Manitoba Labour Board
Suite 500, 5th Floor - 175 Hargrave Street Winnipeg, Manitoba, Canada R3C 3R8
T 204 945-2089 **F** 204 945-1296
www.manitoba.ca/labour/labbrd
MLBRegistrar@gov.mb.ca

DISMISSAL NO. 2604
Case No. 57/24/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

G.Q.,

Applicant,

- and -

Canadian Union of Public Employees, Local 204,

Bargaining Agent/Respondent,

- and -

SHARED HEALTH,

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. On March 26, 2024, the Applicant filed an application with the Manitoba Labour Board (the "Board") seeking remedies for an alleged unfair labour practice contrary to Section 20 of *The Labour Relations Act* (the "*Act*"). The Applicant alleged that the Respondent had violated Section 20 of the *Act* by refusing to proceed to arbitration with his grievance.

2. On April 19, 2024, following an extension of time, the Respondent filed its Reply. The Respondent requested the Board dismiss the Application without a hearing, as the Application had failed to establish a *prima facie* case. Further, the Respondent denied that it had acted in an arbitrary, discriminatory, or bad faith manner.

3. On April 19, 2024, following an extension of time, the Employer filed its Reply advising the style of cause ought to be amended, indicating Shared Health as the Employer. Further, the Employer submitted the Applicant failed to adduce any evidence as to how the Respondent failed to represent his interests.

4. On April 23, 2024, the Applicant filed a Response to the Replies, reiterating his position.

5. For the reasons set out below, the Board has concluded that the matter should be dismissed as it fails to set out a *prima facie* case.

II. Background

6. The Applicant is employed as a plumber with Shared Health. On the morning of August 9, 2022, he experienced car trouble on the way to work. Later that day, at approximately 3:00 p.m., he texted his supervisor asking for time off for the following day to deal with his car repair. The supervisor denied the request, citing a shortage of staff due to the late notice.

7. The Applicant then approached the Director of Facilities and Maintenance Operations for time off. He was told by the Director that while they could not accommodate time off the following day, he would be allowed to take time off on August 11, 2024, to which the Applicant agreed.

8. The following day, August 10, 2022, the Applicant did not attend work until 11:00 a.m. and did not call in to advise he would be late. He had instead brought his car to his dealership to be repaired.

9. An investigation meeting was held with the Employer, a representative of the Respondent, and the Applicant on September 6, 2022, over what occurred on August 9 and 10. The Applicant told the Employer he misread the text from the Director and believed he had August 10 off to deal with his car, and not August 11. He told the Employer that *The Employment Standards Code* (the "*Code*") allowed him to take the leave he had taken, and that the Employer was not able to decline this request for personal leave, nor when the personal leave would be taken by an employee.

10. During a break in the meeting, the Applicant met with his Union representative and told her he would file a Duty of Fair Representation complaint against her and the Respondent if he received discipline.

11. The Employer issued a verbal warning to the Applicant on September 13, 2022, for failure to report to work on time and not following the appropriate call-in process.

12. A grievance was filed at Step 2 on September 15, 2022, seeking, among other things, removal of the discipline.

13. A Step 2 grievance hearing was held on December 2, 2022. In attendance for the Respondent was Margaret Schroeder, Union Support Officer, who presented the Applicant's position based on materials he had provided her on November 20, 2024.

14. The grievance was denied on December 13, 2022, and the Respondent advanced the grievance to Step 3 on January 30, 2023.

15. On March 20, 2023, a grievance hearing was held where the Respondent again presented the Applicant's position that he was entitled to Family Related Leave pursuant to the *Code*. On May 8, 2023, the Employer denied the grievance since in their view, there was no violation of the Collective Agreement.

16. On November 9, 2023, while meeting with the Respondent and their legal counsel to prepare for arbitration on an unrelated grievance, the Applicant asked for an update on the Family Related Leave grievance. The Union provided the file to their counsel on November 14, 2023, for her review. On November 20, 2023, the grievance was referred to arbitration.

17. On December 4, 2023, during a videoconference meeting with the Respondent, their legal counsel, and the Applicant, legal counsel advised the Applicant of her concerns with proceeding further with the grievance. In response, the Applicant threatened to file a complaint with the Board if the grievance was not taken to arbitration.

18. The Respondent requested a legal opinion from their legal counsel, which was provided on February 20, 2024. That opinion concluded the grievance did not have a reasonable likelihood of success at arbitration. As per the recommendation in the legal opinion, on February 26, 2024, the Respondent asked the Employer if the verbal warning could be reduced to a non-disciplinary letter of direction. On March 1, 2024 the Employer declined to do so.

