The Labour Relations Board
Saskatchewan

BARBARA METZ, EMPLOYEE, REGINA, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION and THE GOVERNMENT OF SASKATCHEWAN, Respondents

LRB File No. 164-00; February 6, 2003
Chairperson, Gwen Gray, Q.C.; Members: Leo Lancaster and Hugh Wagner

The Applicant:	Barbara Metz
For the Respondent Union:	Rick Engel
For the Respondent Employer:	Rick Hischebett

Duty of fair representation – Practice and procedure – Board defers jurisdiction over elements of duty of fair representation complaint to Human Rights Commission – Board determines that Commission has authority and expertise to assess settlement pertaining to accommodation aspects of complaint – Board retains jurisdiction over duty of fair representation complaint with respect to the process used by union to achieve settlement.

Unfair labour practice – Duty to bargain in good faith – Board rules that employer owes duty to bargain in good faith to union as exclusive representative of all employees and not to individual employee – Board rules that applicant has no standing to bring unfair labour practice complaint against employer – Board dismisses complaint.

***The Trade Union Act,* ss. 5(d), 11(1)(c) and 25.1**

REASONS FOR DECISION

Background:

[1] On June 13, 2000, Barbara Metz (the "Applicant") filed an application under ss. 25.1 and 36.1 of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*"), claiming that she had experienced multiple forms of harassment and discrimination, and alleging that the Saskatchewan Government and General Employees' Union (the "Union") and officers or employees of the Union failed to fairly represent her in relation to various grievances she filed against her employer, the Government of Saskatchewan (the "Employer"). The Applicant also alleged that the Union failed to accommodate her in her efforts to return to work.

[2] Attached to the application was a list of actions taken or not taken by the Union that the Applicant claimed constituted unfair representation. The list included the following claims:

- *Refused to change AAA's despite constant requests;*
- *Failure to move to arbitration irregardless of requests on several occasions;*
- *Refused me the right to access my grievance file*
- *Failed to include me in negotiations*
- *Failed to return phone calls and emails &/or letters*
- *Refused to file grievances against employer and provincial government*
- *Failed and/or refused to represent me and informed employer to phone me directly irregardless of my verbal request to go through the proper union channels*
- *Bargained directly with employer, excluding member and/or client*
- *Failed and/or refused to accommodate when employer wanted to*
- *Did not represent me in front of employer, despite having the information sent prior to meeting. Unethical behavior to myself in front of employer.*
- *Failed to write and/or supply letters, already agreed to do, to employer*
- *Late for a majority of meetings and sometimes not at all (never once phoned and cancelled)*
- *Intimidation and harassment by raising voices and blaming me for things I did not do, on several occasions.*

[3] On September 11, 2000, the Applicant filed an amended application in response to the Union's request for further and better particulars. In the amended application, the Applicant expanded her claims of unfair labour practices to include an allegation against the Employer that it had failed to accommodate her disability by providing her with work that she could perform. The Applicant framed the Employer's failure as a breach of its duty to bargain in good faith contrary to s. 11(1)(c) of the *Act.*

[4] The Applicant also set out the manner in which the Union failed in its duty to fairly represent her with respect to her grievances against the Employer. The particulars of her claim against the Union included the following:

- *1994 Failed to file and/or to pursue a grievance based upon the employer's discrimination;*
- *1996 Failing to assist the applicant in dealing with the employer assessments;*
- *1996 Failing to apply for employment benefits on behalf of the applicant;*

- *1996 Failing to inform the applicant of job openings available for bid;*
- *1996 Denying the applicant access to a job, which the employer proposed;*
- *1996 Threatening to withdraw representation when applicant complained of the representation;*
- *1996/97Refusal to allow proposed accommodation;*
- *1996/97 Refusal to take signed grievance to arbitration, and to file other grievances;*
- *1997 failing to obtain time off for her shop steward to assist the applicant in dealing with an assessment sought in part by the employer;*
- *1998 Changed the agreement administrative advisor in spite of requests not to because of familiarity with the matter, its' complexity and the former advisor's willingness to continue;*
- *1999 New Advisor agreed over the objection of the applicant to further assessments, despite the existence of previous assessments addressing the matters which thereby further delayed return to work;*
- *2000 Negotiating a Letter of Agreement without consultation on its terms;*
- *Intimidation of the applicant by indicating disputes to the employer during negotiations, deliberate tactics to embarrass;*
- *Misrepresentation of terms of agreements and information available;*
- *By willingly or unwillingly colluding with the employer in its delaying of return to work, by not addressing monetary interests including failing to file grievances on those issues.*

