

**Between Giordano Storti ("Storti"), and
Communications, Energy and Paperworkers Union of Canada, Local Union No. 603 (the "Union"),
and
Canadian Forest Products Ltd. (Canadian Forest Products Northwood Pulp Mill Division) (the
"Employer")**

BCLRB Decision No. B127/2001
Case No. 44374

British Columbia Labour Relations Board
April 2, 2001

Vice-Chair: J. O'Brien,

Counsel: Giordano Storti, on behalf of himself.

Decision of the Board

I. NATURE OF THE APPLICATION

Giordano Storti applies under Section 12(1)(a) of the Labour Relations Code (the "Code") seeking a declaration that the Union has breached its duty of fair representation by arbitrarily settling a grievance concerning back pay.

Section 13(1)(a) of the Code requires that I first determine whether Storti has made out a case that a breach of Section 12 has apparently occurred. For the purposes of this decision, I have assumed that the facts as alleged by Storti are true. After reviewing the information contained in Storti's submission, I find that I can make a decision without holding an oral hearing.

II. BACKGROUND

Storti is a mason at the Employer's Northwood Pulp Division in Prince George. Storti injured his back and neck in a workplace accident. He was off work for a considerable period of time in 1992 and 1993. He resumed work as a mason with modified duties in March 1993. On April 11, 1994 he gave the Employer a letter from his physician, Dr. Mallam, restricting his work ability. Dr. Mallam limited Storti to lifting weights of less than 30 pounds and from carrying any significant weight while climbing scaffolding. Dr. Mallam concluded that Storti was able to carry out the basic duties of his trade with those exceptions.

On April 25, 1994 the Employer demoted Storti to the labour pool with a subsequent reduction in his wage rate to the base rate. The Union filed a grievance on Storti's behalf alleging improper non-disciplinary demotion and loss of pay as a result of his injury.

On April 10, 1995 Storti gave the Employer a letter from Dr. Mallam stating he was capable of returning to his usual job as a mason. He continued to work in the labour pool. On August 11, 1995 the Employer required Storti to travel to Vancouver to participate in a work capacity evaluation by Dr. Hartzell of HealthServ B.C. Inc. On August 15, 1995 Dr. Hartzell reported that Storti had fully recovered from his injury and recommended that he receive strength training if he was required to lift more than 50 pounds on a regular basis. On February 6, 1996 Storti returned to the position of mason. He was not required to use the jackhammer, which weighs about 80 pounds.

During this time, the Union continued with Storti's grievance. The Union sought back pay for Storti of \$11,567 between April 25, 1994 and May 1, 1995 and \$8,935 from May 1, 1995 to February 6, 1996. In June 1999, the Union received a legal opinion from Victory Square Law Office. The legal opinion concluded that there was a good chance that Storti would recover back pay to April 1995 but that he had only a moderate chance of recovering back pay to April 1994. The Union decided to proceed to arbitration.

In the week before the arbitration hearing, the Union began to discuss settlement of the grievance with the Employer. On November 3, 2000 after the Union rejected a lower settlement amount it received an offer of \$8,000.00 from the Employer. The Union's legal counsel advised the Union to accept the offer because it was approximately what Storti would receive if the matter was successful at arbitration.

In a letter dated November 8, 2000 to Storti, Union legal counsel Craig Bavis explained that an arbitrator was unlikely to find that the Employer was required to employ Storti as a mason while he was incapable of performing the essential duties of the job. In those circumstances Storti would not receive back pay between April 25, 1994 and April 10, 1995. Bavis also warned that there was a chance that an arbitrator would find that the Employer was not required to return Storti to the mason position until August 25, 1995 when it received the HealthServ report. In that case Storti would receive less than \$8,000.00 in back pay.

Storti objected to the settlement and insisted that the grievance go to arbitration. After consulting Storti and its legal counsel, the Union decided to accept the settlement.

The Board received Storti's Section 12 application on February 6, 2001. He complains that the Union acted arbitrarily by accepting a settlement that was not in his best interests. Storti requests that the grievance be sent to arbitration.

