ONTARIO LABOUR RELATIONS BOARD

2387-11-U Marcia Robertson, Applicant v. Canadian Auto Workers Union, Local 707, Responding Party v. Voith Industrial Services of Canada Inc., Intervenor.

BEFORE: Caroline Rowan, Vice-Chair.

APPEARANCES: H. Kopyto and Marcia Robertson appearing for the applicant; Farah Baloo, Ron Balazs, Ed Gopsill, and Paulo Ribeiro for the responding party; Jeremy Schwartz, Harry Devlin and Phil Blake for the intervenor.

DECISION OF THE BOARD: February 21, 2014

1. This is an application filed under section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"), in which the applicant, Marcia Robertson, alleges that the responding party, Canadian Auto Workers Union, Local 707, (the "Union"), breached section 74 of the Act. The applicant's complaint relates to the Union's failure to pursue a number of grievances she requested be filed on her behalf in the period from September 2010 to August 2011.

2. By decision dated June 4, 2012, I determined to exercise my discretion not to inquire into the applicant's complaint against the Union in relation to its failure to pursue seven of those grievances at arbitration on the ground that those matters were now largely academic or moot. As noted in that decision, what remains to be considered is therefore the applicant's complaint about the Union's failure to pursue four additional grievances concerning alleged harassment and/or discrimination by the intervenor.

3. At the consultation held in this matter on January 29, 2014, the Board entertained the parties' submissions concerning the applicant's remaining allegations to the effect that the Union breached its duty of fair representation to her when it failed to pursue any of the four discrimination and/or harassment grievances she requested be filed on her behalf. More specifically, the applicant refers to a request she made of the Union in or around September 2010 to file a discrimination and/or harassment grievance at that time. The applicant also noted that, on March 17, 2011, she had requested that the Union grieve the intervenor's alleged harassment of her in relation to its repeated requests for information about her medical appointments. The applicant also referred to a request made on April 2, 2011 that the Union file a discrimination grievance and a further request made in or around August 23, 2011 that the Union file a harassment and/or discrimination grievance regarding the intervenor's daily telephone calls while she was ill and its threat to dismiss her from employment in or around that time.

4. Section 74 of the Act reads as follows:

> **74.** A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

5. In order to establish that a union has contravened section 74 of the Act, an applicant must demonstrate that the union's actions are:

> 1) "arbitrary" - that is, flagrant, capricious, totally unreasonable, or grossly negligent [see, for example, *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001]; or
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> 2) "discriminatory" - that is, based on invidious distinctions without reasonable justification or labour relations rationale; or
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> 3) "in bad faith" - that is motivated by ill-will, malice, hostility or dishonesty.

6. The Board's task is to determine whether the union's actions can be characterized as "arbitrary, discriminatory or in bad faith" within the meaning of this provision. As noted in the Board's earlier decision in this matter, section 74 of the Act generally requires a trade union to act fairly in the handling of employee grievances. It does not, however, require a trade union to file every grievance at an employee's request or to take every grievance to arbitration at the request of an individual grievor. The trade union has a considerable discretion in deciding whether or not to file a grievance and in deciding whether to take a grievance to arbitration. Such discretion must, however, be exercised in good faith following a thorough review of the proposed grievance. The Board in *Yvan Beauparlant*, [1999] O.L.R.D. No. 2611, reviewed the standard required by this section, as follows:

> 7. It is not generally the function of this Board to determine the merits of a grievance which an applicant wished to have advanced to arbitration. For the role of the Board in the context of these types of applications is not to determine the merits of such grievances, but rather, to determine whether the union's decision not to advance such grievance to arbitration was a violation of its statutory obligations. The standard that the Board has adopted in determining whether a union has violated its statutory obligations is well known within the labour relations community and it is perhaps typified by the following comments from the case of *I.T.E. Industries Ltd.* [1980] OLRB Rep. July 1001 at paragraph 19:
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> > 19. It is clear that in order to establish a breach of section 68 [now 74], a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a "flagrant error" consistent with a "non caring

> attitude", or have acted in a manner that is "implausible" or "so reckless as to be unworthy of protection". In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.
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> 8. In that context, it is perhaps not surprising that the Board has generally taken the view that the mere refusal of a union to advance a grievance to arbitration may not give rise, in and of itself, to a violation of section 74 of the Act. The Board has, however, recognized that the nature of its inquiry and perhaps even the level of scrutiny may vary from case to case.

