

Manitoba Labour Board

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DISMISSAL NO. 1930

Case No. 251/09/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An application by:

G.L.C.,

Applicant,

- and -

**D.K., President and L.P., Business Manager, of BCTGM –
Local No. 389 – C.L.C.,**

Bargaining Agent/Respondent,

- and -

WESTON BAKERIES LIMITED,

Employer.

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

SUBSTANTIVE ORDER

WHEREAS:

1. On August 25, 2009, the Applicant filed an application seeking remedy for an alleged unfair labour practice contrary to Section 20 of *The Labour Relations Act* (the “Act”), with additional documentation filed on September 21, 2009,
2. On September 16, 2009, following an extension of time, the Respondent, through Counsel, filed its Reply, requesting that the application be dismissed without a hearing.
3. On September 21, 2009, following an extension of time, the Employer, through Counsel, filed its Reply asking that the Application be dismissed. The Employer filed additional

documentation on September 22, 2009, asking the Board to disregard the documentation filed by the Applicant on September 21, 2009.

4. The Board, following consideration of material filed by the parties, has determined the following:
 - a. An oral hearing is not necessary as this matter can be determined by a review of the written material filed by the parties.
 - b. The Applicant claims that the “Union would not acknowledge my accidents and the Production Supervisor...refused to fill out the WCB Incident Report, for the June and July incidents. However WCB accepted the claim of both incidents on the basis of the medical reports I provided”. He added that the Union directed him to speak to a Human Resources Advisor, presumably employed by the Employer, who advised him that it was “a WCB matter”. The Application went on to state that the Applicant was informed by WCB that they did not receive any reports from the Employer or Union. The Applicant asserts that he assumed the Employer and Union would “do all the right things” but on January 15, 2009, he said he realized that “nothing had been done”. The Applicant alleges, without any relevant particulars, that the Union and the Employer have colluded to “cover up” information regarding his Workers Compensation claim(s). He asserted that the Union has refused to assist him. However, the Application does not specify what, if any, grievance he wished the Union to file on his behalf or what provision of the collective agreement was allegedly breached by the Employer so as to give rise to a grievance.
 - c. The Applicant filed a similar Application with the Board which was dismissed by Dismissal No. 1916 on July 27, 2009.
 - d. The Union replied that the present Application should be dismissed without a hearing on the basis of the principle of *res judicata*. In the alternative, the Union invited the Board to dismiss the Application without a hearing as it does not disclose a *prima facie* case and its filing has been unduly delayed.
 - e. The focus of the Application is certain workplace accidents the Applicant allegedly sustained and the Workers Compensation claims that he subsequently filed (which he stated were ultimately accepted). It should be noted that bargaining agents do not owe a statutory duty under *The Labour Relations Act* to assist individuals whom they represent with claims brought under *The Worker’s Compensation Act*. Section 20 of the *Act* only imposes a statutory duty of fair representation upon bargaining agents “in representing the rights of any employee under the collective agreement”.
 - f. In *Re Peters and Winnipeg Police Association*, Case No. 184/08/LRA, May 21, 2008, the Board noted that a Union’s representation of an individual in relation to a Workers

Compensation appeal does not constitute the representation of the rights of an employee under a collective agreement. Specifically, the Board stated the following:

The duty of fair representation established by Section 20 of *The Labour Relations Act* imposes a duty upon bargaining agents exclusively with respect to “representing the rights of any employee under the collective agreement”. The Respondent’s effort to assist the Applicant with his Workers Compensation Appeal does not constitute the representation of the employee’s rights under the collective agreement. The Applicant has failed to establish a *prima facie* violation of Section 20 of the *Act*. Accordingly, the Board, following consideration of material filed, has determined the application is without merit, and, pursuant to Section 140(8) of the *Act*, the application is DISMISSED.

- g. Any complaint of the Applicant alleging that the Union contravened section 20 of the *Act* when it failed to assist him with his Workers Compensation claim(s) is clearly without merit as the Union is under no statutory responsibility to represent him respecting claims pertaining to rights that are not derived from the collective agreement. Therefore, those complaints are dismissed pursuant to section 140(8) of the *Act*.
- h. To the extent that the Application discloses any other complaints, the Board is not satisfied that the Applicant has demonstrated that the Union acted in a manner which was arbitrary, discriminatory or in bad faith as required to sustain a complaint under section 20(b) of the *Act*.
- i. A concise summary of the Board’s decisions regarding the duty of fair representation as established in section 20(b) of the *Act* 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*.

- j. The Application fails to disclose any particulars which constitute acts or omissions by the Union which may be characterized as arbitrary, discriminatory, or bad faith.
- k. In addition, the Board concurs with the assertion of the Union that the present Application advances essentially the same complaints as the Applicant made in his previous case before the Board. The Board accepts that the principle of *res judicata* applies and, to the extent that the same complaints are being advanced by the Applicant in the present Application as he submitted in his previous Application, which has been dismissed by the Board, those complaints are dismissed.
- l. Furthermore, the present Application was filed on August 25, 2009, which is long after he became aware of the facts upon which he relied in support of his complaints. The Board notes that the Application provides that:

On Jan. 15/09, when I went to Production Manager...to report that I was no longer able to physically do my job, I realized that nothing had been done regarding my case. This is in total violation of *The Labour Relations Act* Section 20.

- m. Section 30(2) of the *Act* provides that the Board may refuse to accept a complaint where its filing has been unduly delayed. Undue delay has been interpreted by the Board to mean periods of as little as six months in duration. See in this regard the Board's decision in *Kepron v. Brandon University Faculty Association* (2004), 103 C.L.R.B.R. (2d) 102. The Board is satisfied that the allegations giving rise to the present Application occurred long before the Applicant filed this complaint with the Board. By his own admission, he was clearly aware at least as of January 15, 2009, that, in his view, the Union violated Section 20 of the *Act*.
- n. Accordingly, for the reasons set out above, the Application is DISMISSED pursuant to sections 30(2), 30(3)(c) and 140(8) of the *Act* as it is untimely and otherwise without merit.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by G.L.C. on August 25, 2009, with additional documentation filed on September 21, 2009.

DATED at **WINNIPEG**, Manitoba this 30th day of October, 2009, and signed on behalf of the Manitoba Labour Board by

“Original signed by”

C.S. Robinson, VICE-CHAIRPERSON

BJG/acr/rb-s