

Manitoba Labour Board

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DISMISSAL NO. 1892

Case No. 65/08/LRA

C/R Case No. 66/08/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

J.H.B.,

Applicant,

- and -

CITY OF WINNIPEG,

Employer,

- and -

Canadian Union of Public Employees, Local 500,

Respondent.

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

WHEREAS:

1. On February 26, 2008, with additional documentation filed on February 27, 2008, the Applicant filed an application seeking remedy for an alleged unfair labour practice contrary to Sections 20(b), 30(1), and other relevant sections of *The Labour Relations Act*.
2. On March 18, 2008, following an extension of time, the Respondent filed its Reply denying each and every allegation made in the application.
3. On April 18, 2008, following an extension of time, the Employer, through Counsel, filed its Reply asserting that a Section 20 complaint can claim relief only from a union, denying the Employer committed an unfair labour practice, and requesting that any portion of the application relating to the Employer be summarily dismissed.
4. On September 23, 2008 and October 1, 2008, the Board, by way of a letter from the Registrar, informed the parties that the Board determined the matters would proceed to hearing to address the preliminary issue as to whether the Applicant has established a *prima facie* case, as well as the issue raised by the Employer in Case No. 66/08/LRA, regarding

Section 140(7) of *The Labour Relations Act* and deferral to arbitration.

5. On January 5, 2009, the Board conducted a hearing, at which time all parties appeared before the Board and presented evidence and argument; the Employer and Respondent being represented by Counsel.
6. The Board reviewed and considered the entire application including all of the documentation submitted by the Applicant as well as the evidence and submissions of the parties at the hearing. A summary of the facts relevant to the disposition of this case is as follows:
 - a) The Applicant asserted that the Union breached section 20 by failing to fairly represent him in relation to a grievance concerning net pay top up for the period of time commencing March 22, 2002 and ending February 7, 2004. Article 23 of the collective agreement in force between the Union and the Employer, the City of Winnipeg, provided for compensation to the extent of an employee's net pay. The Applicant maintains that the manner in which the Employer calculated his net pay top up was incorrect and in violation of the collective agreement. The Applicant maintained that he is entitled to a further payment from the City of Winnipeg of between \$15,000.00 and \$16,000.00 over and above the \$2,411.02 that he received.
 - b) At the hearing, the Applicant provided a bank statement, payroll information and two benefit statements in support of his position that the Employer had erred in its calculations. He added that he did not know whether the error was deliberate or not, however in his view it was clear that the amount paid to him was incorrect. The Applicant added that others including individuals working for Revenue Canada, the Provincial Ombudsman and B.H. (an employee of the City of Winnipeg) verbally advised him that the calculation made by the Employer "did not make sense".
 - c) The Applicant was critical of the alleged delay of the Union in responding to his request for assistance with his concerns related to the issue noted above. In addition, he suggested that the Union failed to represent him when it initially advised him to discuss his issue directly with the Employer. Furthermore, he stated that the Union failed to properly or fully investigate his concerns, refused to discuss his concerns with him, and that it ought to have hired an auditor with an accounting background to review his claims in light of what he considers to be the complexity of the calculations involved.
 - d) The Applicant also filed an unfair labour practice against the Employer concerning the issue referred to in paragraph (a) above.