The Board must therefore determine whether the union's assessment of the chances of success of a proposed grievance was an arbitrary one in all of the circumstances bearing in mind the significance of the grievance to the applicant.

7. With that background, I will now turn to a consideration of each of the applicant's four separate requests that a harassment and/or discrimination grievance be filed on her behalf.

Request made on September 16, 2010

8. The applicant's request made on September 16, 2010 that a discrimination and/or harassment grievance be filed on her behalf relates to two issues. The first concerns an incident which occurred in early July 2010 when the applicant went off work due to a work-related injury. The relevant facts were not in material dispute and may be summarized as follows.

9. On or about July 6, 2010, the applicant left work to go to the hospital as a result of a work-related injury. Her manager, Adam Hibbert, asked her to give him a phone number to reach her before she left and later called her to find out how she was doing because he was concerned about her injury. He attempted to reach her on both July 6th and 7th without success. As a consequence, he went to her house on July 7, 2010 out of concern because he had received no response to his phone messages. At that time, he spoke to the applicant's husband. Shortly thereafter, the applicant called the Union to complain about her manager's visit and expressed her view that it was harassment.

10. In response to that complaint, Ron Balazs, Vice-President of the Union, and Mr. Edward Gopsill, Plant Chair, attended at the Plant to meet with the applicant's manager and Phil Blake, the facility manager, in order to raise their objection to the manager's home visit. At that time, the intervenor's managers apologized for the visit and explained that the visit had simply been out of concern and that the applicant's manager had not realized it was not appropriate. The intervenor's managers also agreed that, in future, they would communicate with someone off sick either by telephone or by

registered letter. According to the Union, a visit to either the applicant's home or to the home of any other bargaining unit member has not happened since.

11. The Union's representatives were also advised during that meeting that the applicant's manager had been phoning her because he needed information from the hospital concerning the applicant's WSIB injury. He was trying to obtain the documents which needed to be submitted within a short time frame. In all the circumstances, the Union determined that it was not necessary to file a grievance with respect to this issue, since, in its view, the intervenor's attempts to reach the applicant by phone after her injury were reasonable and the home visit had simply been a mistake, which the Union had been assured would not be repeated (and has not been repeated since).

12. As noted, the applicant's request to file a harassment and/or discrimination grievance on September 16, 2010 also related to a second issue. That issue arose when the applicant attempted to return to work on or about July 13, 2010 following her work-related injury. There is no dispute that Mr. Hibbert and the facility manager met her at the entrance of the building before she started work. They were attempting to obtain a functional abilities form ("FAF") setting out her medical restrictions before she actually started working. According to the Union and the intervenor, because she was unable to provide them with satisfactory information concerning her medical restrictions she was asked to go to her doctor to get a FAF form completed.

13. The applicant acknowledges that she did not have a FAF form when she returned to work and that she was asked to go to her doctor to get one completed. The applicant however notes that, when Mr. Blake and Mr. Hibbert approached her in the parking lot after waiting for her in their vehicle, she gave them a Physical Demands Analysis Form. According to the applicant, they disputed certain dates on the form and Mr. Blake asked her to go speak to the night supervisor. The applicant states that she thereafter spoke to another supervisor, Ivan Doherty, who told her to show another worker the job she used to do. According to the applicant, when Mr. Doherty was filling out the return to work report, he told her she could dust objects with her left hand. The applicant states that she responded by telling him that she is right-handed and was therefore unable to do that kind of work because her right hand was hurt and swollen. According to the applicant, in light of what she said about not being able to work with her left hand, she was instructed to go back to the doctor to have him fill out another form, which she did.

14. There is no dispute that she was nonetheless paid for that day. It is also common ground that, as a result of the FAF she provided to the Company shortly thereafter, which form indicated that she needed to rest for a further month, she remained off work for an additional month, until on or about August 14, 2010.

