

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

JASON HAN

(the "Complainant")

-and-

CANADA SAFEWAY LIMITED

(The "Employer")

-and-

UNITED FOOD AND COMMERCIAL WORKERS  
INTERNATIONAL UNION, LOCAL 1518

(the "Union")

PANEL: A. Paul Devine, Vice-Chair

COUNSEL: Jason Han, on his own behalf  
Rob Cherniak, for the Union

CASE NO: 13976

DATE OF DECISION: October 28, 1993



## **REASONS FOR THE BOARD'S DECISION**

### **I. INTRODUCTION**

This is an application under Section 12 of the *Labour Relations Code*. The Complainant alleges the Union failed to represent him in a termination grievance. Han said he resigned from his employment as a clerk on December 18, 1992 after his shop steward advised him to do so. He submits he should have been given a second chance to return to his employment. He submits the Union business agent did not consider his grievance and was not interested in assisting him.

The Complainant requested a hearing concerning his complaint. I have determined that the material facts are not in dispute. Therefore, this matter can be adjudicated without a hearing.

### **II. BACKGROUND AND SUBMISSIONS**

The Complainant began his employment as a clerk in May 1990. He was observed by an employee taking a carton of milk from a shelf without paying for it on December 15, 1992. The Complainant left work that day and was called back to the store by a manager. He declined to have a Union representative present. During the ensuing meeting, the Complainant acknowledged that he had not paid for the milk. He said he forgot to do so. He also acknowledged that this had occurred two or three times in the past. The Complainant advised the manager that he had a bad memory. He also told the manager he was aware of the Employee's policy that all such items had to be paid for.

The Complainant was called for a second meeting on December 18, 1992. This time, a shop steward attended. The Complainant reiterated his story that he had forgotten to pay for the milk. During a break in the meeting, the shop steward recommended that he resign, rather than be fired. The Complainant then proposed this to the manager and his resignation was accepted.

Subsequently, the Complainant telephoned the Union office and spoke with the Officer of the Day. As a result of that discussion, a suspension grievance was filed on December 22, 1992 (the Complainant did not advise the Officer of the Day that he had resigned his employment; for

that reason, a suspension grievance was filed). During the conversation with the Officer of the Day, the Complainant advised he was seeing a doctor because he had a bad memory.

The Complainant next met with the Union's business agent on December 24, 1992. The Union says that, during the meeting, the Complainant advised the business agent he attempted to pay for the milk but could not find a cashier on duty. Han disputes that statement. He says that he did not attempt to pay for the milk at any time.

The Complainant also advised that he suffered short term memory loss and had seen a doctor about it. He was informed that he should provide the Union with a doctor's certificate. He did not do so.

At the same meeting, the Complainant was informed that the Employer has a policy of zero tolerance for theft and discharge grievances are invariably lost. Han said he was aware of the Employer's policy requiring employees to purchase merchandise while at work.

The business agent met with the Employer's supervisor on January 7, 1993. The business agent was informed that the Complainant took the milk off the shelf and went directly downstairs with it. Further, the Employer's investigation determined that it was not paid for.

The Complainant and his father met with the business agent and his supervisor on January 13. On January 14, the Union investigated Han's assertion that another employee had been only suspended for similar conduct of alleged theft. The Union spoke to the store manager and employee named by Han and found no evidence to confirm his assertion. Following that, the business agent discussed the case with the head of the Union's grievance and arbitration committee. Both concluded that the grievance should not proceed. The Complainant was advised of this by letter dated January 19, 1993. He was told he could appeal the decision not to proceed further with the grievance. The Complainant did not file an appeal. On February 23, the Union confirmed its earlier advice that it would not proceed with the grievance.

The Complainant does not dispute the Union's facts, except for the allegation that he tried to pay for the milk. He says by way of further explanation he only speculated, in conversation with the Employer, that he might have taken milk two or three times on past occasions. He said

he did not recall if he had or not. He said he was not responsible for empty cartons of milk that the manager found in the cooler; he blamed their presence on the co-worker who he maintains said was disciplined by the Employer for theft, but not fired. He said he was pressured into quitting before he saw a Union representative. Further, he did not tell anyone that he had attempted to pay for the milk before he went downstairs with it. Han's still maintains that he thinks another employee was caught for theft and was discharged. He does so because he took over for that employee for one week during which the employee was not on holidays or ill. Han alleges the actions against him are discriminatory.

