking advice. She was advised to follow SHSA's process and that based on the information L.P. provided, the grievance should advance. L.P. advised the Employer she was seeking to have the Step 1 hearing rescheduled. The Applicant declined to have the meeting as the Employer had indicated they would not change their position.

28. On March 12, 2024, L.P. sent information to CUPE on the selection grievance. The grievance was advanced to the Employer on March 25, 2024. After the Employer rejected the grievance as untimely, CUPE referred it to arbitration on March 28, 2024. On the same date, a grievance was filed asserting the Applicant's resignation had been made under duress.

29. CUPE submitted this Application was premature but due to the Employer's objection to timeliness, the Board should determine the Application.

Employer

30. The Employer submitted that the Application ought to be dismissed as the text messages relied upon by the Applicant did not establish a *prima facie* case. To the contrary, the text messages show SHSA took on the Applicant's case, set up and attended meetings with the Employer, filed a grievance, arranged a grievance hearing and obtained legal advice on the merits of the grievance. In the alternative, the resignation of the Applicant rendered the grievance moot.

IV. Analysis and Decision

31. Based on a review of the Application, Replies, and Response thereto, 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.

b. The onus is on the Applicant to establish a violation of section 20 of the *Act*.

c. Section 20 of the *Act* establishes the duty of fair representation. As this matter does not concern a dismissal, it must be considered under clause (b) of section 20.

d. At the time the Applicant filed this Application, CUPE had become the new bargaining agent pursuant to section 55 of the *Act*. That section provides:

> **55(2)** Where the board makes an affirmative declaration under subsection (1), for the purposes of this Act, the successor union acquires the rights, privileges and obligations of its predecessor under this Act or under a collective agreement or otherwise, and, without limiting the generality of the foregoing,
>
> (a) the successor becomes the bargaining agent for the employees in any unit for which the predecessor was the bargaining agent;
>
> (b) the successor is bound by any collective agreement which, on the date of the merger, amalgamation or transfer of jurisdiction, was binding on the predecessor with respect to employees in that unit;
>
> (c) the successor becomes the applicant in any certification proceeding commenced by the predecessor on or before the date of merger, amalgamation, or transfer of jurisdiction, and may, subject to this Act, be certified by the board as the bargaining agent for the unit in respect of which the application was made; and
>
> (d) the successor union becomes, or is entitled to become, a party to any other proceedings taken under this Act, including proceedings under a collective agreement, which are pending on the date on which the merger, amalgamation, or transfer of jurisdiction takes place to which the predecessor union was, or was entitled to be, a party.

e. On February 22, 2024, the Board through Order No. 1730, ordered CUPE to be the bargaining agent retroactive to November 9, 2023, the date of the merger agreement. As the new bargaining agent, CUPE then became responsible for any outstanding grievances left behind by SHSA.

Premature

f. The allegations raised by the Applicant speak to issues that arose at a time when SHSA was the bargaining agent. As the successor bargaining agent, CUPE assumed all past and present obligations in the representation of the membership, including the Applicant.

g. In so doing, CUPE advanced the selection grievance to Step 2 of the process and ultimately referred the grievance to arbitration. In addition, another grievance has been filed by CUPE on behalf of the Applicant disputing the voluntariness of her resignation.

h. Neither grievance has been resolved at this point in time and both remain outstanding. In other words, the Applicant continues to be represented by CUPE at this time and neither grievance is yet concluded. The Board has said when grievances are not yet fully resolved, or the union has not yet withdrawn them, an application will be premature. See *B.L. v. United Steelworkers, Local 9074* 2022 CanLII 26852 (MB LB). Also, in *M.D. v. Amalgamated Transit Union, Local 1505* (2021 CANLII 23597 (MB LB), the Board found at para 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.

i. The issue of the timeliness of the grievance is a matter to be determined by an arbitrator at an arbitration. As such, the Board makes no finding in that regard.

***Prima Facie* Case**

j. Section 20(b) obligates the bargaining agent not to behave in a certain manner when representing the rights of any employee under a collective agreement. The terms "arbitrary", "discriminatory" and "bad faith" has been defined in *J.H.B. v. Canadian Union of Public Employee*s (2009), 164 C.L.R.B.R. (2d) 182 at page 190 as follows:

> "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;

k. The manner of representation was discussed in *M.D. v Winnipeg (City),* 2021 CanLII 23597 (MB LB) where the Board distilled a number of principles as they relate to section 20(b), including:

> 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.

l. In addition, unions are not held to a standard of perfection. As the Board noted in *B.W v Salem Home Support Association*, 2023 CanLII 139492 (MB LB), at paragraph 28(c):

> 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.

m. While the Applicant seemingly feels that the process took too long and that she was denied access to SHSA's lawyer, although promised meetings with him, this is insufficient to establish a *prima facie* case. Further, a grievance was ultimately filed by SHSA. Even accepting that R.O. did not specify that December 15th was

a grievance hearing, the Employer nonetheless treated it as such and issued a denial of the grievance on December 19, 2023.

Conclusion

n. As the Board has determined that this Application is premature, and the member ought to allow CUPE to continue their representation to a conclusion on the Applicant's outstanding issues, the Board declines to take any further action on the matter pursuant to section 30(3)(c) of the *Act*. In any event, the Board finds the Applicant has not established a *prima facie* case to ground a section 20(b) complaint under the *Act*. In the result, the Application is dismissed.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by P.T. on March 8, 2024.

DATED at **WINNIPEG**, **Manitoba**, this 31st day of May, 2024, and signed on behalf of the Manitoba Labour Board by

"Original signed by"
H. Krahn, Vice-Chairperson

HK/dh/acr/kt-s