15. The applicant argues that management should not have stopped her at the gate and interrogated her in the parking lot. She notes that their questions regarding whether the dates on the form were accurate made her feel upset and harassed. The applicant also argued that it was unreasonable for the intervenor to require her to use a hand she cannot

use to do her job. The applicant takes the position that the doctor's evaluation set out in the Physical Demands Analysis Form was sufficient for the intervenor to return her to work and that it did not make sense to ask her to go back to her doctor to get another form. According to the applicant, the intervenor failed to accommodate her and unreasonably sent her back to get a second form.

16. While the applicant's version of events differs to some extent from that of the Union and the intervenor, little ultimately turns on whether the applicant was permitted to enter the facility before she was told to go to her doctor to get a FAF form completed. In either case, there is no dispute that the applicant did not have a completed FAF form with her when she returned to work, she was instructed to go back to her doctor to get one, and she was paid for the day. There is also no dispute that, as a result of the new FAF form, the applicant required, and was given, a medical leave of absence for an additional month.

17. Following the applicant's complaint to the Union about this incident, the Union's Plant Chair investigated what happened and determined that it was consistent with the intervenor's practice to require a FAF form upon a return to work. The Union's representatives also determined that it was not necessary to pursue a grievance in relation to this incident since their member had not lost any pay.

18. It is, in my view, apparent from the facts asserted by the applicant that there was no reason for the Union to consider the intervenor's request that she provide additional medical documentation in the form of a FAF to be unreasonable. The fact that such additional medical information was necessary is made evident by the fact that the applicant's doctor ultimately determined that she was *not*, in fact, medically fit to return to work at that time and was not fit to return to work for a further period of one month. As such, regardless of how the applicant may have felt about having been met by management in the parking lot so that the intervenor could satisfy itself that she was medically fit to perform her duties before she started work, the Union's determination that there was nothing improper about the intervenor's request for a FAF form establishing her fitness to return was not unreasonable.

19. In the circumstances, the Union cannot be said to have acted arbitrarily in its assessment not to pursue a grievance with respect to that issue, particularly since the applicant had not lost any wages as a result of the intervenor's request for a completed FAF form. It was also not, in my view, arbitrary for the Union to have determined that a grievance with respect to the intervenor's attempts to reach the applicant by telephone or with respect to its subsequent visit to her home after her injury in July, was unwarranted. In this respect, I note the intervenor's explanation to the Union that it needed information concerning her WSIB injury and its assurance to the Union to communicate in future only by telephone or by registered letter.

20. The applicant did not further advance any facts at the consultation in this matter to suggest that the Union treated her differently than other members of the bargaining unit who had been absent and then returned to work following a work-related

injury. She also did not refer to any facts which might suggest that the Union harboured any ill-will toward her personally.

21. Finally, I note that, while the issue of reasonable accommodation by the intervenor was raised by the applicant's representative at the consultation, the grievance the applicant requested that the Union pursue on September 16, 2010 did not relate to accommodation of her injury. There is, in any event, no reason to believe that the Union acted arbitrarily, discriminatorily or in bad faith in failing to address that issue given the absence of any suggestion that the applicant was, to the Union's knowledge, required to do any work beyond her medical restrictions. In this respect, I also note that she was, in fact, accommodated at that time with a leave of absence for the additional month period she required.

Request made on March 17, 2011

22. The applicant requested that the Union file a harassment grievance on or about March 17, 2011. In support of her request, she referred to the fact that she was upset that her supervisor had asked about whether her medical appointment was related to a workplace injury. The applicant also complained about the intervenor's failure to provide her with a Union representative when she asked for one to be present for a discussion with the intervenor about her doctor's appointments. Because this was a non-disciplinary meeting, the intervenor did not call a Union representative when asked.

23. Following the applicant's request to file a grievance, Mr. Gopsill advised the applicant that the intervenor was entitled to ask her whether or not the appointment concerned a workplace injury since the intervenor's practice was to accommodate such an absence and pay the employee for the time off if it related to a workplace injury. The Union also took steps to inform the applicant of the procedure set out under the collective agreement regarding the requirement to provide a leave of absence form (LOA) in order to attend doctor's appointments. In this regard, the Union advised her orally and, by letter dated May 6, 2011, that a LOA is required regardless of whether the appointment is due to a work related injury unless the appointment was made by the WSIB.

