Labour Relations Board
Saskatchewan

RON BEATTY, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES UNION and NORTHLANDS COLLEGE, Respondents

LRB File No. 086-04; November 16, 2006
Vice-Chairperson, Angela Zborosky; Members: Marshall Hamilton and Maurice Werezak

The Applicant:	Ron Beatty
For the Respondent Union:	Don Erhardt and Linda Cowan
For the Respondent Employer:	Ken Hutchinson and Bill McLaughlin

Duty of fair representation – Arbitrary conduct – Evidence established that union intended to file grievance on applicant's behalf in relation to failure of probation and termination – Applicant told by union that grievance filed or would be filed – Grievance not filed without explanation – Union acted in cursory manner and without reasonable care by simply abandoning plan of action without explanation – Whether this resulted from lack of attention, miscommunication or dilatoriness, amounts to arbitrariness and thus violation of union's duty to represent applicant fairly.

Duty of fair representation – Scope of duty – Probationary employee – Section 25 of *The Trade Union Act* requires access to grievance procedure for probationary employees – If union fails to represent member on basis of illegal clause in collective agreement restricting probationary employee's right of access to grievance and arbitration procedures, union could be found in violation of duty to fairly represent member pursuant to s. 25.1 of *The Trade Union Act*.

Duty of fair representation – Remedy – Board imposes remedy which will place applicant in position he would have been in had union's breach of s. 25.1 of *The Trade Union Act* not occurred – Board orders union to investigate merits of grievance, make determination of whether to file grievance and advise applicant of reasons for determination made and appeal rights under union's constitution if determination not in applicant's favour.

***The Trade Union Act*, ss. 25(1) and 25.1**

REASONS FOR DECISION

Background:

[1] Ron Beatty (the "Applicant") filed an application alleging that Saskatchewan Government and General Employees Union (the "Union") failed in its duty to represent him fairly pursuant to s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). In his application the Applicant alleged that the Union failed to assist him with a workplace situation because he was a probationary employee. Attached to his application was a four page document in the form of a memo titled "Ron Beatty, Grievance filed with FAIR Committee, June 20, 2003" and addressed to Darwin Delorme, Chair of FAIR Committee. This document outlines several problems the Applicant was encountering in the workplace including his attempts to file a grievance, his perception of a conflict of interest as a result of his supervisor being a member of the Union and details of the events of his probationary period and his performance evaluations.

[2] In the reply filed by the Union, the Union denied the allegations made by the Applicant, stating that the Applicant was terminated by the Employer in accordance with the provisions of the collective bargaining agreement, during his probationary period. The Union also took the position that further particulars were necessary in order to respond to the claim. A pre-hearing was held on September 8, 2004 and, on March 25, 2004, the Executive Officer of the Board ordered the Applicant to provide particulars of his claim against the Union, including the essential facts upon which he relied in making his allegations. The particulars provided by the Applicant indicated that it was his position that the Union misrepresented him and his case by assigning a certain individual to act on his behalf in relation to the employment problems detailed in his application and in circumstances where the individual assigned to assist him was not a shop steward. Upon receipt of the particulars, the Union maintained that the particulars were insufficient and indicated that it might seek an adjournment at the close of the Applicant's evidence to enable it to properly respond.

[3] The matter first came before the Board for hearing on July 7, 2005. At the outset of the hearing the Union argued that the application should be dismissed without a hearing on the basis that there had been considerable delay since the Applicant failed

his probation and because the Applicant had failed to respond to the Union's requests and the Executive Officer's Order for particulars. Following the parties' submissions the Board ruled that it would not dismiss the application without a hearing on the basis that (i) the Applicant had not delayed in filing the application and there was no evidence before the Board to suggest that the Applicant was responsible for the delay in the matter proceeding to a hearing; and (ii) even if the Board were to determine that it had the authority to dismiss an application without a hearing, the application filed raised allegations against the Union relating to its duty to represent the Applicant fairly pursuant to s. 25.1 of the *Act* and, even though there may be limited facts contained in the application, in the circumstances of this case, the most practical and efficient method of proceeding was to hear the Applicant's case and, at the conclusion of that case, if the Union wished, it could make an application for non-suit and/or request an adjournment should it be taken by surprise and require time to respond to the allegations. Also, regarding the issue of delay, the Board invited the Union to address the issue through evidence and final argument if it wished. The Union did not pursue the issue of delay, nor did it make a motion for non-suit at the close of the Applicant's case. The Union did, however, request an adjournment at the close of the Applicant's case, as the Union did not have all of its proposed witnesses available to testify and the Board granted the Union's request.

[4] Shortly after the filing of the application Northlands College (the "Employer") filed a letter with the Board indicating that it would not be filing a reply but asking to be advised as to the progress of the application. The Employer's representatives attended all days of hearing, participated only to a limited degree in the presentation of evidence and did not take a position with respect to the application.

[5] The hearing was held on July 7 and 8, 2005, January 9 and 10, 2006 and March 1 and 2, 2006.

Evidence:

[6] An extensive review of the evidence is necessary due to the many inconsistencies in the witnesses' testimony and many unexplained circumstances.

[7] The circumstances giving rise to this application primarily involve the six-month probationary period which the Applicant was subject to under the terms of the collective agreement between the Union and the Employer. The Employer is a government funded regional college. The Applicant was hired by the Employer in LaRonge, Saskatchewan as an instructor in the radiation environmental monitoring program on a full-time term basis with the term commencing September 5, 2002 and ending November 5, 2003. According to the terms of the collective agreement, the Applicant was subject to a 180 day probationary period. The Applicant was a new instructor and he was hired along with another individual, new to the instructor position as well, to teach the above referenced course, each assigned half of the required classes, but employed as full-time employees. The Applicant received interim performance evaluations from his supervisor, Hugh Munroe, in October 2002 and February 2003 that indicated that the Applicant's performance was unsatisfactory. The Applicant received a final evaluation upon completion of his probationary period in May 2003 that indicated that he had failed his probation.

Applicant's Evidence

[8] The Applicant testified in support of his application. He testified concerning his extensive education and work experience which he believed enabled him to obtain the teaching position. His education included completion of technical institute programs and a Bachelor of Science degree. He also had several years of experience in environmentally related work.

[9] The Applicant testified that, until he came to be employed by the Employer, he had little experience with unions, having only been a union member during two summer jobs he held while attending high school. When he became employed by the Employer in September 2002 he became a member of the Union. The Applicant testified that he had not received an orientation by the Union concerning the identity of its executive members, the manner in which to file a grievance or the structure of the Union. He acknowledged that he attended two union meetings, one in September 2002 and one in October 2002. It was through attendance at these meetings that he learned that Kelly Haydukewich was a shop steward and Hugh Munroe and Linda Cowan were co-chairs of the Union, all of whom worked for the Employer. Other evidence led at the

hearing clarified that Ms. Cowan was the chair of the local of the Union while Mr. Munroe was the vice chair.

