

MANITOBA LABOUR BOARD

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CASE NOS. 190/09/LRA and 104/09/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

N.S.,

Applicant,

- and -

Manitoba Association of Health Care Professionals,

Respondent,

- and -

HEALTH SCIENCES CENTRE,

Employer.

BEFORE: C. S. ROBINSON, Vice-Chairperson

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

REASONS FOR DECISION

On April 16, 2009, the Applicant filed an Application seeking Remedy for Alleged Unfair Labour Practice contrary to section 20 of *The Labour Relations Act* (the “*Act*”) against the Manitoba Association of Health Care Professionals (the “Union”). On May 4, 2009, the Union filed its Reply denying that it committed an unfair labour practice and requesting that the Application be dismissed without a hearing. The Employer, Health Sciences Centre, also filed a Reply requesting that the Application be dismissed. Following consideration of the material filed, on June 9, 2009, the Board dismissed the Application pursuant to sections 30(3)(c) and 140(8) of the *Act*, having determined that the Application did not disclose a *prima facie* violation of section 20 of the *Act*.

The Applicant filed an Application Seeking Review and Reconsideration of the Board's decision on June 22, 2009. The Union and Employer each filed Replies disputing the Application and requesting that it be dismissed. Having determined to its satisfaction that the Applicant had not provided any new evidence that would constitute a reasonable basis for review and further that the particulars provided by the Applicant did not affect the Board's original decision, by Order dated August 14, 2009, the Board dismissed the Application Seeking Review and Reconsideration. The Applicant subsequently requested Written Reasons for the Board's decision. These Reasons address both of the Applications filed by the Applicant.

The principal issue in the unfair labour practice case concerns whether the Union failed to comply with the duty of fair representation established under section 20(b) of the *Act*. The Applicant asserts that the Union effectively concurred with the Employer's interpretation of the collective agreement and advised the Applicant that it would take no further action with respect to her complaint that she was not paid all monies owing to her by the Employer while on a Graduated Return to Work Program.

The facts of this matter may be briefly summarized as follows. The Applicant suffered an injury which required surgery in October of 2008. Following a period of recovery and rehabilitation, her surgeon advised her that she could resume her duties as an employee of the Employer commencing in early February of 2009. However, the surgeon further advised that she limit her hours to four per day during the first week of her return to work and that she gradually increase her hours until early March of 2009 at which time she could resume full-time work.

In accordance with the surgeon's direction, on January 26, 2009, the Applicant met with a representative of the Employer and a representative of the Union in order to establish the hours which she would work upon her return. At the meeting a "Graduated Return to Work Program Schedule" was agreed upon and signed by the Applicant, and the representatives of the Union and the Employer. At that time, the parties, including the Applicant, also agreed in writing to participate in a "Graduated Return to Work Program" and to follow the specific written

Guidelines which govern that Program. One of the said Guidelines is a requirement that the Applicant “file for Disability & Rehabilitation Benefits through HEBP [the Healthcare Employees Benefit Plan] as soon as possible by contacting the HSC Benefits Section of Human Resources”. A follow-up meeting was scheduled for February 24, 2009.

Reference to the “Disability & Rehabilitation Plan” is found in Article 2205 of the current collective agreement entered into by the Union and Employer which reads in part as follows:

2205 Disability & Rehabilitation Plan

The Disability & Rehabilitation Plan with benefit levels, as determined by the HEBP Board of Trustees, shall continue to be implemented for all eligible employees. The Employer will contribute to a maximum of two point three percent (2.3%) of base salary to fund the Provincial Disability and Rehabilitation Plan.

The Union pointed out in its Reply that the “Disability & Rehabilitation Plan” set out in this provision is a negotiated benefit for employees intended to provide a form of a wage loss benefit for qualified employees who are ill or injured. The Union stated that in the present case the “Disability & Rehabilitation Plan” applied to provide a wage loss benefit to the Applicant while she participated in the “Graduated Return to Work Program” which she agreed upon. The “Graduated Return to Work Program” is a work hardening program which, as is noted in the “Guidelines” agreed to by the Applicant, permits employees to return to a safe working environment which respects individual restrictions, on terms acceptable to the employee, the Union, and the Employer. The said “Guidelines” further provide that it is a responsibility of the Employer to consider such an employee to be an “extra” person in addition to the regular complement of staff.

The Applicant made an application for benefits under the “Disability & Rehabilitation Plan” which was accepted by the Healthcare Employees Benefit Plan. The Plan provides benefits equal to 66 2/3% of monthly pre-disability earnings which, in the Applicant’s case, provided a benefit of \$3,564.00 per month.

While the Applicant applied for and received benefits under the “Disability & Rehabilitation Plan” during the “Graduated Return to Work Program”, she claims that she was entitled to further payment and benefits from the Employer during the period of her graduated return to work. Her application indicated that she spoke to one of the Union’s Labour Relations Officers regarding this issue and was advised that, in the Union’s view, the Employer had not made any mistake and did not owe her additional pay. The Applicant’s father also contacted the Labour Relations Officer and was advised that the Employer’s practice regarding pay during the “Graduated Return to Work Program” was consistent with Article 2205 of the collective agreement. The Applicant’s father also discussed the issue with the President of the Union who confirmed that, in her view, the Union could not “take any action” on behalf of the Applicant.

The Applicant alleged that the Union has violated section 20 of the *Act* which provides the following:

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.

As the present matter does not concern the dismissal of an employee, subsection 20(a) of the *Act* does not apply. The scope of the duty of fair representation in cases not concerning dismissal is limited to acting in a manner which is not arbitrary, discriminatory or in bad faith. The Board has reviewed the meaning of the terms “arbitrary, discriminatory or in bad faith” in many cases. A concise summary of the Board’s decisions in this regard appears in *J.H.B. v. Canadian Union of Public Employees* (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 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...

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.

There is no evidence that the Union in this case acted in a manner which was arbitrary, discriminatory, or in bad faith as those terms have been characterized by the Board. The material filed by the Applicant reveals that she applied for and received benefits from the Healthcare Employees Benefit Plan under the “Disability & Rehabilitation Plan” as provided for under the collective agreement. The Applicant participated in discussions regarding her Return to Work Program with the Union and the Employer and she agreed to the Program’s written Guidelines. The Application also notes that she and her father discussed her concerns with the Union on a number of occasions and they were advised that the Union’s view was that the Employer was correct and acting in compliance with the collective agreement and, accordingly, the Union was not prepared to take further action. The Application does not disclose any facts that suggested that the decision of the Union not to proceed with the Applicant’s issue was based on any improper considerations, irrelevant factors, hostility, ill-will, discrimination, indifference, capriciousness, or any other conduct prohibited by Section 20(b) of the *Act*. Accordingly, the Board exercised its discretion pursuant to sections 30(3)(c) and 140(8) of the *Act* to dismiss the Application.

With respect to the Application for Review and Reconsideration, the facts set out therein essentially echo those found in the original Application seeking Remedy for Alleged Unfair Labour Practice. The Board was satisfied that the Application for Review and Reconsideration failed to disclose any new evidence that would constitute a reasonable basis for review and further that the particulars provided by the Applicant did not affect the Board's original decision. As such, the Application was dismissed.

DATED at **WINNIPEG**, Manitoba, this 7th day of October, 2009 and signed on behalf of the Manitoba Labour Board by

“Original signed by”

C. S. ROBINSON, Vice-Chairperson

CSR:tj/rb-s