19. On March 8, 2024, the Respondent provided the Applicant a summary of the legal opinion, including a copy of the legal opinion, and recommended withdrawing the grievance. He was given the option to appeal that recommendation by April 3, 2024. The Applicant did not appeal.

20. On March 9, 2024, the Applicant advised the Respondent he would be filing a complaint at the Board.

III. Positions of the Parties

Applicant

21. The Applicant submitted that the *Code* obligated the Employer to give him Family Related Leave as necessary. The Respondent had refused to proceed to arbitration with his grievance.

22. In his Response, the Applicant claimed a family vehicle was within the purview of family responsibilities and employers do not have control over when employees can take the leave. He said he has a family, and he needs an operating vehicle to manage his responsibilities.

23. He said he felt the matter had been handled inappropriately by the Respondent.

Respondent

24. The Respondent submitted that the Application failed to raise a *prima facie* case and there was no evidence that the Respondent acted in a manner that was arbitrary, discriminatory, or in bad faith.

25. A grievance had been filed, proceeded through the various Steps, and was referred to arbitration, but a legal opinion, recommended the arbitration not be pursued further. The grievance has not yet been withdrawn.

Employer

26. Similarly, the Employer submitted the Applicant failed to set out any particulars or evidence as to how the Respondent failed to represent his interest or that the Respondent acted in a manner that was arbitrary, discriminatory or in bad faith.

27. Therefore, the Employer submitted that the Application ought to be dismissed without a hearing as it failed to establish a *prima facie* case regarding a violation of Section 20 of the *Act*.

Analysis and Decision

28. Based on a review of the Application, Replies, and Response thereto, the Board has determined an oral hearing is not necessary as this matter can be determined on the basis of the written material filed by the parties.

29. The onus is on the Applicant to establish a violation of Section 20 of the *Act*. 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.

30. A good summary of the meaning given to the terms “arbitrary”, “discriminatory” and “bad faith” by the Board is discussed in *J.H.B. v. Canadian Union of Public Employees* (2009), 164 C.L.R.B.R. (2d) 182 where the Board said 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.

31. It is also well understood that a breach of Section 20 will not occur simply because a Union decides not to proceed to arbitration with a grievance even where a grievor disagrees with such a decision. This is particularly so where the Union has obtained legal advice and followed that advice.

32. In a number of decisions, the Board has reiterated that relying on legal advice, will be a potent defence to Section 20 complaints.

33. In *M.D. and Manitoba Nurses Union,* MLB Case No. 548/07/LRA, the Board said:

> b. The fact that the Applicant disagrees with the Respondent's decision not to file a grievance or to pursue a grievance to arbitration regarding of the "duty to accommodate" issue does not constitute a breach of Section 20(b). A union is entitled to decide not to file a grievance; not to pursue a grievance to arbitration; and is entitled to decide to settle a grievance, with or without an employee's agreement, so long as the union's decision is not arbitrary, discriminatory, or made in bad faith.
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> c. The Respondent, like any bargaining agent, is entitled to rely upon legal opinions and/or advice when determining whether or not to file a grievance in the first instance; whether to take a grievance to arbitration; or whether to settle a dispute [see Re Maintenance Trades, [2006] MLBD No. 2, at p. 5 and 6]. In this case, the Respondent sought and obtained legal advice from experienced counsel in respect of the Applicant's circumstances and a copy of the legal opinion was provided to the Applicant. Further, legal counsel met with the Applicant prior to preparing the opinion and the Board is satisfied that legal counsel reviewed the relevant documentation and factual circumstances pertaining to the Applicant's circumstances.

34. In this case, the Respondent relied upon the advice of experienced counsel who provided a lengthy legal opinion that concluded the grievance the Applicant wished to advance did not have a reasonable likelihood of success.

35. Indeed, the opinion suggested that advancing this grievance to arbitration could result in a decision that could be harmful to other members of the Union.

36. The Applicant did not say how relying upon that advice amounted to arbitrary, discriminatory, or bad faith conduct by the Respondent. He simply disagreed with the legal opinion and threatened throughout the Respondent’s representation of his issue to file this complaint if he did not get what he wanted.

37. Based on the foregoing, the Board has determined that the Applicant has failed to establish a *prima facie* case and, accordingly, the Board declines to take any further action on the complaint, pursuant to Subsection 30(3) of the *Act*. In the result the Application is to be dismissed.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by G.Q. on March 26, 2024.

DATED at **WINNIPEG**, **Manitoba**, this 5th day of July, 2024, and signed on behalf of the Manitoba Labour Board by

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

HK/st/gmn/fs-s