[10] The Applicant began to experience workplace difficulties upon receiving an instructor evaluation from his supervisor on October 10, 2002 that outlined difficulties with his work performance as an instructor. The Applicant was not pleased with the evaluation and, because he did not know how to file a grievance, he met with Mr. Haydukewich, a shop steward, to explain his problems with the evaluation. The Applicant took the position that some of the information in the evaluation was false and that it was unfair because it was largely based on the observations of only one person (his supervisor, Mr. Munroe) and the responses of a survey of his twelve students, which in his view was not a large enough statistical sample. The Applicant stated that he wanted to file a grievance but Mr. Haydukewich told him that a grievance could not be filed while the Applicant was on probation and that, in any event, he did not agree with the Applicant's observations about the evaluation. The Applicant stated that Mr. Haydukewich seemed unsure about a possible grievance and stated that he was going to speak with Mr. Munroe. The Applicant was unsure whether Mr. Haydukewich was going to meet with Mr. Munroe because he was the co-chair of the Union or because he was the Applicant's supervisor who gave him the evaluation. A few weeks after this meeting with Mr. Haydukewich, the Applicant stated that he asked Mr. Haydukewich what Mr. Munroe said and that Mr. Haydukewich told the Applicant there were no grounds for a grievance.

[11] The Applicant testified that in December 2002 he was still dissatisfied with his evaluation and he therefore telephoned a union committee titled "friends against indigenous racism" or the "FAIR" Committee and left a message for them to return his call. (The Applicant's testimony was somewhat at odds with the statement sworn to in his application (he stated it was February 14, 2003) as well as those made in his opening remarks at the hearing (he stated, it was February 2003, after returning from sick leave)). The Applicant had seen a poster in the workplace about this committee and thought it might be able to provide him with assistance, it being the Applicant's understanding that the committee was established to help employees with work difficulties. In cross-examination by the Union, the Applicant acknowledged that racism was not a factor in the workplace problems he experienced.

[12] Darwin Delorme testified on behalf of the Applicant. He is currently employed with the Department of Communications, Resource and Employment with the Government of Saskatchewan and is also a member of another local of the Union. Mr. Delorme was chair of the FAIR Committee at the time the Applicant left a message on the FAIR Committee hotline. Mr. Delorme described the FAIR Committee as a standing committee of the provincial council of the Union, which is obligated by the Union's constitution to protect and encourage recruitment and retention of aboriginal employees. The FAIR Committee looks at barriers to aboriginal employment and provides advocacy assistance for members going through the grievance and arbitration process. The FAIR Committee is made up of 18 elected individuals from different sectors within the Union and meets once every three to four months. It was explained that the FAIR Committee, like all standing committees of the Union, has an "agreement administration adviser" (or an "AAA" who is an employee of the Union) assigned to it who sits in on all meetings, takes minutes, gives directions and advises on the collective agreement that applies to the arbitration cases that the FAIR Committee is assisting with. Mr. Delorme testified that, as Chair of the FAIR Committee, he was in a position to direct the AAA to perform certain tasks for the FAIR Committee.

[13] Mr. Delorme testified that the phone message he received from the Applicant on the FAIR Committee hotline indicated that the Applicant was refused the assistance of the shop steward. Mr. Delorme therefore contacted Karen Kilgour, a FAIR Committee representative in LaRonge, and asked her to make contact with the Applicant.

[14] The Applicant received a return telephone call from Ms. Kilgour of the FAIR Committee. The Applicant testified that Ms. Kilgour first met with him at his workplace at which time he outlined some of the work problems he was having. He relayed his problems with the evaluation to Ms. Kilgour in a similar manner as he had to Mr. Haydukewich. The Applicant provided Ms. Kilgour with information concerning the steps he had taken to attempt to improve his performance. The Applicant also complained to Ms. Kilgour that it was unfair that his supervisor was also a co-chair of the Union, making it difficult, in his view, for the Union to address his problems. The Applicant also stated that he indicated to Ms. Kilgour that there was unfairness in the

fact that a large proportion of the employees are related to each other and that this impacted his evaluation, although he did not explain at the hearing what he meant by this. The Applicant also testified that he indicated to Ms. Kilgour that he felt he was being set up to fail his probation because the new instructor who was hired to teach the other half of the program had relatively little education and experience and the Applicant believed the Employer was trying to eliminate him so it could give the full program to the other instructor who would cost the Employer comparatively little.

[15] The Applicant had a second performance evaluation in February 2003. He felt that the evaluation was unfair and told Mr. Munroe, his supervisor, that he thought it was inaccurate and not reflective of how the students felt about him. The Applicant was not satisfied with Mr. Munroe's response and he therefore met with Peter Mayotte, a senior administrator who, the Applicant testified, said that he did not think it was detrimental to the Applicant working there. As a result of the stress caused to him by the evaluation the Applicant saw a doctor and took a couple days off from work. Upon his return to work on February 18, 2003, the Applicant stated that he had a good discussion with Bill McLaughlin, another senior administrator, about his work and he thereafter retuned to class.

[16] The Applicant stated that his next contact with the FAIR Committee was when Ms. Kilgour came to meet with him at his home in Weyakwin in February 2003. The Applicant was uncertain whether this meeting was held before or after his second evaluation. The Applicant testified that he and Ms. Kilgour met for three to four hours during which time Ms. Kilgour took extensive notes and the Applicant provided her with several documents he felt were relevant to his problems. The Applicant stated that Ms. Kilgour might have explained the process for filing a grievance although he could not remember for certain. It was his understanding that, following this meeting, Ms. Kilgour would be having her notes typed up. The Applicant testified that he also signed something during this meeting with Ms. Kilgour and, although he could not specifically recall what it was, he believed he signed the notes and that it had something to do with a grievance. He stated that he believed that Ms. Kilgour "had the grievance" and that the FAIR Committee would be taking a lead role with respect to the grievance.

[17] The Applicant also relayed the circumstances of a meeting he had with Mr. Haydukewich some time just prior to the end of his probationary period in May 2003. Before he received his final evaluation, the Applicant asked Mr. Haydukewich to grieve what the Applicant expected would be failure of the Applicant's forthcoming performance evaluation. The Applicant stated that Mr. Haydukewich told him he could not grieve something that had not yet happened. This was the last time that the Applicant saw Mr. Haydukewich and the Applicant did not contact Mr. Haydukewich to file a grievance following his receipt of the evaluation that indicated the Applicant had in fact failed his probation.