[5] The Union filed a Reply in general terms on July 26, 2000 and an amended Reply on October 5, 2000. In its amended Reply, the Union asserted that the Applicant lacked standing to bring an unfair labour practice against the Employer, as she had not been authorized by the Union to bring such application. In addition, the Union asserted that the Labour Relations Board was not the proper jurisdiction to hear and determine the Applicant's dispute with the Employer as it was in its essence a human rights complaint that ought to be determined in accordance with *The Saskatchewan Human Rights Code* or as a grievance under the collective agreement between the Union and the Employer.

[6] The Union also disputed the allegation that it had not fairly represented the Applicant in relation to her grievances with the Employer and set out the steps it took to fulfill its statutory duty.

[7] On December 31, 2002, the Employer filed a Reply in which it asserted that the Applicant has no standing to bring an application for an unfair labour practice

against the Employer, and that the allegations contained in the unfair labour practice application against the Employer do not constitute an unfair labour practice.

[8] A hearing was held in Regina on January 8, 2003. At that time, the Applicant requested an adjournment of the application. She indicated to the Board that she wished to amend the application further and to allow for a settlement of her human rights complaint filed with the Human Rights Commission against the Employer.

[9] The Union asked the Board to hear and determine a preliminary issue of whether the Board should defer its jurisdiction over the application to the Human Rights Commission.

[10] The Employer asked the Board to hear and determine the preliminary issues of whether the Applicant has standing to bring an unfair labour practice against the Employer, without the approval of the Union, and whether her allegations against the Employer can constitute an unfair labour practice under the *Act.*

[11] The Applicant indicated to the Board that she was willing to present her arguments on the preliminary matters raised by the Union and the Employer.

[12] These Reasons address the preliminary matters.

Facts:

[13] The facts were presented on this application through Counsel for the Union and Employer and through the Applicant, without the testimony of witnesses. The facts appear to be relatively straightforward and, for the most part, are not contested. They are accepted by the Board in the form they were presented for the purpose of determining the preliminary objections.

[14] The Applicant was employed as a clerk by the Government of Saskatchewan for some years. In April 1993, the Applicant suffered a workplace injury. She was placed on workers' compensation benefits and continued to receive those benefits until mid-March 1998.

[15] On March 1, 1996, the Applicant filed Grievance No. 96-01028R alleging a violation of Article 151 of the Union's collective agreement. We understand from counsel for the Union that Article 151 contains anti-discrimination commitments related to disability, among other grounds.

[16] On August 22, 1996, the Applicant filed a complaint with the Human Rights Commission in which she alleged that the Employer discriminated against her in the terms and conditions of her employment because of her disability. In essence, the Applicant's complaint raised the issue of whether the Employer had accommodated her disability as required by *The Saskatchewan Human Rights Code.*

[17] On March 3, 2000, the Employer, the Union and the Applicant entered into an agreement to return the Applicant to work. The Applicant resumed her work in September 2000 and has remained in her position since that time.

[18] On June 13, 2000, the Applicant filed her first unfair labour practice against the Union alleging a breach of s. 25.1 as outlined above.

[19] On November 30, 2001, the Union and the Employer entered into a memorandum of settlement of the Applicant's grievances. The Employer agreed to pay the Applicant $50,000.00 ($5,000 as payment for general damages; $45,000.00 as payment of lost wages). In return, the Employer required the following documents:

- *a letter from SGEU advising that all grievances by Barb Metz have been settled and withdrawn;*
- *a letter from the Saskatchewan Labour Relations Board to SGEU confirming withdrawal of the unfair labour practice filed by the Ms. Metz against the Employer on September 11, 2000;*
- *a copy of a letter addressed to the Saskatchewan Human Rights Commission from Barb Metz advising that the terms of this Agreement represent a reasonable settlement of the human rights complaint she filed against the Employer on August 22, 1996;*
- *a signed Release from the Union and Ms. Metz releasing the Employer from all current and future legal actions and liabilities relating to the Employer's duty to accommodate the Applicant for the period from April, 1993 to September, 2000.*

[20] Prior to entering into the settlement agreement, the Union obtained a legal opinion from its counsel on the offer to settle the Applicant's claim. In the opinion letter, Mr. Engel conducted an extensive review of the law pertaining to the duty of an employer to accommodate an employee suffering from disability and based his assessment of the settlement document on the case law that has developed in this area. He recommended acceptance of the offer outlined above as constituting a reasonable assessment of the damages suffered by the Applicant as a result of the Employer's failure to accommodate her.

