

IN THE MATTER OF AN ARBITRATION  
PURSUANT TO THE *POLICE SERVICES ACT*, R.S.O. 1990

BETWEEN

OMAR DELVALLE

(the "Applicant")

AND

TORONTO POLICE ASSOCIATION

(the "Association")

AND IN THE MATTER OF A COMPLAINT ALLEGING A BREACH OF THE  
ASSOCIATION'S DUTY OF FAIR REPRESENTATION

David Starkman

Arbitrator

Omar Delvalle

On His Own Behalf

APPEARANCES FOR THE ASSOCIATION

Caroline Jones  
Lauren Pearce

Counsel

A Virtual Hearing Concerning this Matter was held on May 29, 2024

## DECISION

Mr. Delvalle alleges that the Association breached its duty of fair representation by withdrawing his grievance concerning the denial of Central Sick Leave Bank Benefits,(CSLB) and not filing and pursuing a grievance concerning the termination of his employment.

Much of the history of this matter is not in dispute. Mr. Delvalle was employed as a Parking Enforcement Officer by the Toronto Police Services since December, 2014. On April 16, 2018 he was charged with impaired driving, refusal to provide a breath sample and resisting a police officer. He was suspended without pay.

In March, 2019 he pled guilty to impaired driving and failure to provide a breath sample.

Subsequently, Mr. Delvalle was diagnosed with alcohol use disorder. He was placed on medical leave, and was in receipt of benefits from the Central Sick Leave Bank. He attended Homewood Health Centre in Guelph, Ontario which is a residential program for the treatment of alcohol use disorder, but was unable to complete the program because of continued use of alcohol.

In September, 2021, Mr. Delvalle was advised that his CSLB benefits were being suspended for non-compliance with treatment for his drinking. The Association filed a grievance on behalf of Mr. Delvalle alleging that the suspension of the CSLB benefits was contrary to the collective agreement.

Mr. Delvalle attended a number of counselling sessions and programs to assist with his alcohol use disorder.

In the spring of 2022, the Employer indicated its intention to terminate Mr. Delvalle's employment. The Association negotiated a last chance agreement with the Employer which provided, inter alia, that Mr. Delvalle would be returned to work if he successfully completed the programme at the Homewood Health Centre, provided a positive written medical prognosis for continued abstinence in the future, and be subject to random urine and blood testing.

Mr. Delvalle refused to sign the last chance agreement. He objected to the requirement that he abstain completely from alcohol, and objected to being subject to random urine and blood testing.

His employment was terminated in September, 2022. The Association did not grieve his termination and withdrew the September, 2021 grievance concerning the denial of CSLB benefits.

## DECISION

The jurisprudence concerning the duty imposed on an Association with exclusive bargaining rights has been settled for some time and I accept the comments in the decision of the Ontario Labour Relations Board in *Murray Hill v. Canadian Union of Public Employees*, Local 793 No 2797-05-U, commencing at p. 4:

4. With respect to the meaning of Duty of Fair Representation and its application to the specific circumstances in which a grievance is not processed to arbitration, The Board has concluded as follows:

(a) *Home v. CAW* (March 26, 2003)

Section 74 of the Act

19. Section 74 of the Act provides:

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.

20. The relevant standards of care in section 74 have been interpreted by the Board as follows:

- (a) "arbitrary" means conduct which is capricious, implausible, or unreasonable in the circumstances. This is often demonstrated by a failure by the union to properly direct its mind to a situation, or to conduct a proper and meaningful investigation when one appears to be called for;
- (b) "discriminatory" means distinguishing between or treating employees differently without good reason;
- (c) "bad faith" is conduct motivated by hostility, malice, ill-will or dishonesty.

See *Chrysler Canada Ltd.* [1999] OLRB Rep. July/August 757, at Paragraph 21.

21. The mere fact that a union settles or withdraws a grievance without the grievor's consent, where the grievor would prefer to have the matter pursued to arbitration, does not constitute a prima facie breach of section 74. The applicant must also assert what it is about the union's decision that was arbitrary, discriminatory or in bad faith...

(b) *Peroni v. Sub. Local and Local 1-500 IWA* unreported (March 1, 2001)

34. The mere fact that a trade union has refused to file a grievance, or has failed to pursue a grievance to arbitration, does not by itself constitute even a prima facie breach of section 74. As the Board pointed out in *George Lee*, [1994] OLRB Rep. August 1009, a union must give a grievance honest consideration, but having done so, the union is entitled to settle or withdraw the grievances as it considers appropriate. Because settlement is always preferable to litigation, particularly in labour relations matters where there is ongoing collective bargaining relationship, most grievances can and should be settled. Whatever the wishes of an

employee, it is generally inappropriate to “fight regardless of the odds”, or to seek some sort of revenge, or to pursue a matter merely because an employee insists on his/her “day in Court”.

35. In *Canadian Merchants Service Guild v. Guy Gagnon*, [1984] 1 SCR 509 (at page 527), the Supreme Court of Canada had occasion to review the principles applicable to fair representation cases as follows:

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
2. When, as is true here, and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. This discretion must be exercised in good faith, objectively and honestly after a thorough study of the grievance and the case, taking into account the significance of the grievance and of the consequences for the employee under one hand and the legitimate interests of the union on the other.
4. The union’s decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine, and not merely apparent, undertaken with integrity and competence without serious or major negligence and without hostility towards the employee.

Having reviewed the evidence presented, I have concluded that the Association did not breach its duty of fair representation. At all times it engaged with Mr. Delvalle, endeavored to assist him, negotiated with the Employer and produced a last chance agreement which would have returned Mr. Delvalle to the workplace.

I appreciate that Mr. Delvalle did not agree with the terms of the last chance agreement and felt that he should be able to return to work without a guarantee of abstinence and without having to submit to random blood and urine testing.

The Association was aware of Mr. Delvalle's concerns, and turned its attention to his situation and concluded that the grievance concerning the denial of benefits and any potential grievance concerning the termination of his employment should not be pursued.

Nothing in its actions indicate that it proceeded in a manner that was arbitrary, discriminatory or in bad faith.

The application is therefore dismissed.

Dated at Maberly, Ontario this 24<sup>th</sup> day of June, 2024.

 

David Starkman