[18] Mr. Haydukewich testified on behalf of the Applicant. He recalled that the Applicant did come to see him about his poor work evaluation although Mr. Haydukewich was not certain whether it was in October 2002 or at a later point in time. Mr. Haydukewich's recollection was that the Applicant had not asked Mr. Haydukewich specifically about a grievance but was wondering what his options were. Mr. Haydukewich recalled that he suggested that the Applicant work on the weaknesses identified in the evaluation and he viewed his discussions with the Applicant as more in the nature of "instructor to instructor" rather than "shop steward to union member." Mr. Haydukewich also recalled meeting a second time with the Applicant and believed it was sometime in May 2003 before the Applicant failed his probationary period. At this time the Applicant had indicated that he did not feel he would pass his probation. Mr. Haydukewich did not recall the Applicant asking him to file a grievance and, in his view, the Applicant did not have a valid grievance. Mr. Haydukewich stated that he advised the Applicant to wait and see what his final evaluation said, although the Applicant never contacted Mr. Haydukewich following his final evaluation. (While Mr. Haydukewich believed that there was no valid grievance, he had wanted to discuss the matter with someone else and believed he spoke to Ms. Cowan about the Applicant's unhappiness with his evaluation, although the evidence was unclear concerning when this occurred, whether after Mr. Haydukewich's first or second meeting with the Applicant.) Mr. Haydukewich did not know what the FAIR Committee was and he had had no dealings with the FAIR Committee as a shop steward.

[19] The Applicant received his final probationary evaluation at the end of the program, which he believes was May 15 or 23, 2003. The evaluation form, entered into

evidence, was signed by Mr. Munroe on May 23, 2003 and it indicated that the Applicant did not perform the required self-assessment and had refused to meet with Mr. Munroe to discuss the evaluation, apparently aware that he would not pass the evaluation. The Applicant confirmed that those comments in the evaluation form were accurate and that he had asked Mr. Munroe to email the evaluation form to him.

[20] The Applicant testified that he also had a meeting with Ms. Kilgour at her home in LaRonge, although he could not recall whether this meeting took place before or after he had failed his probationary period. The Applicant testified that he was required to sign some forms that contained typewritten information. Although the Applicant's evidence on this matter was confusing, he appeared to state that he believed he signed three sets of forms and the forms were pink, yellow and green. He also stated that he did not read the forms, but he understood that they were something to do with the grievance process and that Ms. Kilgour said that she was filing a grievance. In the Applicant's view he believed his grievance began in late 2002 when he first discussed the matter with the FAIR Committee, although he acknowledged he had not previously signed a grievance. The Applicant did not recall seeing, at this meeting, the handwritten notes that Ms. Kilgour had taken at their earlier meeting. The Applicant's evidence again became confusing in that he also testified that he thought he was signing those notes, not the forms, and that he had not reviewed the notes.

[21] In relation to the four-page document that was attached to his application, the Applicant testified that he believed he received this in the mail sometime between June and August 2003. He initially testified that it came from the FAIR Committee but later he was uncertain and thought it could have come from the Employer because he had received other correspondence from the Employer around that time. In any event, he thought it was part of the grievance procedure. Earlier in his testimony, the Applicant had indicated that the document was compiled from a discussion he had had with Ms. Kilgour in February 2003 and, in later testimony, he indicated that the discussions he had with Ms. Kilgour were contained in the document, although in his view he was unsure how all of the information in the document related specifically to his grievance. He believed his grievance only concerned the unfair evaluation he had received. The Applicant stated that, when he received a copy of the document during the summer of 2003, he was not pleased with its contents.

[22] The Applicant testified that the next and last contact he had with Ms. Kilgour was in approximately June or July 2003 when he phoned her to ask about the progress of his grievance. He stated that she replied that it was between step two and step three of the grievance procedure.

[23] Evidence of the FAIR Committee's dealings with the Applicant's issues was adduced by the Applicant through Mr. Delorme and Ms. Kilgour. Mr. Delorme stated that, approximately one week after he assigned Ms. Kilgour to the Applicant's issues, he spoke to Kerry Armbruster-Barrett, the AAA assigned to the FAIR Committee, and asked that Mr. Armbruster-Barrett advise Ms. Kilgour of the grievance procedure. At the next FAIR Committee meeting, Mr. Delorme recalled that Ms. Kilgour gave Mr. Armbruster-Barrett a sealed envelope and when Mr. Delorme told Mr. Armbruster-Barrett to make sure that an out-of-scope manager signed the grievance form, Mr. Armbruster-Barrett assured him he would. It was Mr. Delorme's recollection that another AAA, Vern Wicks, assisted Mr. Armbruster-Barrett and Ms. Kilgour with the Applicant's matter and would have knowledge of the grievance. Mr. Delorme stated that, approximately six to nine months later, while he was under the assumption that a grievance had been filed in relation to the Applicant's matter, he attempted to contact both Ms. Kilgour who had moved from LaRonge and Mr. Armbruster-Barrett to determine the status of the grievance. No one appeared to know what stage the grievance was at. It came as a surprise to Mr. Delorme when Mr. Armbruster-Barrett advised him that the grievance was not "registered" in the Union's records. It was Mr. Delorme's opinion that the Union's representation of the Applicant "started out well, with good intentions," the Applicant's issues were "given priority," but that, at some point, the process fell apart.

[24] Mr. Delorme testified that it was his view that, once Ms. Kilgour gave the grievance to Mr. Armbruster-Barrett, it belonged to the Union and it was the Union's responsibility to process the grievance and make decisions with respect to the grievance, although the FAIR Committee would be made aware of the progress of the grievance to the extent people involved were willing to share information. The FAIR Committee keeps such such information confidential.

[25] Mr. Delorme also testified that the FAIR Committee discussed the collective agreement that applied to the Employer, specifically the provision that disallowed union representation for probationary employees. The FAIR Committee was concerned about this clause and brought it up with the Union's executive director of operations. A number of meetings were set up with the Employer to discuss this issue, however, none of those meetings went ahead. The probationary clause in issue reads as follows:

> *8.1.3 At any time during the initial probationary period, the College may terminate an employee. The employee shall not have access to the grievance procedure. The College shall provide reasons in writing in all cases of termination of a probationary period.*