[21] The Applicant apparently was not satisfied with the settlement and she continued to pursue her human rights complaint with the Human Rights Commission.

[22] In May 2002, the Human Rights Commission wrote to the Union's solicitor to enquire into the settlement agreement between the Union and the Employer with respect to the Applicant's accommodation grievances. In response to this request, counsel for the Union forwarded various documents to the Human Rights Commission, including the his opinion letter to the Union regarding the settlement offer.

[23] On September 20, 2002, the Human Rights Commission advised the Applicant by letter that it would not direct an inquiry of her complaint before a Tribunal. Chief Commissioner Scott ruled as follows:

> *In conclusion if you decide to reject the offer of the respondent, it is my intention to dismiss your complaint under section 27.1(2)(a) of the Code, on the basis that your best interests will not be served by continuing with the complaint. By this, I do not mean to suggest that you do not have a legitimate complaint or that you are not entitled to reasonable compensation. What I do mean is that I do not believe that we can achieve any more, or even as much, as had already been offered and therefore it would serve no useful purpose to expend further commission resources in attempting to do so.*

[24] The "offer" referred to by the Chief Commissioner was the offer negotiated between the Union and the Employer with respect to the accommodation grievances. In relation to the Union's assessment of the damages owing to the

Applicant under the general duty to accommodate principles, the Chief Commissioner found as follows:

> *I agree with Mr. Engel's assessment of the responsibility of the government to accommodate and the extent to which the government is now liable to compensate for a failure to accommodate. I could find no fault with his opinions except that he may be unduly optimistic in his assessment of the high end of the amount of compensation he believes you could be awarded if this matter were adjudicated.*

[25] The Applicant indicated at the hearing that she was willing to enter into a settlement of her human rights complaint with the Employer, and would, at that time, release it from the unfair labour practice complaint. She was not willing, however, to withdraw her duty of fair representation complaint against the Union.

[26] At the same time, the Union is unable to fulfill the terms of the settlement with the Employer because, so long as the duty of fair representation complaint is outstanding, the Union is unable to provide the Employer with a signed release as required by the terms of the proposed settlement. If this Board finds that the Union violated its duty of fair representation, we could order the Union to take the Applicant's accommodation grievance to arbitration. As a result, the Employer would not be released from future legal actions or liabilities.

[27] The Applicant indicated that she has requested a reconsideration of the Chief Commissioner's decision. She also has an option to pursue her complaint before the Tribunal at her own expense without assistance from the Commission.

Arguments:

A. Should the Labour Relations Board defer its jurisdiction to the Human Rights Commission?

[28] The Union argued that the Board should defer its jurisdiction over the duty of fair representation application to the Human Rights Commission. Although the Board has not previously dealt with its overlapping jurisdiction with the Human Rights Commission, counsel for the Union noted that the Board has deferred its jurisdiction to

arbitration boards and that the same or similar principles ought to apply to overlapping jurisdiction with the Human Rights Commission.

[29] The Union noted that the duty of fair representation application requires the Board to assess the settlement reached between the Employer and the Union with respect to the Applicant's accommodation grievances in order to determine if the Union breached its duty of fair representation owed to the Applicant by entering into such an agreement. At the same time, the Human Rights Commission has informed the Applicant that it could not expect to obtain as good a result through the adjudication processes established under *The Saskatchewan Human Rights Code* as the Union obtained in its settlement negotiations with the Employer. Counsel for the Union argued that it would be a waste of time and money for the Board to conduct the same review of the settlement. It would also require the Board to assess a settlement that had already been determined by another, more specialized tribunal as meeting the requirements of the duty to accommodate.

[30] In making its argument, the Union referred the Board to *Cadillac Fairview Corp. v. Saskatchewan (Human Rights Commission),* [1999] S.J. No. 217 (S.C.A.); *Ilicic v. International Union of Operating Engineers, Local 963 and Board of School Trustees of School District No. 39,* BCLRB No. B235/95; *Alam v. Power Workers Union – CUPE, Local 1000 and Ontario Hydro,* [1994] OLRB Rep. June 627; *United Food and Commercial Workers, Local 1400 v. Saskatchewan (Labour Relations Board),* [1992] S.J. No. 425 (S.C.A.).