- e) The Applicant indicated at the hearing that the sole issue which he wished to pursue by way of the current applications(s) concerned the issue referred to in paragraph (a) above.
- f) By letter dated February 25, 2004, the Applicant first received a detailed written response from the Employer regarding his inquiries into the calculation of the \$2,411.02 paid to him respecting the net pay top up for the period of time commencing March 22, 2002 and ending February 7, 2004.
- g) The Applicant wrote to the President of the Union on March 1, 2004 to indicate that he did not feel that the payment made to him by the Employer complied with Article 23 of the collective agreement. The President replied by letter dated March 3, 2004 and requested that the Applicant direct his inquiries regarding the calculation to the Employer. In fact, by letter dated March 2, 2004, the Applicant had written to the Employer with respect to the payment he had received.
- h) By letter dated March 5, 2004, the Applicant wrote to B.R., Special Assignments Officer with the Union, regarding the calculation. B.R. provided a lengthy and detailed response to the Applicant by letter dated March 17, 2004 in which he attempted to answer the Applicant's inquiries while explaining the Union's position regarding the proper interpretation of Article 23 of the collective agreement. B.R. indicated that if the Employer had in fact calculated payments in the manner suggested by the Applicant, it would be in violation of the collective agreement. B.R. concluded by indicating that he would be prepared to facilitate a meeting with the Applicant, himself and the Employer in order to have the Employer explain its calculation.
- i) The Applicant agreed that he did meet with B.R. on two or three occasions in his office regarding the issue of the Employer's calculation.
- j) The Applicant further agreed that he did not avail himself of the opportunity offered by B.R. to attend a meeting with the Employer in order to have the calculation explained to him in detail. The Applicant stated that it would have been "pointless" to attend such a meeting.
- k) On March 19, 2004, the Applicant wrote to the Employer, care of B.H., to reiterate that he had not been paid all of the amounts owed to him. He accused the Employer of singling him out for adverse treatment. The Applicant wrote to the Employer's Chief Administrative Officer, A.S., on March 23, 2004. He indicated that he had not received a response from payroll or human resources and that there had "been no communication from the City explaining the propriety of the calculation process that was used or where the WCB benefits were factored into a gross pay adjustment". The Applicant requested in this letter that A.S. "personally enquire into this situation and

advise me of the action that will be taken by the City to ensure my pay has been, is, and will continue to be, properly processed”. A.S. responded to the Applicant by letter dated April 6, 2004.

- l) By letter dated March 23, 2004, the Employer’s Paymaster, D.W., wrote to the Applicant and provided another detailed explanation of the calculation made by the Employer in relation to the net pay top up he received for the period of time commencing March 22, 2002 and ending February 7, 2004. The letter concludes with an invitation for the Applicant to contact D.W. if he had any further questions or concerns regarding the calculations. A copy of the correspondence was sent by the Employer to B.R. The Applicant continued to have discussions and to exchange correspondence with the Employer following D.W.’s letter of March 23, 2004.
- m) On April 19, 2004, the Applicant wrote to the Union regarding the “continuing difficulties that I am experiencing with my payroll from the City of Winnipeg”. The Applicant states therein that the Union failed to address his request to “have an accountant go over the pay roll (sic) mess the City has made”. He asked that the Union “clarify the assistance it will provide in these matters”.
- n) By letter dated April 23, 2004, the President of the Union responded that the Union had “offered numerous times verbally, and in writing” to meet with the Applicant and the Employer to have the calculations explained, however the Applicant declined all offers to attend such a meeting and instead met with the Employer without union representation. The President of the Union added that the Union was not satisfied that the Employer had calculated his pay incorrectly. He noted that “until such time that the Union can meet with all the stakeholders involved and acquire a full understanding of the issues, the Union is not prepared to take further action at this time”. The letter concludes that if the Applicant required the Union’s assistance in relation to the issue, he should contact B.R. “to convene a meeting with the appropriate officials of the City of Winnipeg to try to resolve the ongoing issues with regard to your pay”.
- o) The Applicant wrote to the Union on April 27, 2004 at which time he indicated that he did not feel that a meeting with the Employer would be of assistance without first having information in writing from the Employer regarding “the figures being used”.
- p) The Applicant continued to exchange correspondence with the Employer and the Union regarding the issue of his net pay top up as well as various other matters. On October 1, 2006 and May 31, 2007, the Employer provided further correspondence explaining the payments received by the Applicant.

