Issue 3 // January 2021

CAUT LegalUpdate

Duty of Fair Representation

The duty of fair representation is a legal obligation that unions and associations owe to represent their members. It requires a union or bargaining agent to treat all members fairly and honestly in a way that is not arbitrary, discriminatory or in bad faith. This legal duty generally applies to the union's representation of members during the administration of the collective agreement, and not to internal union matters.

As recent cases summarized below illustrate, the standard in determining whether a union has fulfilled its duty of fair representation is not one of perfection, but of diligence in a particular circumstance. This means unions are not required to pursue all member complaints, but rather to make decisions in a manner that is not arbitrary, discriminatory or in bad faith. **Arbitrary** decisions are those that are made superficially or indifferently. A union acts in a **discriminatory** manner when it deals unequally with members unless there are valid reasons for doing so. Finally, **bad faith** decisions are those that are motivated by factors such as ill-will, personal animosity, or dishonesty.

The duty of fair representation requires the union and its officers to always take a reasonable and objective view of a members' concern, explore the relevant facts, and arrive at a thoughtful judgment about what to do.

Ulysse et Syndicat général des professeurs et professeures de l'Université de Montréal, 2020 QCTAT 2420 (CanLII), http://canlii.ca/t/j8ggh

The Quebec Labour Tribunal rejected a duty of fair representation ("DFR") complaint against the University of Montreal's Faculty Union. The Complainant/Grievor argued the Faculty Union had failed to investigate his concerns and properly represent him when the Employer refused to allow him to work, and eventually terminated his employment. At the time, the Complainant/Grievor was experiencing serious mental illness and refusing to comply with information requests and medical examinations.

Facts

The Grievor was a professor in the Department of Social Work with ten years' experience. In 2013, he was administratively suspended from work due to erratic and aggressive behaviour. The Employer was concerned he presented a danger to himself or others. About a month after his suspension, he attended a psychiatric assessment ordered by the insurance company. The psychiatrist determined that his cognitive abilities were fine, but that his judgment was severely impaired by paranoid and delusional

CAUT ACPPU
Canadian Association of University Teachers
Association canadienne des professeures et professeurs d'université
www.caut.ca

thinking. From this point on, the Grievor was off work on a medical leave.

Five months later, the Grievor submitted a different psychiatric report that did not specifically refute the earlier diagnosis but stated he could return to work. The University was not satisfied with this report, since it lacked necessary details.

Throughout his leave, the Grievor was assisted by the Faculty Union. Their first goal was to maintain disability benefits to replace his salary. Their efforts were hindered by the Grievor's frequent absences from his home. His disability benefits were stopped multiple times throughout 2014.

The Grievor attempted to return to work with two subsequent medical notes. Neither the Employer nor the insurance company were satisfied with these medical notes, since they lacked specificity and detail.[1] The Employer requested consent to contact this doctor in Miami, which the Grievor refused to provide.[2]

In January 2015, the Grievor was in and out of different hospitals and psychiatric facilities in Quebec. The Faculty Union eventually persuaded him to return to Montreal to find a regular treating physician. The Faculty Union paid for his lodgings in Montreal. A representative from the Faculty Union accompanied the Grievor to his medical appointments.[3] They were not able to find a regular physician for him.

In February 2015, the Grievor again requested to return to work. The Employer refused to allow him to return without a new psychiatric evaluation. After finally being able to review the initial psychiatric report, the Faculty Union realized they would need detailed medical information in order to get him back to work.

The Grievor did not attend a psychiatric appointment booked by the Employer on February 25, 2015. The Employer then notified the Faculty Union that they would terminate his employment, if he did not attend at a new psychiatric appointment on April 2, 2015. The Grievor attended on April 2, 2015 with a friend.

The April 2, 2015 report explained that the Grievor was suffering from paranoia and delusions, especially in relation to the workplace, that he had no insight into his mental health, and that his dissociation from reality would persist without medication. The Grievor continued to refuse to take medication. Subsequently, the insurance company found him completely incapacitated, and reinstated his disability benefits. The Employer reiterated that they could not allow him back at work in this state.

In the Fall of 2015, the Grievor became convinced that the Faculty Union was in a conflict of interest. He did not explain how. The Faculty Union invited him to meet with the grievance committee, which he refused.