[26] Ms. Kilgour also testified on behalf of the Applicant. Ms. Kilgour testified that she had worked for the Employer for approximately four years during the period 1998 - 2003. She was a member of the FAIR Committee and, while she had some union steward training, she was not a shop steward. During the course of her testimony, Ms. Kilgour had difficulty recalling dates of the events she testified about and gave her best approximations. Ms. Kilgour testified that, in approximately January or February 2003, Mr. Delorme directed her to see the Applicant in Weyakwin following the Applicant's phone call to the FAIR Committee hotline. Ms. Kilgour stated that, before she met with the Applicant, she spoke with Mr. Armbruster-Barrett by phone for assistance as to how a grievance should be filled out and to ensure she had the proper grievance forms. Mr. Armbruster-Barrett mailed the forms to Ms. Kilgour although she was not certain whether it was before or after her first meeting with the Applicant; it could have been in approximately March or April 2003. It was approximately one week after the Applicant's call to the hotline that Ms. Kilgour attended at the Applicant's house. At the meeting, which lasted approximately 4 hours, Ms. Kilgour made handwritten notes of the discussion, with the intention of attaching those notes to the grievance as part of the grievance. Approximately one week after this meeting and the day before a FAIR Committee meeting, Ms. Kilgour attended at the Union's office in Saskatoon and gave an envelope containing these handwritten notes and the grievance form signed by the Applicant to Mr. Armbruster- Barrett, in the presence of Mr. Delorme. The next day at the FAIR Committee meeting, Mr. Armbruster-Barrett returned Ms. Kilgour's notes, which had now been typed. It was Ms. Kilgour's understanding that Mr. Armbruster-

Barrett had typed the notes as he performed all of the typing for the FAIR Committee, including the agenda and the minutes. Ms. Kilgour was not entirely sure where the original and the copies of the documents went, but believed that the original grievance and notes would stay with the Union while copies of the grievance and the notes were in the envelope given to Mr. Armbruster-Barrett and that perhaps a copy of the notes but not the grievance went into the FAIR Committee's records. She also believed that the Applicant would have received a copy of the grievance. It was Ms. Kilgour's understanding that the grievance with the notes would have been filed with the Employer and that Mr. Armbruster-Barrett would know where the grievance went to because he usually reported back at the next FAIR Committee meeting on any action taken. It was her view that the grievance was Mr. Armbruster-Barrett's responsibility at that point.

[27] Ms. Kilgour testified as to her understanding of the grievance procedure. Initially, the employee attempts to resolve the grievance directly on his or her own, failing which, the employee takes his or her problem to the shop steward who gathers information and possibly fills out a grievance form. The shop steward takes the matter to the chief steward or the chair of the local union at which time the local union executive attempts to resolve the matter and makes a decision whether to proceed further. If such a decision is made, the matter goes to an AAA, however, the local union executive may decide not to proceed further with the matter if it believes the grievance is not valid. If the individual does not feel that his or her problem or grievance has been handled properly, the individual can bring the matter to an AAA or to the FAIR Committee. If the individual goes to the FAIR Committee, the FAIR Committee meets with the employee, prepares a grievance and gives it to the FAIR Committee' s AAA to "send up." Although Ms. Kilgour was uncertain why the grievance was not filed at the local level in this case (and she believed the Applicant should have contacted the shop steward or local executive before the FAIR Committee), she felt it was appropriate to go to the FAIR Committee because of the nature of the problem. It was Ms. Kilgour's understanding that the Applicant's grievance was concerning the loss of his instructor position and the awarding of the position to the person with whom he had job-shared. Ms. Kilgour could not positively identify that the four-page typed document entered into evidence and attached to the Applicant's application emanated from her handwritten notes taken during her meeting with the Applicant. She stated that her notes were not in a memo

form like the typewritten document was, however, she did recognize some of the information as being obtained at her meeting with the Applicant.

[28] In cross-examination by the Union, Ms. Kilgour recalled that Rod McCorriston was an AAA for the FAIR Committee at one time, but believed that Mr. Armbruster-Barrett became the AAA shortly following her meeting with the Applicant -- maybe in the spring of 2003 and she believed that Mr. McCorriston's last meeting with the FAIR Committee was in approximately January, 2003.

[29] With respect to the grievance that the Applicant thought had been filed, the Applicant was questioned at the hearing concerning what provision of the collective agreement had been violated in his case. He did not know and said that he left that up to the shop steward and the FAIR Committee. The Applicant had seen copies of the collective agreement but had not reviewed the collective agreement in any detail and, specifically, had not reviewed the provisions related to probationary periods or the grievance procedure. In cross-examination by the Union, the Applicant stated that, given his lack of understanding of union procedures and the collective agreement, it was up to Mr. Haydukewich to file a grievance concerning the Applicant's problems and to determine which provision of the collective agreement applied. The Applicant also acknowledged that it was up to Mr. Haydukewich to decide whether the collective agreement had even been violated. When Mr. Haydukewich told the Applicant later that there was no violation of the collective agreement, the Applicant was not satisfied with this response and therefore went to speak to Mr. Munroe and, still not being satisfied, spoke to Mr. Mayotte. The Applicant acknowledged that, based on their advice, he spoke with two other instructors to provide him with advice to assist him with his work performance. In cross-examination, the Applicant acknowledged that Mr. Munroe and Mr. Mayotte were trying to assist him in overcoming the problems pointed out in his evaluation, although the Applicant maintained that that there remained problems with the evaluation itself that they were not going to address for him. The Applicant maintained that, while the evaluation process (using student appraisals and class observation by the supervisor) is consistent in that the same process applies to all instructors, the subjective nature of the evaluation makes it unfair and the results were inaccurate because his supervisor was very thorough and others' supervisors might not be. The Applicant also felt it was unfair that his supervisor who evaluated his performance was

also the Union's co-chair, although he acknowledged that his supervisor, Mr. Munroe, was elected to that position by the Union's membership.

[30] During the Union's cross-examination of the Applicant, letters from Mr. Munroe to the Applicant were entered into evidence that outlined discussions they held concerning the Applicant's performance problems and suggested steps to correct those problems. In his evidence the Applicant acknowledged that he followed only some of the recommendations (speaking to other instructors – Mr. Mayotte and Lorraine Bunyon – on how to be a better instructor) but that he disagreed with many of the comments and suggestions, stating that it was not possible, nor healthy, to follow every order or suggestion given.

[31] With respect to his probationary period the Applicant felt that the 180 day period was not "set in stone" and suggested at the hearing that the Employer could have extended the probationary period instead of failing him. In cross-examination by the Union, the Applicant stated that he felt that the purpose of the probationary period was to provide an employer with the opportunity to assess an individual and to assist the individual to retain his or her employment -- not to find a way to terminate the employee.

[32] The Applicant testified that he believed it was reasonable for him to expect that Ms. Kilgour was properly acting on his behalf in relation to filing a grievance. She was assigned to assist him following his telephone call to the FAIR Committee, they had lengthy discussions about his problems in the workplace, she told him he "had a case," she told him she was currently handling several cases, she described to him her credentials and the specialized labour relations training she had, she took time off work to come to see him and she was paid her expenses by the Union.