III. ANALYSIS AND DECISION

Under Section 12, a union is prohibited from acting in a manner that is arbitrary, discriminatory or in bad faith. The Board's main concern is not the merits of the grievance but the union's conduct in handling the matter. It is well established that the scope of review under Section 12 is very limited. In a recent Board decision, Anthony Jakubowski, BCLRB No. B477/99, the principles guiding the review are set out:

...A grievor has no absolute right to have his or her grievance pursued to arbitration as control over the grievance procedure is vested in the union as the exclusive bargaining agent. The union has the power to settle or drop those cases which it believes have little merit, even if the individual affected disagrees. The Board affords considerable latitude to a union in arriving at such a decision and does not review the Union's conduct to ensure that it is correct. Nor are the merits of a grievance under direct scrutiny in a Section 12 complaint. It is only the actions of the union that are under review to ensure that it has not acted in an arbitrary or discriminatory manner, or in bad faith. If a union takes a reasonable view of the problem and arrives at a thoughtful judgment about it, a union has the right to control the grievance procedure and to choose to settle or abandon a grievance, even without the approval of the grievor. (para. 22)

In the context of Section 12, arbitrary conduct is reckless or indifferent to the interests of an individual. Discriminatory conduct occurs where the union does not treat members the same due to irrelevant factors such as the member's race, sex, religion or disability. Bad faith means the union has made a decision based on ill will, hostility or revenge toward an individual: *Rayonier Canada Ltd.*, BCLRB No. 40/75, [1975] 2 Can LRBR 196.

Section 13(1)(a) of the Code requires an applicant under Section 12 to establish that the complaint is likely to succeed unless contradicted and overcome by other evidence. This requires a complainant to

provide sufficient details and information to establish that, in the absence of contrary information, a union's conduct was arbitrary, discriminatory or in bad faith: Terry Norris, BCLRB No. B156/94, (Leave for Reconsideration of BCLRB No. B23/94). The Board requires more than unsupported allegations:

...To establish a prima facie case a complainant must provide information or details "such as will prevail until contradicted and overcome by the evidence": Black's Law Dictionary, 5th ed. (St. Paul Minn.: West Publishing Co., 1979). In essence, it is a standard or onus of an evidentiary nature. (p. 5)

There must be information or details to satisfy the Board that a breach of the duty of fair representation has occurred. A complainant must do more than make bald assertions that a breach of Section 12 has occurred: Mike Bates, BCLRB No. B159/97; Kenneth Schwab, BCLRB No. B284/97. In this case, Storti has provided no details that describe a breach of Section 12. He has simply made a bare assertion that the Union acted arbitrarily.

The substance of Storti's application is that he considers the Union to have acted arbitrarily because it settled the back pay grievance without his agreement. The Board recognizes that a union has control of the grievance procedure and does not breach Section 12 in its handling of a grievance as long as it takes a thoughtful view of the employee's problem and arrives at a reasoned judgment about whether or not to proceed. The test as set out in Donato Franco, BCLRB No. B90/94 (Reconsideration of IRC No. C244/92), (1994), 22 CLRBR (2d) 281 states:

A union discharges its obligation where it makes sure it is aware of the circumstances, of the possible merits of the grievance, puts its mind to the case and comes to a reasoned decision whether to proceed. Again there is no requirement that the union adopt or agree with the position of the grievor. See for example, George Reid, IRC No. C199/89. (pp. 290 - 291)

Since its earliest decision on the duty of fair representation, the Board has recognized that unions have considerable latitude in deciding whether to drop or to settle grievances, even when the individual employee wishes to have them pursued through to arbitration: Rayonier Canada (B.C.) Ltd., supra. As was stated in Richard Findlay, IRC No. C144/90:

The statutory duty of fair representation does not give an employee an absolute right to have his grievance arbitrated. The union retains control over the grievance and the grievance procedure and has the right to settle or withdraw grievances prior to arbitration. ... A union must have the authority to settle grievances, notwithstanding the desires of an individual employee, to protect the interests of its members as a whole. If all grievances were arbitrated a union would be unable to ration its scarce resources and the arbitration of frivolous grievances would result in a loss of credibility with the employer. (p. 18)

In reaching its conclusion, the Board considers the Union's conduct as a whole rather than focusing on a single aspect that may be lacking. When the Union's handling of Storti's grievance is considered as a whole there is no basis to find within the meaning of Section 12 that the Union acted with blatant or reckless disregard of Storti's rights. The material submitted by Storti indicates that the Union conducted an investigation and determined that the grievance should go to arbitration. In the week before the arbitration hearing, the Union discussed settlement of the grievance. It rejected a lower offer but decided to accept a settlement that would pay Storti a portion of the back pay he sought. After consulting Storti and its legal counsel, the Union concluded that this was a reasonable settlement because it was approximately the same as the amount Storti would receive if the strongest part of the grievance succeeded. I find that the Union acted in a thoughtful way and arrived at a reasoned decision to settle the grievance. I find that there is no evidence that the Union acted arbitrarily.

IV. CONCLUSION

For all of the above reasons I find that Storti's complaint does not demonstrate that the Union breached Section 12 of the Code. Accordingly, Storti's complaint is dismissed.

J. O'BRIEN, VICE-CHAIR