In 2016, the Faculty Union President wrote to him, reiterating that his refusal to see a psychiatrist meant that they had no way to contradict the reports from the insurer's doctors. They also informed him that they planned to seek a legal opinion regarding his return to work grievance. They attempted to communicate with him by courier and by email – neither of which the Grievor acknowledged receiving.

Throughout May and June of 2016, the Grievor complained about what he perceived to be a lack of direct action or updates from the Faculty Union. The Faculty Union replied that they were waiting on the lawyer's opinion before proceeding. The lawyer's opinion arrived at the beginning of June. She advised that the Grievor's employment was still intact, but any chance of returning to work would require better medical documentation or a new psychiatric report.

The Faculty Union president wrote to the Grievor to explain what the legal opinion meant for his grievance. The president invited the Grievor to forward any available medical documentation to the Faculty Union. The Grievor responded with a request to see the legal opinion, the questions posed to the lawyer, and a copy of the file sent to the lawyer. The Faculty Union president refused that request.[4]

---

1. An Employer is not entitled to the same level of information as an insurer. For instance, the Employer is not entitled to know an employee's diagnosis.
2. There is no need for an employer to speak directly with an employee's physician and we recommend this not be permitted. The employer can send a letter, via the employee, specifying the information requested.
3. It is atypical for representatives to accompany a griever to medical appointments and is generally not required.
4. The Union was under no obligation to provide the requested information.

In December 2016, the Grievor filed his DFR complaint. In January 2017, the Grievor renewed his request to return to work. This time, he supplied a psychiatric report from a doctor in New York. The report was not dated but stated that the Grievor was seen in the Fall of 2016. There was no mention of his hospitalizations in 2015. The Grievor reported to the doctor that he had no history of mental illness. The report concluded that he did not suffer from any mental illness.

The Employer did not accept the report and exercised its collective agreement right to request an independent medical examination for those currently on medical leave. In the Spring of 2017, the Grievor failed to attend at two separate medical examination appointments, which led to his termination.

The Faculty Union filed a termination grievance and proceeded to take it to arbitration. The Faculty Union informed the Grievor of these steps. The Grievor attempted to file his own termination grievance with his own lawyer.

Decision

The Board provided a concise review of the DFR jurisprudence, including the Supreme Court's decision in *Noël c. Société d'énergie de la Baie James*. In representing members and administering the collective agreement, a union must act in good faith, without discrimination, malice, arbitrariness, or gross negligence. In addition, the Board confirmed that the union had carriage of grievances (not the grievor) and that a grievor does not have a guaranteed right to an arbitration hearing. The union can decide how far to pursue a grievance provided this decision is reasoned and based on a review of the facts of the case. These same principles apply to jurisdictions outside Quebec.

The Board rejected the Grievor's argument that the Faculty Union failed to investigate. The Faculty Union was aware of all the facts and had all the available medical documentation. If there was anything else available, then the Grievor should have submitted that to the Faculty Union. The fact that the Faculty Union was not taking the return to work grievance to arbitration was not evidence of collusion with the Employer. The Faculty Union came to its own conclusion, based on the merits of the case.

With respect to the termination grievance, there was no failure in any duty, since the Faculty Union properly filed the grievance and was in the process of taking it to arbitration.

In the course of the proceedings, the Employer sought to obtain a copy of the Faculty Union's legal opinion in order to better participate. As the Board notes, employers are invited to participate in DFR complaints, so they might be aware of the matter and respond to any potential collusion between the employee and their union. The Employer's role in a DFR complaint is limited. The Board found there was no justification to breach solicitor-client privilege and rejected the Employer's request to produce the legal opinion.

Significance of this Decision

There are several key takeaways from this decision. First, the Quebec law on the DFR is similar to the statutory requirement that exists in other provinces – a union must act in good faith, without discrimination, malice, arbitrariness, or gross negligence and can decide how whether and how far to pursue a grievance based on a reasoned review of the facts of the case. Second, a union is not necessarily required to conduct an investigation before deciding whether or not the pursue a grievance to arbitration provided it has all necessary facts for consideration. Third, the Employer should have no need to access any confidential or privileged documents that the union relied upon in coming to its decision. In fact, it is rare for an Employer to seek access to a legal opinion obtained by a union, particularly when participating in a DFR proceeding.