[33] In any event, in cross-examination by the Union, the Applicant stated that he had not read anything presented to him for signing, nor did he keep copies of anything he signed. Also in cross-examination he stated that he did not know whether he signed a grievance form. When he was asked why he would not know whether he signed a grievance given the seriousness with which he viewed his problems, the Applicant responded that he was relying on Ms. Kilgour to take care of him and the FAIR Committee to keep the necessary documents. He acknowledged that he simply did not

accept the advice of Mr. Haydukewich that he did not have a valid grievance and that he took his problem to other individuals until he found someone who agreed with his point of view, that is, Ms. Kilgour. When it was suggested to the Applicant in cross-examination that the FAIR Committee had come to the conclusion that there were no grounds for a grievance, the Applicant disagreed. When it was pointed out to the Applicant in cross-examination that, given that the Applicant did not recall whether he signed a grievance and that neither the Applicant nor Ms. Kilgour nor Mr. Delorme had any paperwork to that effect, this suggested a grievance was never filed, the Applicant denied this. The Applicant stated that Mr. Delorme and Ms. Kilgour had a sealed envelope with documentation that looked formal and professional, although he acknowledged that he did not know whether he filed an actual grievance and did not know the nature of the document held by Mr. Delorme and Ms. Kilgour.

Union's Evidence

[34] Rod McCorriston testified on behalf of the Union. He has been employed by the Union for approximately three years in the capacity of AAA. He stated that he was assigned as the AAA to the FAIR Committee during the time period November 2002 to July 31, 2003. As the staff person assigned to the FAIR Committee, his role was to provide advice on any issues that arose before the FAIR Committee and to record minutes of the meetings. With reference to the Union' s constitution, Mr. McCorriston indicated that the FAIR Committee is a standing committee of the Union that reports to the Union's provincial council and to convention. He referred to the duties of the FAIR Committee as stated in the constitution and indicated that the work of the FAIR Committee was directed primarily toward racial discrimination. In his opinion, the FAIR Committee did not have the ability to file a grievance and the FAIR Committee did not file any grievances while he was the adviser to the FAIR Committee. Mr. McCorriston also indicated that there was nothing in the constitution with regard to an advocacy role to be played by the FAIR Committee and that the FAIR Committee was there to assist Indian and Métis employees and to support them within the established processes of the Union. If an employee wanted the FAIR Committee to file a grievance, the FAIR Committee would put the individual in touch with the shop steward assigned to his or her bargaining unit. If an employee brought forward a general workplace problem to the FAIR Committee, the FAIR Committee would gather information from the employee for

the purposes of having a confidential discussion at its next meeting and, if necessary, the FAIR Committee would assign one of its members to assist the individual.

[35] In early 2003, Mr. McCorriston recalled discussing the Applicant's issue at a FAIR Committee meeting, specifically that the Applicant received an unfavourable report during his probationary period. Mr. McCorriston stated that he may have discussed the matter with Mr. Delorme at the time, but that discussion was in the nature of "wait-and-see" what action the Employer took. Mr. McCorriston did not recall speaking with Ms. Kilgour at the time.

[36] In his evidence, Mr. McCorriston referenced FAIR Committee meeting minutes for April 7-8, 2003 and for June 9, 2003. Mr. McCorriston observed that there was no reference in the minutes of April 7-8, 2003 to the Applicant's issue and noted that the first reference to the Applicant's issue was contained in the minutes of June 9, 2003 where the Applicant's issue was assigned a file number and was first discussed by the FAIR Committee.

[37] Mr. McCorriston testified that, at the June 9, 2003 FAIR Committee meeting, he believed that Mr. Delorme had given a verbal report concerning the Applicant's matter. The Applicant's issue had been an agenda item because contact had been made through the hotline prior to the meeting. Mr. McCorriston characterized the discussion of the Applicant's issue at this meeting as a "brainstorming/idea-generating discussion" and the FAIR Committee discussed the following options: the FAIR Committee attempting to get the Employer to provide a letter explaining why the Applicant failed his probation; assigning Ms. Kilgour to meet with the Applicant to obtain further information; advising Ms. Kilgour to lobby the steward to file a grievance; considering whether to suggest that the Applicant file a complaint with the membership committee concerning the union steward's handling of the Applicant's matter (the FAIR Committee was aware that the steward had refused to file a grievance); and speaking to Dave McNeill, a staff person in the education sector of the Union, to suggest that he lobby a staff member of the Union because the FAIR Committee had been told there was reluctance to file a grievance at the local steward level. The specific authority in the minutes reads as follows:

> 4. *Advocacy cases update*
> ***2003-07- LaRonge Education sector*** *- failed initial probation. No access to grievance procedure. Letter to be provided to employee. FAIR to talk with Dave McNeil to seek advice and guidance and hopefully ask for assistance from staff assigned to Northern Colleges. If not satisfied then pursue membership complaint avenue.*
> *Write up concern to membership committee. Is this language 8.1.3 Northlands College CBA in violation of the Trade Union Act? Section 36 violation. Denied access to steward from steward three different occasions.*

[38] Mr. McCorriston indicated that following the June 9, 2003 meeting he spoke with AAA, Vern Wicks, (because Don Erhardt, the AAA assigned to that local bargaining unit, was away on vacation at the time) about the issues of whether a grievance could be filed and whether a probationary employee had the right to grieve a failure of probation. The FAIR Committee had concerns over the restriction in the probationary clause of the collective bargaining agreement (according to the collective bargaining agreement, a probationary employee could grieve only those matters not related to a failure to pass probation) and how that could conflict with the Union's obligations under the *Act*. Mr. McCorriston stated that he suggested to Mr. Wicks that a grievance be filed and the grievance process could sort out those issues. He indicated that this was the only occasion on which he spoke to Mr. Wicks, although he later stated that at some point he and Mr. Wicks discussed the wording for a possible grievance. He is not certain whether Mr. Wicks had that discussion with the local union chair (Ms. Cowan) and he had no knowledge whether a grievance was in fact filed.

[39] Mr. McCorriston stated that he received a memo dated July 18, 2003 which included Ms. Kilgour's expense claim regarding her meeting with the Applicant in Weyakwin, which was submitted to him for his approval. In cross-examination by the Applicant concerning the possible timing of the meeting for which Ms. Kilgour was claiming expenses, Mr. McCorriston indicated that expense claims had to be filed within three months of the expenses being incurred. Mr. McCorriston testified that Ms. Kilgour also noted in the memo that there would be a package of documents coming from her through the mail. Mr. McCorriston received this package of documents some time after July 18, 2003. This package of documents was entered into evidence at the hearing and it contained documentation that spanned the time period October 2002 to June 2003, including the four-page typewritten document attached to the Applicant's application and

dated June 20, 2003. As Mr. McCorriston was returning back to his elected role with the Union at the end of July 2003, he indicated he would have organized these papers to be handed off to the next AAA assigned to the FAIR Committee. He indicated that the package of documents would have been placed on the Applicant's file with the FAIR Committee, to be shared and discussed at the next FAIR Committee meeting. Mr. McCorriston noted that the June 9, 2003 minutes indicated that another meeting would be held in August 2003 and, at that point, Mr. Armbruster-Barrett would have been the AAA assigned to the FAIR Committee. While Mr. McCorriston did no further follow-up, he indicated that, at some later time, he found the Applicant's file in the office of another representative of the Union, Ms. Bishop, who was not an AAA of the Union.