- q) On March 1, 2007, the Union scheduled a meeting with the Applicant to review explanations the Union received from the Employer regarding the calculations. The Union scheduled a meeting between the Applicant, B.R. and the Employer on May 3, 2007 in order to review the method of calculation. The Applicant agreed to the meeting, however on the morning of May 3, 2007 he called the Union to indicate that he would not be able to attend due to health issues. The Union offered to have the meeting rescheduled, however, the Applicant directed the Union to proceed with the meeting in his absence. B.R. and G.M. of the Union attended the May 3, 2007 meeting with City officials including D.R., Manager of Payroll, A.M., Manager of Human Resources, and G.T., Corporate Finance. At the meeting, the calculations made by the Employer were reviewed and explained to the Union. G.M. followed up on the meeting with the letter dated May 31, 2007, referred to above, in which she provided another detailed analysis of the calculations in question.
- r) The Applicant was not satisfied with the explanation and continued to suggest that the Union ought to have retained an accountant or auditor to inquire into the issue.
- s) The Applicant agreed that he was never able to explain how specifically the calculation made by the Employer was incorrect. He testified at the hearing that he was not qualified to show how the calculation was wrong, however in his view the calculation did not make any sense and “the numbers just don’t add up”.
- t) The Applicant acknowledged during cross-examination that the Union never accepted his position regarding the calculation and instead that the Union agreed that the Employer had calculated the amount payable to the Applicant correctly.
- u) On November 5, 2007, G.M. wrote to the Applicant regarding the issue of his net pay top up for the period of time commencing March 22, 2002 and ending February 7, 2004. G.M. indicated therein that the Union determined that “there is no evidence to proceed with a Union Policy Grievance on this matter”. G.M. concluded that, having received information in writing and verbally from the Employer, it was his opinion that a grievance would not be successful at arbitration. As a result of that determination, G.M. indicated that he would be recommending to the Union’s Executive Committee that the Union not proceed with the matter. He added that if the Applicant disagreed with the recommendation not to proceed, he had the right to appear at the Executive Committee meeting on November 19, 2007 and that he could bring representation with him to that meeting if he so chose.
- v) On November 19, 2007, approximately two hours prior to the Executive Committee meeting, the Applicant sent an email to G.M. to indicate that he would not be appearing at the meeting but that he would send a letter.

- w) The Applicant wrote to G.M. on November 28, 2007 at which time he insisted that the calculation was incorrect and he expressed his view that the Union failed to put forward the “appropriate effort of due diligence to properly investigate and represent me on this issue”.
 - x) G.M. wrote to the Applicant on November 29, 2007 at which time G.M. reiterated that he would be recommending to the Executive Committee that the Union not proceed any further with the matter. At that time, G.M. offered another opportunity for the Applicant to attend and make representations to the Executive Committee regarding his recommendation and noted that the next Executive Committee meeting was scheduled for December 10, 2007.
 - y) The Applicant replied by letter dated December 4, 2007. He indicated that he was unable to appear at the December 10, 2007 meeting. The Applicant did not request that the Committee defer making a decision on his issue until such time as he was able to appear. Rather, the Applicant requested that G.M. “represent my views and suggestions in prior correspondence as well as this to all those concerned on how I believe this matter could be effectively resolved”. The Applicant continued that he was “perplexed” as to why the Union “chose to take the City’s word for it without doing a proper and thorough investigation” and he reiterated that the Employer’s calculation “just does not make any sense”.
 - z) At the meeting on December 10, 2007, the Union’s Executive Committee decided not to further pursue a grievance on behalf of the Applicant and he was advised of this decision.
7. Applying the material facts recited in paragraph 6 to the following legal principles established by the Board concerning alleged breaches of Section 20 of the *Act*, the Board **DETERMINED:**
- a) The onus is on the Applicant to establish a violation of Section 20 of the *Act*. In the present case, which does not concern the dismissal of the employee, Section 20(b) is applicable. Section 20(b) prohibits bargaining agents from acting in a manner which is arbitrary, discriminatory or in bad faith.
 - b) The Board has reviewed the meaning of “arbitrary”, “discriminatory” and “bad faith” in the context of Section 20 of the *Act* in a number of cases including *Moreau and M.A.H.C.P.*, [2004] 102 C.L.R.B.R. (2nd) 263 at page 268 and *Beach and Manitoba Teachers’ Society* [2005] M.L.B.D. No. 2.
 - c) “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 a 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.