[31] In response, the Applicant argued that the human rights complaint is separate from the duty of fair representation complaint and that the Union has no role to play in the former proceedings, as it is not a party to the proceedings and does not represent her in relation to those proceedings. The Applicant argued that the Union is not in a position to put the duty of fair representation complaint on the table vis-à-vis her human rights complaint and cannot hold up the settlement of that complaint by insisting that the duty of fair representation application be withdrawn. The Applicant indicated that she would clarify her duty of fair representation complaint with respect to her claims against the Union and the Employer once she has settled the human rights complaint

with the Employer. She indicated in a general way that she expects to make a claim for damages against the Union for its alleged breach of the duty of fair representation.

[32] Mr. Hischebett, counsel for the Employer, noted for the Board's information that the proposed settlement of the human rights complaint was the same settlement as had been arrived at between the Union and the Employer in November 2001 with the addition of two provisions – first, an agreement with respect to restoring the Applicant's seniority during the period that she ought to have been accommodated in her employment, and an agreement to forward a letter to SGI with respect to the Applicant's wage loss during a portion of the time period. These additional agreements were made between the Union and the Employer.

[33] The Applicant pointed out to the Board that she takes a different view of the matter. In particular, in her view, the Employer made an offer to settle the human rights complaint to her through the Human Rights Commission and it has no relationship to the grievance settlement entered into between the Union and the Employer in November 2001.

B. Does the Applicant have standing to bring an unfair labour practice application against the Employer? If so, does the unfair labour practice allegation contained in the Applicant's amended application raise an issue over which the Labour Relations Board has statutory jurisdiction?

[34] The Employer argued that the Applicant lacks standing to bring an unfair labour practice application against the Employer under s. 11(1)(c) – the duty to bargain in good faith – without the approval of the bargaining agent, the Union. In this regard, the Employer noted that its obligation is to bargain collectively with the Union, not with individual members of the Union. It could not fulfill its statutory obligations if it were required to answer bargaining demands of individual employees. The purpose of the *Act* is to establish the Union as the exclusive bargaining agent for employees, and their bargaining concerns need to be focused through the certified trade union. In this regard, the Employer referred the Board to *Beurling et al. v. Christian Labour Association of Canada,* [1998] OLRB Rep. January/February 115; *Reekie and Thompson,* [1998] C.P.S.S.R.B. No. 120; and *Feldsted and Treasury Board,* [1999] C.P.S.S.R.B. No. 57.

[35] The Applicant replied to this argument by indicating that she is unwilling to drop the duty of fair representation complaint, although she will consider removing the Employer from the complaint (the unfair labour practice aspect) if the human rights settlement is finalized. Otherwise, the Applicant is of the view that the Employer and the Union are colluding against her and she intends to raise this allegation in her pleadings.

[36] Mr. Hischebett responded to the Applicant by indicating that the Employer is required by the *Act* to deal with the Union with respect to the Applicant's grievances and it is not permitted to deal directly with her in relation to the settlement agreements.

Relevant statutory provisions:

[37] Relevant statutory provisions are as follows:

> *25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*

Analysis:

A. Should the Labour Relations Board defer its jurisdiction to the Human Rights Commission?

[38] It is clear in this case that the Board has jurisdiction in a general sense over the subject matter of the Applicant's application in relation to her claims against the Union. She claims that the Union has failed to fairly represent her in relation to her workplace problems arising from her disability and her return to work. At the time of the application, the Applicant had not returned to work nor had the Union entered into the financial settlement of her grievance with the Employer.

[39] When the Board considers a claim that a union has failed to fairly represent an employee, the Board measures the conduct of the Union against the standards set out in s. 25.1 of the Act, that is, did the Union conduct itself in a manner that demonstrated bad faith, discrimination or arbitrariness. The elements that constitute "bad faith, discrimination or arbitrary treatment" have been described as follows by our Board and other labour relations boards:

> *The union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally, whether on account of such factors as race and sex (which are illegal under The Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations (Rayonier Canada (B.C.) Ltd., (1975), 2 CLRBR 196, at 201).*
>
> *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favouritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about it (Ward v. Saskatchewan Union of Nurses and South Saskatchewan Hospital Centre, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88).*