[40] With respect to the four-page typewritten document, it was Mr. McCorriston's view that, if the document had been prepared by the Union's staff, it would have had a reference number at the bottom, unless the staff person was new.

[41] With respect to the issue of who may file a grievance, Mr. McCorriston first indicated that only a local steward may file a grievance or the AAA assigned to that bargaining unit. Later in his testimony Mr. McCorriston indicated that maybe an employee could also file a grievance on his or her own. Mr. McCorriston acknowledged that the FAIR Committee sent a report to the Union's convention in June 2003 in an attempt to change the mandate of the FAIR Committee so that it could file grievances and obtain steward training. This motion was defeated at convention.

[42] In cross-examination by the Applicant, Mr. McCorriston indicated that he told Ms. Kilgour to lobby and advocate to the Applicant's steward and not to act as a shop steward. Mr. McCorriston indicated he would not know if the Applicant viewed Ms. Kilgour as acting in the role of shop steward and he was not aware that the Applicant had sought Mr. Haydukewich's assistance and was denied that assistance.

[43] Also in cross-examination by the Applicant, Mr. McCorriston acknowledged that the collective agreement allowed for the extension of a probationary period and indicated that it would be with the agreement of the Union, typically following a request by the Employer.

[44] Mr. Armbruster-Barrett also testified for the Union. Mr. Armbruster-Barrett is an AAA who, in addition to servicing bargaining units, was assigned to the FAIR Committee on a temporary basis in August 2003 and thereafter on a permanent basis, continuing to the date of the hearing. Mr. Armbruster-Barrett denied having had any conversations with Mr. Delorme and Ms. Kilgour in late 2002 or early 2003 as he was not on the FAIR Committee at that time.

[45] The first FAIR Committee meeting at which Mr. Armbruster-Barrett attended in his capacity as AAA was August 21-22, 2003. This was the first occasion on which Mr. Armbruster-Barrett saw the package of documents that had been sent by Ms. Kilgour to Mr. McCorriston. With respect to the four-page typewritten document attached to the Applicant's, application, Mr. Armbruster-Barrett denied typing the same, noting that all the documentation he prepares has a reference path at the foot of the page that includes his initials. The portion of the minutes which dealt with the Applicant's issue stated as follows:

> ***2003-07 LaRonge Education Sector*** *Karen to contact complainant to submit a grievance. Need to talk with Vern Wicks for language of grievance. Darwin will set up three-way call with himself, Karen and Vern.*

[46] With the assistance of the meeting minutes for August 21-22, 2003 referenced above, Mr. Armbruster-Barrett testified that, at that meeting, the FAIR Committee assigned Ms. Kilgour to the Applicant's file, advising her to submit a grievance and to work with Mr. Wicks, the AAA assigned to that bargaining unit, concerning the proper language of the grievance. At later points in his testimony, Mr. Armbruster-Barrett stated that Ms. Kilgour "was to contact the Applicant and tell him to file a grievance" and also that the FAIR Committee was suggesting that Ms. Kilgour and Mr. Wicks file a grievance on the Applicant’s behalf. Mr. Armbruster-Barrett also testified that he recalled having a lengthy telephone conversation with Ms. Kilgour to advise her as to the language of the grievance and, although he did not recall mailing her the grievance forms, he acknowledged he might have done so. Through cross-examination by the Applicant, Mr. Armbruster-Barrett indicated that the language for the grievance included a statement that the Applicant had been unjustly terminated while on probation and that that determination was arbitrary, discriminatory or in bad faith. In Mr.

Armbruster-Barrett's evidence, he also stated that Mr. Delorme was to set up a three-way call in order to get the grievance filed or, in other words, to determine who could file a grievance, whether it be Mr. Wicks or Ms. Kilgour. Based on subsequent events, he assumed that this three-way call had not taken place and he had no recollection of Ms. Kilgour returning to the FAIR Committee with a grievance.

[47] Mr. Armbruster-Barrett indicated that the status of grievances or issues is updated at every FAIR Committee meeting, however, in this case, Ms. Kilgour left shortly after the August 2003 meeting and efforts to contact her to get her files were not successful. Mr. Armbruster-Barrett testified that he searched the Union's database shortly following Ms. Kilgour's departure and prior to the FAIR Committee meetings and was not able to find a grievance registered. In addition, there was no grievance contained on the FAIR Committee' s file for the Applicant. Based on these searches, Mr. Armbruster-Barrett concluded that either a grievance was never submitted to the Employer to be signed or the grievance never made it into the Union' s offices to be processed. Mr. Armbruster-Barrett testified that it was his recollection that Mr. Delorme was assigned to contact the Applicant to determine the status of the matter. Mr. Armbruster-Barrett acknowledged that he never went to the Employer to determine whether the grievance had been filed and, as far as he was aware, nobody had filed a grievance. He was uncertain as to the reason why a grievance had not been filed.

[48] With respect to the relevance of the clause in the collective bargaining agreement that restricted a probationary employee's right to grieve a failure of probation, Mr. Armbruster-Barrett testified that it was discussed at the meeting that it was still not impossible to win a grievance and that the grievance process would allow them to gather further information about the matter.

[49] With respect to the issue of who could file a grievance, Mr. Armbruster-Barrett referenced the Union's policy manual which outlines that process. He seemed to imply that Ms. Kilgour had authority to file a grievance on the Applicant's behalf as "an elected member." Reference was made to the following clauses:

13.1 ***FILING A GRIEVANCE***

> *13.1.1 grievances should be filed by a steward or, if no steward is available, an elected member or staff representative.*
>
> *. . .*
>
> *13.1.3 A steward should seek advice from their elected or staff representative if unsure about a grievance.*

[50] Ms. Cowan also testified on behalf of the Union. Ms. Cowan has held many positions in the Union and, at the time relevant to this application, she was the chair/chief shop steward of the bargaining unit, a position that she has held for many years. This position is the highest elected position in the local representing employees of the Employer.