The Union went out of its way to maintain contact with the Grievor and support his treatment. Where there is a medical condition that interferes with the union's ability to contact or represent a member, then the union must accommodate to the point of undue hardship. Failure to accommodate by the union can result in a DFR claim or liability for human rights discrimination. This contrasts with a grievor who is merely being difficult or negligent. Where the grievor has no medical or other reasonable basis for the behaviour with the union, then the Union must exercise its duties fairly and with diligence; but there is no duty to accommodate.

A union can steer clear of breaching its duty of fair representation by reviewing the grievance on the merits, without discrimination, arbitrariness, or conflict of interest. Sometimes, this may require seeking a legal opinion, but doing so is not a requirement for every case.

Roy et Syndicat des chargées et chargés de cours de l'Université de Sherbrooke (CSQ), 2020 QCTAT 723 (CanLII), http://canlii.ca/t/j57tp

This case involves the faculty union's decision not to take a grievance to arbitration. The grievance involved the non-renewal of a sessional course that the grievor had been teaching. The decision in the case reminds us that the duty of fair representation does not require the union to take every grievance to arbitration.

Facts

In the winter of 2015, the Grievor informed the Faculty Union that a course he recently taught was assigned to a different sessional instructor. The collective agreement provided that sessional instructors retain seniority for their recently taught courses. The Faculty Union decided it needed more information to properly assess the case. Prior to obtaining that additional information, the Faculty Union filed a work assignment grievance on the Grievor's behalf in order to satisfy the timeline for grievances. The Faculty Union inquired about this assignment with the Employer's human resources department. Later, the Faculty Union met with the Employer who did not have the necessary information to explain how the assignment was made. After interviewing other sessional instructors and contract academic staff, the grievance was ignored for two years.

In March 2017, the Employer finally gave a full response to the grievance. The Faculty Union then wrote to the Grievor that, with the additional information in hand, they believed that the collective agreement had been followed. The Grievor attempted to obtain more detailed information from the Faculty Union throughout the Spring of 2017, but to no avail. The Faculty Union explained that they had to prioritize working on termination and harassment grievances that were going to arbitration. They did not make any final decision on closing or continuing the Grievor's grievance.

In May 2018, a representative from the Faculty Union met with the Grievor. They assured him that they would seek further clarification on certain facts and come to a final decision on whether to pursue the grievance to arbitration. After a thorough review, the Faculty Union concluded at the end of September 2019 that the grievance had no chance of success due to a specific agreement made with the other sessional instructor. This agreement, they felt, did not violate the collective agreement.

Decision

The Board began its analysis with a statement of essential labour law principles. First, the union has the exclusive responsibility for enforcing the collective agreement to which it is signatory. This does not leave room for individual members to seek their own redress directly from the employer for breaches of the collective agreement. Second, the Board's role is not to sit in appeal of union decisions. Third, no union member has an absolute right to have their grievance carried through to arbitration.

With respect to the union and its membership, the duty of fair representation is a necessary counterpart to the exclusive agency of the union. The union must administer the collective agreement and represent its members in good faith, and honestly while considering the merits of each case and the consequences to the member and to other legitimate union interests. The Board quoted these principles from an older Supreme Court Case from Quebec, *Gagnon v. Guilde de la marine marchande du Canada* (1984). In short, a union may be within its rights to refuse to take a grievance to arbitration for financial or other legitimate concerns.

When examining the circumstances of the Grievor's complaint, the Board found that the Faculty Union conducted an honest and objective review of all relevant facts. This satisfied their duty of fair representation. With respect to the three-year delay, the Board noted that it was not ideal, but that there was no negligence on the part of the Faculty Union. The Faculty Union filed the grievance on time even though they were not convinced of its merits. The delay did not prejudice the Grievor since the grievance could be remedied through monetary compensation. In addition, the Employer contributed greatly to the delay by not providing required facts for quite some time.

Significance of this Decision

Union representatives are required to conduct themselves with due diligence. What due diligence looks like may vary from case to case. A union should not allow grievances to go on for years without taking steps to remind the employer and grievor of what needs to be done, but if such a delay does occur for legitimate reasons (e.g. illness, lack of resources, crisis, loss of contact) this does not mean the union breached its DFR obligations. In this case, the Faculty Union continued to seek relevant information from the Employer, who did not have that information on more than one occasion. It is not a case of the union simply forgetting about this matter for years.