[40] In *Radke v. Canadian Paperworkers Union, Local 1120,* [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, the Board pointed out that the inquiries concerning bad faith and discrimination require the Board to assess the presence of improper motives or discriminatory impact of the Union's decisions without inquiring into the quality of those decisions. However, when the Board is considering whether a Union has treated the Applicant in an arbitrary fashion, it will assess the quality of the Union's decisions at least to the extent that the Board will determine whether the Union has acted without serious negligence. As explained in *Radke, supra*, at 64, the overall obligation on the Union requires it to:

> *… act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they*

> *should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*

[41] As well, the duty of fair representation has both procedural and substantive elements. That is, the Board will examine both the procedures adopted by the Union in representing the Applicant and the outcome of the representation against the standards set out in s. 25.1. On most occasions, if the outcome of the representation is favourable to the Applicant, the procedural elements will not be found to be wanting.

[42] However, this is not always the case. For instance, in *Gagnon v. Cartage and Miscellaneous Employees' Union, Local 931 et al.* (1992), 88 di 52, the Canada Labour Relations Board found that the outcome of the union's representation, that is, a decision not to proceed with a termination grievance, was made following serious investigation and on legal advice, and was not a violation of the duty of fair representation, while the steps taken by the union in processing (or, better put, not processing) the Applicant's grievance did constitute a breach of the duty of fair representation. At 74, the Board summarized its findings as follows:

> *In conclusion, the evidence reveals that Mr. Gagnon did not receive this minimum representation to which he was entitled from his union. Its inaction or superficial action until November 1990 shows, in our opinion, such a total abdication of its responsibilities that the problem is not one of simple communication, but rather a lack of representation. The Board therefore allows this part of Mr. Gagnon's complaint.*
>
> *What of the subsequent abandoning of the grievances? On this question, the Board does not see how it could conclude that the union breached its duty of fair representation in deciding to withdraw Mr. Gagnon's grievances on the eve of their hearing at arbitration.*
>
> *That decision followed the serious investigation conducted by Mr. Lehrer and was taken on his recommendation. Moreover, counsel for the complainant himself acknowledged, during his argument, the validity of the legal opinion on which the union based its decision not to proceed to arbitration.*

> *It may seem paradoxical to find the processing of certain grievances contrary to the Code and at the same time find their eventual abandonment consistent with the Code. This contradiction is merely apparent. The right to representation is of an ongoing nature; however, it does not carry an obligation for a union to refer all grievances to arbitration. It must, however, address them. In the instant case, only after a serious examination of them, could the union have abandoned them without violating the Code. Had it decided not to pursue them in as nonchalant a manner as it displayed earlier, it would have unquestionably violated the Code as well. It is not the decision to drop per se that offends the Board, but rather the way in which the decision has been made.*
>
> *The real paradox, however, as we are well aware, is telling the complainant that he was not the victim of poor representation when the decision was made to abandon his grievances.*

[43] In *Gagnon, supra,* the remedy awarded by the Canada Labour Relations Board consisted of reimbursement of expenses, including legal fees, incurred by the applicant in his efforts to obtain union representation.

[44] Similar results can be found in cases where the Union has conducted an arbitration hearing but in a manner that is not in accordance with the duty of fair representation. In such instances, the Board's remedial authority is limited due to the final and binding nature of an arbitration decision. However, remedies may be fashioned to compensate such an applicant for losses incurred as a direct result of the lack of fair representation. See, for instance, *Eamor v. Canadian Airline Pilots Association and Air Canada,* (1996) 39 C.L.R.B.R. (2d) 14 (CLRB); upheld on judicial review (1997), 39 C.L.R.B.R. (2d) 52 (Fed. C.A.) where the Canada Labour Relations Board ordered the Union to reimburse the employee for legal fees and expenses occurred in obtaining union representation.

[45] The Applicant's application raises both procedural and substantive complaints in relation to the Union's duty of representation. The Applicant raises many issues with respect to the process the Union used to deal with her grievances, for instance, refusal to return phone calls and emails; refusal to permit access to the grievance file; delay in filing grievances and processing grievances; etc.

[46] The Applicant's application also raises substantive issues in relation to the accommodation settlement, the financial settlement and the overall grievance settlement entered into by the Union with the Employer, although the details of her complaints in relation to these settlements are somewhat unclear.

[47] For our purposes on this application, the details of any such complaints on the substantive issues are not critical.