[51] Ms. Cowan is employed by the Employer as one of eight program coordinators, a position also held by Mr. Munroe, and one of her duties is to conduct performance evaluations of the instructors in her area of programs. Ms. Cowan testified about the process followed for performance evaluations, which is dictated by the Employer's policy and applies to all new employees. Approximately four to five weeks after the instructor commences employment, she observes the instructor's performance in class and performs a confidential student evaluation of the instructor. She then reviews the evaluations with the instructor expressing any concerns, commenting on changes required and develops a plan to help the instructor implement those changes. She then checks back with the instructor in approximately three months. Ms. Cowan referenced article 8 of the collective bargaining agreement that deals with probationary employees. All employees must serve a 180-day probation, with a possible 90-day extension. Ms. Cowan indicated that the 90-day extension is used in situations where it appears that the employee is attempting to address the problems identified in the evaluations and it appears likely that the employee will meet the requirements of the position given the additional 90-day period. Typically, the Employer will seek the Union's agreement to extend an employee's a probationary period.

[52] Ms. Cowan testified that, in approximately October 2002, Mr. Haydukewich approached her after the Applicant asked Mr. Haydukewich to file a grievance about the Applicant's unsatisfactory performance evaluation. Ms. Cowan then went to see Mr. Munroe to obtain an outline of the issues, to ensure the process was

properly followed and to determine what Mr. Munroe was doing to address the problems identified in the Applicant's evaluation. Ms. Cowan then advised Mr. Haydukewich that it did not appear that any terms of the collective agreement had been violated and that the Applicant should attend his meeting with Mr. Munroe to hear his concerns and take his advice. Ms. Cowan stated that Mr. Haydukewich confirmed to her that he gave this advice to the Applicant and she acknowledged that at no time did she discuss the issue with the Applicant, Ms. Kilgour, Mr. McCorriston or any other supervisors or shop stewards. Ms. Cowan stated that this was the only occasion on which Mr. Haydukewich told her that the Applicant wanted to file a grievance.

[53] Ms. Cowan testified that, near the end of the Applicant's probationary period, she was aware that Mr. Munroe had a meeting with a number of the managers where he indicated that the Applicant had not made any progress. The Employer determined that the Applicant would fail his probationary period.

[54] Ms. Cowan stated that the Applicant never approached her about the failure of his probationary period. She indicated that the Applicant may have contacted Mr. Haydukewich but she believed that, if the Applicant had, Mr. Haydukewich would have come to her because the practice of this local of the Union was that shop stewards were not "allowed to do anything without the chief steward’s advice." Ms. Cowan believed that there was no request in May 2003 to file a grievance on the Applicant's behalf.

[55] Ms. Cowan stated that other than being aware that the Applicant did not attend his final performance evaluation meeting, she heard nothing of the Applicant’s concerns or his wishes to file a grievance until she received a telephone call from Mr. Wicks in late August or early September 2003. Mr. Wicks had asked her why the local had not filed a grievance with regard to the Applicant’s failure of his probationary period. Ms. Cowan described to Mr. Wicks the events leading up to the Applicant's termination. She also advised him of the clause in the collective agreement that probationary employees could not grieve their termination and stated that the Union had to "stick to" that clause and that the local had at no time approved the grievance proceeding. She also indicated to Mr. Wicks that her investigation led her to believe that there was no violation of the collective agreement as the process of evaluation was consistent with

other instructors and the Applicant had received clear direction regarding the requirements. Later in her testimony, Ms. Cowan stated that she had explained to Mr. Wicks the events leading up to the termination and, given that there was just cause, coupled with the clause regarding probationary employees' limited right to grieve, the local would not file or pursue a grievance. She indicated that a decision to file a grievance would have been made by her and Mr. Haydukewich but that, as far as she was aware, the Applicant had never actually asked the local to file a grievance after his termination in May 2003. Ms. Cowan clarified that, if the Applicant had come to the local following his termination, the local would not have filed a grievance. Ms. Cowan's view of the telephone conversation was that Mr. Wicks was just seeking further information and that he was satisfied with her response, as she had heard nothing more from him. She had no recollection of Mr. Wicks indicating that the FAIR Committee would be filing a grievance. Ms. Cowan could not recall whether Mr. Wicks raised the issue of the legality of article 8 during their telephone conversation and said that Mr. Wicks could have mentioned the involvement of the FAIR Committee although she could not recall for certain.

[56] Ms. Cowan acknowledged that the local had never actually evaluated the filing of a grievance because it did not know that the Applicant had wanted to file a grievance following his termination. When she spoke to Mr. Wicks in late August/early September 2003, Ms. Cowan said that the local would not have pursued a grievance because there was no violation of the collective agreement. She stated that on that occasion she was speaking on behalf of the local executive and she is confident that the executive would have agreed with her assessment about that. In reaching that decision, Ms. Cowan stated that the investigation she had performed in relation to the Applicant's concerns consisted of the following: her awareness of the Applicant's concerns as stated to Mr. Haydukewich in October 2002; and that there had not been the required behavioural changes by the Applicant to pass his probation based on information provided by Mr. Munroe both prior to and subsequent to the Applicant's final evaluation. Ms. Cowan would have seen copies of the Applicant's evaluation forms and would have spoken to Mr. Munroe about his reasons. Ms. Cowan also stated that some students had approached her with complaints and she directed them to Mr. Munroe. Ms. Cowan stated that she made sure that the evaluation process had been followed correctly and that the Applicant was given clear direction early on. She stated that the subsequent

information provided by Mr. Munroe and the students led her to conclude there had been no change in the Applicant's behaviour.

[57] Ms. Cowan testified that, in accordance with article 8, it was her understanding that probationary employees did not have access to the grievance procedure for termination, although a probationary employee could grieve any other issue that arose during his or her employment.

[58] Ms. Cowan testified that, in approximately December 2003, she was advised by the executive director of operations with the union to bargain out the provision in article 8 that prevented a probationary employee from grieving a failure of probation, commenting that the clause might not be legal any longer because of something that transpired at the Labour Relations Board. Ms. Cowan stated that she was unaware whether the Applicant's situation prompted the taking of this position by the Union but said that perhaps Mr. Wicks or someone from the FAIR Committee had brought this to the attention of the executive director of operations. The clause was subsequently bargained out of the collective agreement. No other probationary employee had complained about the clause or about a failure of probation either prior or subsequent to the Applicant's termination.

[59] With respect to the grievance procedure in article 19 of the collective agreement, Ms. Cowan testified that the typical process involved the identification of an issue by a member to the steward who then would converse with the chief shop steward to determine whether a provision of the collective agreement had been violated. Some times the vice-chair would also be involved in the decision-making process, however, in this case Mr. Munroe would not have been involved given his role as the Applicant's supervisor. If the local believed there had been a violation of the collective agreement, a grievance form would be filled out and taken to the Employer for a signature. If the local did not feel that there had been a violation of the collective agreement, it would advise the grievor of the right to appeal to the provincial level of the Union. With respect to who could file a grievance, Ms. Cowan stated that it could be a steward or any elected representative (within that local, that is, either one of three stewards, the vice chair or the chair), although in cross-examination, she acknowledged that an elected member of the FAIR Committee could be considered an "elected member," if a steward was

unavailable. Ms. Cowan also stated in her evidence that, while she was not certain whether an AAA could file a grievance, she believed that an AAA could direct a local to file a grievance.