- d) Bargaining agents have the discretion to determine whether or not a grievance shall be filed, referred to arbitration, or ultimately withdrawn or settled with or without the consent of the employee concerned. Provided that this discretion is exercised in a manner which is not inconsistent with the provisions of the *Act*, principally Section 20 thereof, the Board will not interfere with a Union's decision. The fact that an employee disagrees with the decision of the Union not to pursue a grievance to arbitration does not, in itself, constitute a breach of Section 20 of the *Act*.
- e) There is no evidence that the Union in this case acted in a manner which was arbitrary, discriminatory, or bad faith as those terms have been characterized by the Board. The material filed by the Applicant as well as his testimony at the hearing reveal the following. The Union met with the Applicant, investigated his concerns, received verbal and written accounts from the Employer which it accepted, reviewed the applicable provisions of the collective agreement and considered the issues prior to determining that it would not proceed further with the Applicant's concerns. The Union offered to meet with the Applicant and the Employer to review the calculation; however he refused to attend and ultimately advised the Union to meet with the Employer in his absence. The Union did meet with the Employer and received a detailed explanation of its calculation verbally and in writing. The Applicant was given the opportunity to contest the decision not to proceed to arbitration and to make submissions to the Union's Executive Committee, however he chose not to do so. There is no evidence that the decision not to proceed with the Applicant's issue was based on any improper considerations, irrelevant factors, hostility, ill-will, discrimination or any other conduct prohibited by Section 20(b) of the *Act*.
- f) In so concluding, the Board considered the alleged delay of the Union in responding to the Applicant's request for assistance. At the time the Applicant initially brought his concerns to the Union in early 2004, the Union provided timely advice. The matter was subsequently drawn out due to the Applicant's refusal to accept the Union's and Employer's conclusion, however, in the circumstances of this case, the Board is satisfied that the period of time that it took for the Union to finally and

definitively conclude that it would not pursue the Applicant's grievance is not indicative of a breach of its obligations under Section 20 of the *Act*. In addition, the Applicant suggested that the Union failed to represent him when it initially advised him to discuss his concerns with the Employer. Given the nature of the issue and the subsequent actions of the Union in dealing with the Applicant's concerns, that advice does not constitute a breach of Section 20 of the *Act*. The Board further considered the Applicant's submission that the Union failed to properly or fully investigate his concerns, refused to discuss his concerns with him, and that it ought to have hired an auditor with an accounting background to review his claims in light of what he considers to be the complexity of the calculations involved. There is no evidence that the Union did not represent the Applicant, or that it did not thoroughly investigate and discuss his concerns with him. The evidence indicates quite the opposite. The Union met and corresponded with the Applicant on numerous occasions, it provided him at an early stage with an analysis of the collective agreement with respect to the issue of the calculation, and it discussed the matter with the Employer and met with the Employer to obtain an explanation of the calculation at issue. In addition, the Union received written correspondence from the Employer, which it provided to the Applicant, regarding the calculation. The Union did not agree to retain an accountant or auditor to review the matter. In the circumstances of this case, the decision of the Union to not retain professional advice does not constitute a breach of Section 20 of the *Act*. Clearly, the unwavering view of the Union was that the Employer calculated the amount owed to the Applicant in a correct manner and in accordance with the collective agreement. There is no evidence that the Union's view of the issue or its decision was arbitrary, discriminatory or in bad faith.

- g) The application also references Section 30(1) and "any other relevant sections" of the *Act*. Section 30(1) is the provision in the *Act* which permits the filing of an unfair labour practice which the Applicant has done. There is no evidence that satisfies the Board that any other sections of the *Act* have been violated as alleged.
8. The Board, following consideration of material filed, evidence and argument presented is satisfied that the Applicant has failed to establish a *prima facie* case that the Union has acted contrary to Section 20 or any other sections of *The Labour Relations Act* and accordingly, pursuant to Section 140(8) of *The Labour Relations Act*, finds that the application should be **DISMISSED**.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by J.H.B. on February 26, 2008.

DATED at **WINNIPEG**, Manitoba, this 3rd day of April 2009 and signed on behalf of the Manitoba Labour Board by

“Original signed by”

C.S. Robinson, Vice-Chairperson

BJG/dlm/acr/rb-s