[48] We would also note that in the remedial portion of her amended application, the Applicant sought the following relief:

(a) a cease and desist order;
(b) accommodation by providing her with a job;
(c) payment of losses resulting from the failure to accommodate;
(d) payment of monetary loss caused by the unfair labour practices or violations of the collective agreement;
(e) a requirement that the Union fairly represent her.

[49] In relation to the Applicant's human rights complaint, the Human Rights Commission noted that the Employer did accommodate the Applicant into a position effective September 1, 2000 and that the only issue outstanding on the human rights complaint was the financial compensation that the Applicant may be entitled to as a result of the delay in making the accommodation. In essence, according to the Human Rights Commission, the remedy sought in paragraph (b) above has been met.

[50] The Human Rights Commission then reviewed in some detail the quality of the financial settlement agreement reached between the Union and the Employer. It assessed the agreement in light of the requirements of *The Human Rights Code*, particularly the statutory duty imposed on an Employer to accommodate an employee who is disabled. The Chief Commissioner, in her decision letter, found the agreement to be a satisfactory financial settlement of the Applicant's complaint that she had been discriminated against by the Employer for the period in which it failed to accommodate her disability. In essence, then, the remedy sought in paragraph (c) above has also been met, according to the Human Rights Commission.

[51] We are therefore faced with a situation where one statutory tribunal, the Human Rights Commission, has already considered and ruled on a good portion of the matter that it currently before this Board. This is not an unusual occurrence in labour relations law and has been addressed by the courts in a number of recent decisions.

[52] In *Brown v. Westfair Foods Ltd.,* [2002] S.J. No. 227 (Sask. Q.B.), Ball J. summarized the state of the law on the question of overlapping statutory jurisdictions as follows at paragraph 80:

> *Given the judicial authorities cited above, it is fair to say that it remains unclear in any particular case whether a statutory tribunal or an arbitrator has exclusive, paramount, or concurrent jurisdiction over a dispute in a unionized workplace. If the contest is between court action and labour arbitration, the exclusive forum is labour arbitration (Weber v. Ontario Hydro; New Brunswick v. O'Leary, supra; St. Anne Nakawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704 and a multitude of other authorities). Paradoxically, if the contest is between court action and a statutory tribunal other than labour arbitration, the court has a shared or concurrent jurisdiction with the statutory tribunal (Kolodziejski v. Auto Electric Service Ltd., supra). Finally, if the contest is between labour arbitration and another statutory tribunal (as it is in this case), a tribunal's jurisdiction over a matter will be exclusive if that is what the legislature intended (Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, supra). On the other hand, the jurisdiction of a tribunal established under The Human Rights Code in respect of "fundamental human rights" is concurrent (Cadillac Fairview, supra), the jurisdiction of a tribunal established under The Occupational Health and Safety Act, 1993 in respect of rights related to workplace safety is "paramount" (Prince Albert (District Health Board), supra) and the jurisdiction of a tribunal established under The Labour Standards Act in respect of other employment rights is concurrent if, in the court's view, the employee cannot succeed by grieving under the collective agreement (Dominion Bridge, supra).*

[53] In *Cadillac Fairview Corp. v. Saskatchewan (Human Rights Commission)* (1999), 173 D.L.R. (4th) 609 (Sask. C.A.), the Court held that a complaint before the Human Rights Tribunal takes priority over a claim that could be dealt with under *The Trade Union Act* where the essence of the dispute is an alleged human rights violation. In the *Cadillac Fairview* case, *supra,* employees had filed a complaint of sexual

harassment with the Human Rights Commission. The Employer argued that the employees ought to have filed grievances under the "no discrimination" provision contained in their collective agreement with the Employer as s. 25(1) of *The Trade Union Act* requires the parties to a collective agreement to settle their differences through grievance and arbitration provisions. The Court of Appeal held that parties cannot contract out of fundamental, quasi-constitutional, public rights, such as the rights enshrined in *The Human Rights Code* and that such rights take priority over other statutory regimes, when they are in conflict.

[54] Applying the principles of *Cadillac Fairview, supra,* to the present case, we find that the Human Rights Commission has primary jurisdiction over the Applicant's complaints that the Employer failed in its duty to accommodate her due to her disability. Although the Applicant raised similar issues in her duty of fair representation complaint against the Union and her unfair labour practice application against the Employer, the underlying issues in the complaint relate to discrimination on the basis of disability, a right established by *The Human Rights Code.* Although the Labour Relations Board has the obligation to consider and apply human rights law when it interprets the provisions of the *Act*[1]*,* our primary focus is on the enforcement of rights under the *Act* and, unlike the Human Rights Commission, we have no specialized knowledge or practice in the area of human rights law or adjudication.