### III. ANALYSIS

Section 12(1) of the *Labour Relations Code* provides as follows:

12. (1) A trade union or council of trade unions shall not act in a manner that is arbitrary, discriminatory or in bad faith
- (a) in representing any of the employees in an appropriate bargaining unit,
  - or
  - (b) in the referral of persons to employment
- whether or not the employees or persons are members of the trade union or a constituent union of the council of trade unions.

The issue in this case is whether the Union acted in an arbitrary manner in its treatment of Han's grievance. It is the Union's conduct which is the focus of the Board's enquiry under Section 12. While the Complainant alleged in his submissions that the Employer discriminated against him, there is no evidence of bad faith or discriminatory conduct by the Union.

Arbitrary conduct is conduct where the Union disregards the interests of one of its members and acts in an arbitrary or perfunctory manner. The Union must investigate the grievance and reasonably consider its merits before deciding to advance or abandon the grievance. As Han's case involved a termination, the Union faces a higher duty of care in dealing with the grievance. The Union is, however, permitted to settle grievances, including termination grievances, short of arbitration. Provided the Union does not act in a manner that exhibits arbitrary, discriminatory, or bad faith conduct, the decision not to pursue a grievance to arbitration will not be reviewed.

In this case, the Union investigated the circumstances surrounding the incident which led Han to resign from his employment. The Union considered the allegation of theft in the context of the food industry, where such conduct is generally regarded as justification for discharge. For example, in *Rod Pratt*, BCLRB No. B243/93, a complaint that the union failed to grieve a discharge where the employee failed to pay for a sandwich was dismissed. The union successfully relied on its experience with the employer's "zero tolerance for theft" policy. The Union's experience is that it has not succeeded in arbitration for such cases. In other words, the past practice and the Union's experience has been that discharge grievances fail where theft is established.

Han has suggested several explanations for his conduct, including forgetfulness. He has also explained his statements to the Employer that he had engaged in similar activity previously. The difficulty for the Union is that it is faced with all of his statements if it advances his grievance to arbitration. Further, the Union investigated the circumstances surrounding Han's resignation. It also investigated the allegation by him that another employee had not been dismissed for similar conduct. Han disagrees with the conclusion reached by the Union on this issue. He has not however, given the Union any direct evidence to support his allegation that the Employer has dealt with his case unfairly. This was a matter he could have raised if he had appealed against the Union's decision to drop his grievance.

I conclude, the Union conducted a thorough investigation of the circumstances surrounding Han's resignation. It assessed those circumstances against its past experience in arbitrating theft cases in food industry. The Union then decided the grievance could not succeed. Han was advised of the Union's decision and given an opportunity to appeal against that decision. Han did not avail himself of that opportunity. A grievor has a duty to pursue reasonable internal remedies provided by the Union in order to obtain assistance with his grievance from the Union.

I am therefore, unable to conclude that the Union acted in an arbitrary manner. The Union investigated the circumstances of Han's grievance and made a reasoned decision before abandoning the grievance. The Union is not required to arbitrate all termination grievances. Provided it makes that decision on a reasoned basis and does not act in an arbitrary, discriminatory or bad faith manner, the Board will not second guess that decision: see *Joseph*

*Kobescak*, IRC No. C178/89, (reconsideration of IRC No. C134/89).

In summary, the Union investigated the circumstances of Han's grievance and made a reasoned decision not to pursue the grievance to arbitration. Han was informed of that decision and had an opportunity, which he did not exercise, to have the decision reviewed. In these circumstances, I conclude the Union has not acted in an arbitrary manner. Therefore, this application is dismissed.

LABOUR RELATIONS BOARD

PAUL DEVINE  
VICE-CHAIR