24. The applicant takes the position that it was unreasonable for the intervenor to have asked her three times if her medical appointment was related to a work-related injury and notes that she felt she was being "grilled". The applicant also takes the position that, if she wants to receive payment for her absence, she will let the intervenor know when she returns from the appointment that it related to a workplace injury. With respect to the Union's failure to attend the non-disciplinary meeting, the applicant contends that the Union should have, at a minimum, told her why its representatives were not going to show up. According to the applicant, the Union had an obligation to communicate that to her.

25. The Union responds by noting that it was not even aware that she had made the request for union representation until after the fact. When that fact was brought to its attention, the Union raised the issue with the applicant's supervisor, notwithstanding the

fact that there is no right to a Union representative in these circumstances. The applicant's supervisor responded to Mr. Gopsill by apologizing for not getting in touch with the Union to let the Union's representatives know of the request and explained that he had simply forgotten. The intervenor promised to get in touch with the Plant Chair in future when a member asked for a Union representative to be present in order to let the Union know that such a request had been made. In the Union's view, this matter was resolved and there was no need to file a grievance, particularly since there was no right to Union representation at non-disciplinary meetings.

26. In the circumstances, the Union cannot, in my view, be faulted for having failed to communicate with the applicant about why one of its representatives was not attending the non-disciplinary meeting given that its representatives were not advised until after the fact that the applicant had requested Union representation. The Union cannot further be said to have been acting arbitrarily, discriminatorily or in bad faith when it failed to pursue a grievance with respect to the intervenor's denial of her request for union representation, since it is not disputed that there is no right under the collective agreement to such representation at a non-disciplinary meeting.

27. There is finally nothing in the facts asserted by the applicant at the consultation to suggest that the Union breached its duty of fair representation to her when it failed to pursue a grievance about the fact that she had been asked to indicate prior to her doctor's appointment whether the appointment was related to a workplace injury. Irrespective of the applicant's view that it should be up to her to advise the intervenor upon her return that the appointment was related to a work-related injury, the Union reasonably assessed that the intervenor required this information in order to comply with its practice of accommodating such absences and of paying the employee for the time off where the appointment relates to a workplace injury.

April 2, 2011 Request for a Discrimination Grievance to be Filed

28. On or about April 2, 2011, the applicant requested that the Union file a grievance on her behalf on the ground that the intervenor was discriminating against her by requiring her to complete a LOA form to attend a doctor's appointment when the intervenor did not require this of other employees. The applicant's representative notes that, in her letter to the Union dated April 2, 2011, she raised the issue of why she should have to apply for a LOA for a leave of less than two days and asked for a discrimination grievance to be filed.

29. In response to this request, the Union's representative wrote to the applicant asking for additional information concerning her claim, including "what grounds of harassment/discrimination is being charged or based", including details of the conversations that took place, what was said and if there were any witnesses. The applicant then responded by referring to her various earlier complaints discussed above in the context of her earlier requests for discrimination/ harassment grievances to be filed. She referred, for example, to the fact that she had been stopped at the gate, was not getting a Union representative when required, was being phoned at home, etc. There was

however no suggestion at the consultation in this matter that she ever identified to the Union any other employees in the bargaining unit who were not required by the intervenor to complete a LOA form in order to attend a doctor's appointment.

30. The Plant Chair ultimately responded to the applicant's request for a discrimination grievance to be filed because she had been required to apply for a LOA by advising the applicant that the intervenor's requirement that she complete a LOA form was consistent with Article 26.01 of the collective agreement and that the intervenor was not applying the policy inconsistently in her case. As noted above, Mr. Gopsill also advised the applicant of the intervenor's policy with respect to LOA forms both verbally and in writing by letter dated May 6, 2011.

31. The applicant ultimately appears to have recognized that the collective agreement required employees to submit a LOA form for all absences, since she then proposed to the Union that Article 26 be amended to carve out certain exclusions. The applicant's proposed amendment was to the effect that, in regard to a work-related injury, employees should not have to fill out a LOA in order to see their doctors and that employees should not be required to apply for a LOA for less than two days off.

32. The Union responded to these concerns raised by the applicant by putting forward the applicant's proposed amendment to Article 26 of the collective agreement given that the workplace parties were in bargaining in or around this same time. The Union was, in fact, partially successful in amending the clause to address the applicant's concerns. As a consequence of the amendment, it is no longer necessary to have a LOA form filled out for a WSIB directed doctor's visit.