[55] The human rights complaint subsumes three aspects of the complaint that is currently before the Board: (1) all aspects relating to the failure to accommodate the Applicant into employment with the Employer; (2) all aspects relating to the financial settlement entered into between the Union and the Employer; and (3) all aspects relating to the settlement of the Applicant's grievances. With respect to (1), the Human Rights Commission, as we indicated above, has ruled on the accommodation and indicated that it is not an outstanding issue. With respect to (2), the Commission has ruled that the financial settlement entered into between the Union and the Employer for the Applicant was a satisfactory settlement. The grievance settlements include the accommodation settlement and the financial settlement, along with the provision of appropriate releases

[1] See *K.H. v. C.E.P., Local 1-S and SaskTel,* [1997] Sask. L.R.B.R. 476, LRB File No. 015-97, where the Board applied the duty to accommodate to determine the required standard of representation by a trade union of a disabled employee.

from the Union and the Applicant to the Employer. This settlement is implicitly approved by the Commission's findings.

[56] Given this overlapping jurisdiction, the Board will defer its jurisdiction under s. 25.1 and will not determine if the agreements entered into by the Union and the Employer meet the tests under s. 25.1. If the Board did not defer its jurisdiction over these aspects of the Applicant's duty of fair representation complaint, we would be required to examine the agreements reached on the accommodation and the financial settlement. Although the Board may use slightly different standards to judge the two agreements, nevertheless, the results of its examination might conflict with the ruling of the Human Rights Commission. If the Board were to find a breach of the duty of fair representation and order the parties to refer the Applicant's grievance to arbitration, an arbitration board would surely be bound by the findings of the Human Rights Commission that accommodation had been achieved and the financial settlement was satisfactory. By deferring to the Human Rights Commission, we avoid unnecessary litigation and potentially contradictory results.

[57] In this regard, we would also refer to *United Food and Commercial Workers, Local 1400 v. Saskatchewan (Labour Relations Board)* (1992), 95 D.L.R. (4th) 541, [1992] S. J. No. 425 (Sask. C.A.) where the test for determining if deferral is an appropriate response to an unfair labour practice application was set out as follows:

> *Morris Rod Weeder speaks of "an alternative remedy of the same grievance" and makes clear the principle that where a trade union elects both the grievance-arbitration procedure provided for in the collective agreement between the parties and an application to the Board for an unfair labour practice order to resolve the same dispute, the Board may consider the trade union's election to use the grievance–arbitration procedure as a relevant factor in determining whether to dismiss the application. The case is authority for the proposition that for such an elective to constitute a relevant (as opposed to an "extraneous" or "irrelevant") consideration three preconditions must coexist: (i) the dispute put before the Board in the application for an unfair labour practice order and this dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute; (ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance-arbitration procedure, and (iii) the remedy under the*

> *collective agreement must be a suitable alternative to the remedy sought in the application to the Board.*

[58] In the present case, the Applicant's complaint against the Union, to the extent that it raises issues of discrimination on the basis of disability, refusal to accommodate and denial of compensation for the period of non-accommodation, are matters that are squarely before the Human Rights Commission. The Commission has primary authority for enforcing compliance with *The Saskatchewan Human Rights Code* and it has equal or superior remedial powers to rectify the complaint. On these grounds, the Board should also exercise its discretion to defer to the Human Rights Commission and its processes.

[59] The remaining matters in the Applicant's unfair labour practice complaint relate to the processes the Union used to deal with her accommodation grievance. There is a long list of "process" complaints outlined in her applications that may or may not constitute breaches of the duty to fairly represent.

[60] In this regard, the Applicant seeks a cease and desist order; payment of monetary loss caused by the unfair labour practices or violations of the collective agreement; and an order requiring the Union to fairly represent her. The request for monetary loss, in so far as it seeks damages for violations of the collective agreement (the "no discrimination" clause) is subsumed in the human rights complaint and will be deferred to that process for the reasons set out above.

