

**Manitoba Labour Board**

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**DISMISSAL NO. 1937**

**Case No. 267/09/LRA**

**IN THE MATTER OF:     *THE LABOUR RELATIONS ACT***

**- and -**

**IN THE MATTER OF:     An Application by**

**B.M.,**

**Applicant,**

**- and -**

**National Automobile, Aerospace, Transportation and General  
Workers of Canada (CAW- Canada), Local 3005,**

**Bargaining Agent/Respondent,**

**- and -**

**BRISTOL AEROSPACE,**

**Employer.**

**BEFORE: W.D. Hamilton, Chairperson**

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

**SUBSTANTIVE ORDER**

**WHEREAS:**

1. On September 25, 2009, the Applicant filed an application (the “Application”) with the Manitoba Labour Board (the “Board”) seeking certain remedies for an alleged unfair labour practice contrary to Section 20 of *The Labour Relations Act* (the “Act”). The Applicant alleges that the Respondent Union (the “Union”), on or about September 17, 2009, wrongfully withdrew a policy grievance (the “Grievance”) which he had filed. As to remedial relief, the Applicant requests the Board order that the Grievance proceed to arbitration. In more particular terms, the Applicant filed the Grievance on April 22, 2009 claiming that certain benefit provisions of the collective agreement between the Union

and the Employer reduced those benefits when employees turned age 65, in violation of Article 3.01(e) of the Agreement and applicable provincial or federal legislation. The Grievance was filed on behalf of the Applicant and any other member affected by the benefit reductions. The Grievance requested that the Employer immediately ensure members who reach age 65 continue to receive the same entitlements as other employees, and that the parties to the Agreement amend the relevant provisions of the Agreement to ensure compliance with applicable legislation pursuant to Article 24.01 of the Agreement.

2. On October 19, 2009, following an extension of time, the Employer, through Counsel, filed its Reply asserting that the Application as a whole does not disclose that the Union acted in an arbitrary, discriminatory or bad faith manner.
3. On October 20, 2009, following an extension of time, the Union filed its Reply admitting that the Grievance was withdrawn on September 17, 2009, but asserting that, at all material times, the Union acted in a non-arbitrary, non-discriminatory and good faith manner; that it turned its mind to relevant considerations and based its decision on the interests of the bargaining unit as a whole. The Union asserts that the Application ought to be dismissed.
4. The Board, following consideration of material filed by the parties, has **DETERMINED:**
  - (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) As the Application does not deal with the dismissal of any employee, the Application is to be assessed under Section 20(b) of the *Act* which requires that the Union, in representing the rights of any employee under the Agreement, does not act in a manner which is "... arbitrary, discriminatory or in bad faith."
  - (c) The material filed discloses that members of the Union's committee, including the Applicant, had been discussing the issue of whether various provisions in the Agreement terminating or reducing benefits at age 65 were contrary to human rights legislation or Article 3.01(a) of the Agreement, which prohibits, *inter alia*, discrimination on the basis of age.
  - (d) It is not disputed that, on or about, April 22, 2009, the Applicant filed the Grievance, a copy of which is attached to the Application.
  - (e) The Plant Chairperson of the Union, Mr. Dan Davis ("Davis") sought a legal opinion in respect of the "age 65" issue and a legal opinion dated May 21, 2009 (Attachment B to the Application) was received. The legal opinion did not propose a specific course of action, but addressed the general state of the law on

the issue of providing benefits over the age of 65, and noted that, while denial of a benefit at age 65 is *prima facie* in violation of *The Human Rights Act*, an employer can justify this exclusion on the basis of the 3-part test outlined at page 4 of the opinion.

- (f) In the Application, the Applicant correctly notes that the legal opinion does not specifically address Article 3.01 of the Agreement, but the Board is satisfied that the opinion does address the matter of age discrimination and outlines the tests that must be met by an employer to justify what might otherwise be regarded as *prima facie* discrimination on the basis of age.
- (g) The legal opinion was received prior to the filing of the Grievance and the Board accepts that the Applicant received a copy of the opinion. The Application also discloses that the Plant Chairperson had concerns regarding the filing of the Grievance and the Board accepts that, on or about July 2, 2009, the Union's Bargaining Committee discussed the matter and determined that this issue was better raised as a human rights matter in an Human Rights forum (Para 25 of the Union Reply). The Board accepts that the view of the Union's Bargaining Committee was communicated to the Applicant.
- (h) The Applicant did file a complaint with the Human Rights Commission on or about July 13, 2009 (attached to the Union's Reply) and that this complaint addresses the same issue as the Grievance, the essence being that the employer was discriminating against its employees and their employment on the basis of age by reducing certain negotiated benefits at age 65.
- (i) The fact that the Applicant disagrees with the decision of the Union not to pursue the Grievance to arbitration and that the Applicant disagrees with the legal advice received by the Respondent does not constitute a breach of Section 20(b). A union may decide not to pursue a grievance to arbitration or to settle a grievance without an employee's agreement as long as the union's decision is not arbitrary, discriminatory or made in bad faith.
- (j) The Union, 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 Union sought and obtained legal advice in respect of discrimination issue raised by the Applicant and a copy of the legal opinion was provided to the Applicant.
- (k) When assessing the conduct of the Union, an objective standard of review and not a subjective standard must be used, meaning that the proper question to be asked is whether the Union's decision was one that could reasonably have been made

in the circumstances. Based on the legal advice received, the Union's decision that there was no legitimate basis to proceed to arbitration was a reasonable one and it is not the role of the Board to assume the role of surrogate arbitrator and decide whether the Grievance would have succeeded at arbitration.

- (l) In deciding not to take the Grievance to arbitration, the Application does not provide any particulars as to how the Respondent acted in an "arbitrary" or "discriminatory" manner under Section 20(b), as those terms have been interpreted by the Board. The material reveals that the Respondent directed its mind to the legal advice received. Further, the Application does not recite any acts or omissions which, if proven, would establish that the Union made its decision on the basis of attitude which can be characterized as "... indifferent and summary, or capricious and non-caring or perfunctory" [see *Re Moreau –and – Manitoba Association of Health Care Professionals* [2004] 102 CLRBR (2<sup>nd</sup>) 263, at p.268].
- (m) The Application does not reveal, on its face, that any decision of the Respondent or the conduct of its representatives was made in "*bad faith*" in that there are no facts alleged in the Application that the Union acted on the basis of hostility, ill will or dishonesty or that it attempted to deceive the Applicant or that it refused to process the Grievance for sinister purposes [see *Moreau, supra*, p.268; and *Re Beach*, [2005] MLBD No. 2].
- (n) The material filed reveals that the Respondent investigated the Applicant's concerns and that it considered relevant factors, including legal advice received.
- (o) See also the discussion of principles applied by the Board under Section 20(b) in *J.H.B. v. Canadian Union of Public Employees* (2009) 164 CLRBR (2d) 182 at p190.

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 B.M. on September 25, 2009.

**DATED** at **WINNIPEG**, Manitoba, this 16<sup>th</sup> day of November 2009 and signed on behalf of the Manitoba Labour Board by

*“Original signed by”*

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**William D. Hamilton, Chairperson**

WDH/ar/rb-s