33. While the applicant still wanted a discrimination grievance to be filed on her behalf, it was not, in my view, arbitrary, discriminatory or in bad faith for the Union to have refused to pursue such a grievance given that, at the relevant time, the collective agreement required a LOA to be completed in all cases and the Union's information was that the intervener did, in fact, require one in all cases. In the circumstances, the Union instead properly did what it could do to address the applicant's concerns by raising the issue in bargaining. The Union was further successful in obtaining some of the relief sought by the applicant in that respect. In all the circumstances, I am not persuaded that the Union breached its duty of fair representation to the applicant when it failed to pursue a discrimination grievance on her behalf because she had been required, prior to this collective agreement amendment, to complete a LOA form in order to attend a doctor's appointment.

August 23, 2011 Request

34. The applicant's request that a harassment grievance be filed on her behalf on or about August 23, 2011 relates to a letter she received from the intervenor on or about August 18, 2011 when she was off work. In that letter, the intervenor noted that it had not received any communication from her since August 16, 2011 and that she had not called or returned its daily phone calls/messages, nor had she stated her intention

regarding her return to work. The letter also noted that her August 8, 2011 FAF form was now expired and, as such, she had been absent without leave since August 8, 2011. The applicant was advised that, if she did not contact the intervenor by a specified date and provide a satisfactory explanation and evidence regarding her continued absence from work, her employment would be terminated and her seniority rights would cease in accordance with Article 11.01(4).

35. The Union explains that it did not file a harassment grievance because it did not view the intervenor's warning letter as constituting harassment. In this respect, the Union notes that it is normal practice for the intervenor to require employees who are off work to provide regular medical documentation to justify their absence and to inquire about their anticipated return to work date.

36. The Union's representative did nonetheless intervene on the applicant's behalf by speaking to management and, as a consequence, the intervenor agreed not to discipline the applicant and instead provided her with a non-disciplinary counselling letter dated August 26, 2011. As such, while the Union determined that there was no basis for a harassment grievance to be filed as a result of the intervenor's August 18, 2011 warning letter, it still took action to address the problem she raised and was successful in persuading the intervenor not to impose discipline.

37. However, according to the applicant, she had filed an updated FAF form dated August 16, 2011 with the intervenor on August 16, 2011 (albeit sent by facsimile to the intervenor's offices in Ohio given that she was no longer able to send facsimile transmissions to the intervenor using a third party's facsimile machine on site) and it was harassment for the intervenor to have made false allegations against her and accused her of being absent without leave. The applicant contends that the Union's failure to pursue the matter and to address her request that the intervenor remove the August 18 and 26, 2011 letters from her file and apologize amounts to a breach of section 74 of the Act.

38. In response, the Union notes that the first time that management personnel in the intervenor's Canadian office had received the August 16, 2011 FAF form was when the Union provided it to them, after the applicant sent it to the Union by letter dated August 23, 2011 (enclosing the FAF form dated August 16, 2011). Upon receipt of that letter, the Union responded by promptly sending the new FAF form to the intervenor. However, at that time, the intervenor already had the documents ready to proceed to terminate the applicant's employment. The Union consequently intervened on the applicant's behalf and was successful in persuading the intervenor not to proceed with her termination, notwithstanding her failure to provide the requisite justification for her absence in a timely manner.

39. In all the circumstances, including the absence of any confirmation provided to the Union (or to the Board at the consultation) to suggest that the intervenor's representatives in Canada knew at the time of the August 18, 2011 warning letter that her August 8, 2011 FAF form had not expired, it was not unreasonable for the Union to have

determined that there was little basis to pursue a harassment grievance in relation to that letter. The Union instead acted entirely appropriately in response to the new FAF form the applicant provided to the Union on or about August 23, 2011 by immediately taking steps to bring the form to the attention of management concerned and by advocating on her behalf to have the termination decision reversed. Given the absence of any discipline on the applicant's file in relation to her absence without timely justification in August 2011, the Union's decision not to pursue the matter further cannot be said to amount to conduct that is arbitrary, discriminatory or in bad faith within the meaning of the Act.

Disposition

40. For all these reasons, this application is dismissed.

"Caroline Rowan"
for the Board