[61] The remaining issues (i.e. those relating to the processes used by the Union) may give rise to a breach of the duty of fair representation in the sense described above in the *Gagnon* case, *supra*. That is, the outcome of the representation (the agreements) may be unassailable (here, by reason of the ruling of the Human Rights Commission), while the processes used to get to the agreements in question may be flawed by bad faith, discrimination or arbitrary treatment and require some compensation to the Applicant from the Union. To this extent, the Applicant's duty of fair representation complaint is not totally subsumed by the human rights complaint and the Board retains jurisdiction to determine this aspect of the complaint.

[62] The Board therefore defers its jurisdiction over the Applicant's duty of fair representation complaint to the Human Rights Commission with respect to (1) the agreement to accommodate the Applicant's disability; (2) the financial agreement to compensate the Applicant for the failure to accommodate her in a timely manner; and (3) any claim for damages arising from an alleged breach of the collective agreement.

[63] The Board will retain jurisdiction over the Applicant's duty of fair representation complaint to determine whether any of the processes that the Union used to arrive at the accommodation, financial or grievance settlements were taken in bad faith, with discrimination or in an arbitrary fashion. If the Board were to determine that the Union had not processed the Applicant's grievances in accordance with the standards set down in s. 25.1 of the *Act,* liability would affect only the Union, not the Employer. On this limited aspect of the application, there is no possibility that the Board would order the Union to refer any of the Applicant's grievances to arbitration. Vis-à-vis the Union, the Employer and the Applicant, the settlement of these matters are in the hands of the Human Rights Commission.

[64] The Board will hear evidence and argument with respect to these limited matters at a time to be set by the Board Registrar.

B. Does the Applicant have standing to bring an unfair labour practice application against the Employer? If so, does the unfair labour practice allegation contained in the Applicant's amended application raise an issue over which the Labour Relations Board has statutory jurisdiction?

[65] In her amended application, the Applicant alleges that the Employer violated its duty to bargain in good faith by failing to accommodate her disability. As indicated, the Employer attacked the Applicant's standing to bring an unfair labour practice against the Employer under s. 11(1)(c) without the approval of the bargaining agent. The Union asserted, as well, that the matter should be deferred to the Human Rights Commission for the reasons set out above.

[66] We find that the Applicant lacks standing to bring the s. 11(1)(c) complaint against the Employer. The Employer owes a duty to bargain in good faith to the Union selected by the employees to be their exclusive representative. Once employees select

a union to represent them in collective bargaining, the Employer must negotiate work place disputes exclusively with the Union. As set out by the Ontario Labour Relations Board in *Christian Labour Association of Canada,* [1998] OLRB Rep. January/February 115 at para. 9, citing *J. Abramowitz,* [1987] OLRB Rep. April 455, at para. 8:

> *Thus, the Board has consistently held in the context of The Labour Relations Act that employees do not have the status to assert that their trade union or their employer has violated the duty to bargain in good faith and make every reasonable effort to make a collective agreement … The bargaining duty imposed by those provisions is owed by the trade union to the employer, and vice versa.*

[67] For these reasons, the unfair labour practice application brought by the Applicant against the Employer is dismissed for lack of standing.

[68] If we did not dismiss the unfair labour practice application against the Employer, we would have deferred jurisdiction over the complaint to the Human Rights Commission as the complaint is in its essence a human rights dispute related to the obligations on the Employer to accommodate the Applicant's disability.

Conclusion:

[69] In summary, the Board:

1. defers its jurisdiction over the Applicant's duty of fair representation complaint to the Human Rights Commission with respect to (1) the agreement to accommodate the Applicant's disability; (2) the financial agreement to compensate the Applicant for the failure to accommodate her in a timely manner; and (3) any claim for damages arising from an alleged breach of the collective agreement. The Board dismisses these aspects of the Applicant's duty of fair representation complaint against the Union.

2. retains jurisdiction over the Applicant's duty of fair representation complaint to determine whether any of the processes allegedly used by the Union to arrive at the accommodation settlement, the financial

settlement or the grievance settlements were influenced by or taken in bad faith, with discrimination or in an arbitrary fashion contrary to s. 25.1 of the *Act.* The Board will hear evidence and argument with respect to these limited matters at a time to be set by the Board Registrar.

3. dismisses the unfair labour practice complaint against the Employer.

DATED at Regina, Saskatchewan this **6th** day of **February, 2003.**

LABOUR RELATIONS BOARD

Gwen Gray, Q.C.
Chairperson