[60] Ms. Cowan stated that, had the Applicant passed his probationary period, he would have completed the remaining days in his term and thereafter his name would have been put on the "re-employment list" which guaranteed no future employment but would allow the Applicant to bid on positions as they became available. The same classes are not offered by the Employer every year and whether the Applicant would be successful with a bid for a position to teach a different class would depend upon his seniority and qualifications for that position.

Arguments:

Applicant's Argument

[61] The Applicant argued that the Union was in violation of its duty to represent him fairly pursuant to s. 25.1 of the *Act*. The Applicant argued that, when he took his workplace problems to Mr. Haydukewich, his grievance was not properly considered in that the Applicant expected Mr. Haydukewich to discuss the merits of a grievance with him. The Applicant suggested that his grievance was not given proper consideration because his supervisor, Mr. Munroe, was a vice-chair of the local bargaining unit executive who made decisions about grievances along with the chair, Ms. Cowan, with whom Mr. Haydukewich consulted about the possibility of filing a grievance on the Applicant's behalf. The Applicant also argued that the FAIR Committee, as a part of the Union from which he sought assistance and guidance, had a duty to file a grievance on his behalf once it had determined to do so. As his exclusive representative, the Union was required to process that grievance through the steps of the grievance procedure. The Applicant pointed to the lack of communication between the FAIR Committee and the shop steward of his bargaining unit and argued that the onus was not on him as an employee with a grievance to act as a go-between. The Applicant suggested that the Board should take into consideration the fact that he was unfamiliar with unions and the grievance process. He pointed to the evidence of Mr. Delorme who said that the grievance started out well but that, at some point, the process fell apart and communication broke down.

[62] The Applicant also pointed to the evidence of Ms. Kilgour, who testified that she commenced the grievance process and that the Applicant's grievance commenced in the fall of 2002. The Applicant stated it was reasonable for him to rely on Ms. Kilgour to handle the grievance for him given that, upon his inquiry, she advised him that his grievance was between steps two and three. Ms. Kilgour also indicated she had taken time off to obtain labour relations training and the Applicant was also aware that Ms. Kilgour was paid for her travel expenses to meet with him in Weyakwin. The Applicant argued that, if it was true that Ms. Kilgour did not have the proper authority to file a grievance on his behalf and/or did not follow up on the grievance which she represented to him had been filed, the result is that he was not properly or fairly represented in the grievance procedure. The Applicant argued that the answer to the question of who authored the four-page typewritten document attached to his application appears unknown but it is unimportant given that Ms. Kilgour testified that she understood that a grievance was in place. He argued that this fact was buttressed by the testimony he gave where he recalled attending in LaRonge to sign grievance forms. He argued that these breakdowns in communication and the loss of the grievance forms point to responsibility on the part of the Union to the extent that it should be found guilty of unfair representation.

[63] The Applicant submitted that, should the Board find the Union in violation of s. 25.1, the Board should order that he be reinstated as a member of the Union, that his grievance be permitted to go through the grievance procedure and that his grievance proceed to arbitration. He also asked the Board to order that he be permitted to choose his own lawyer to represent him at arbitration, arguing that the Union is no longer capable of representing him after its arbitrary treatment of him. The Applicant also requested that the Board order the Union to pay a portion of his monetary loss should he be reinstated as a result of an arbitration process.

Union's Argument

[64] The Union argued that it did not act in a manner that was arbitrary, discriminatory or in bad faith and took the position that the Applicant had not met the onus of establishing a violation of s. 25.1 of the *Act*. The Union argued that the evidence was very inconsistent in terms of who should have done what, when. The Union submitted that the only ground for consideration was arbitrariness as there was no bad faith by the Union in that there was no ill will or hostility shown toward the Applicant and no unfairness, lack of impartiality or dishonesty by the Union. Further, the Applicant acknowledged that there was no discriminatory treatment of him.

[65] With respect to the allegation of arbitrariness, the Union argued that the Applicant's complaint had been reviewed carefully and that, based on the nature of the complaint and the language of the collective agreement, the Union reasonably determined that there was little likelihood of being successful with a grievance. With respect to the events in October 2002, the Union pointed out that there was conflicting evidence as to whether the Applicant had asked for a grievance to be filed on his behalf but that, in any event, Mr. Haydukewich undertook to make inquiries and he did so by consulting with Ms. Cowan who in turn had a discussion with Mr. Munroe and determined that there was no basis for a grievance as the evaluation process undergone by the Applicant was consistent with that applied to all instructors. While the Applicant may have complained that it took the Union a few weeks to get back to him, the Union did in fact keep him informed of its decisions and the timeline was reflective of the effort the Union gave to his problem. The Union took the position that the Applicant was the master of his own misfortune in that, because he disagreed with the evaluation process, he appeared to make no effort to improve his behaviour.

[66] The Union referred to the Board's decision in *Place Riel v. Canadian Union of Public Employees, Local 1975*, [1985] Apr. Sask. Labour Relations Rep. 57, LRB File No. 409-84, for the proposition that a union's obligations to its members relates only to those employees who have access to the grievance procedure and that it is open to the parties to decide, through bargaining, who has access to the grievance procedure. The Board interpreted this argument to mean that, because in this case the Employer and Union agreed that probationary employees would not have access to the grievance

procedure for a failure of probation, the Union had no obligation to pursue a grievance for the Applicant.

[67] The Union relied on *John Robert Chrispen v. International Association of Fire Fighters' Local 510 (Prince Albert Fire Fighters' Association),* (1992) 4th Quarter Sask. Labour Rep. 133, LRB File No. 003-92, where the Board described its role in relation to analyzing duty of fair representation applications. The Board is to determine whether proper processes were followed by the union and only a cursory examination of the merits is needed to determine whether the union's procedures were appropriate. An unmeritorious grievance could be one of many factors that the Board examines in determining whether a union acted appropriately. The Union submitted that, in this case, the Board should only consider the merits as they apply to a possible remedy.

[68] Another factor that the Union urged the Board to take into account is that the Union encourages the involvement of its members through holding positions in the Union and that those members do not always have extensive knowledge or experience in labour relations matters.

[69] The Union argued that the FAIR Committee did not have the authority to do what it told the Applicant it would do, that is, file a grievance with the Employer on his behalf. A standing committee, such as the FAIR Committee, has no jurisdiction in the affairs of a local and its role should merely be to provide support and advice for the members. Although the members of the FAIR Committee may have felt they were doing what they thought was best, simply put, they had no jurisdiction in the local bargaining unit, in that union members employed by other employers cannot file a grievance against the Employer. If Ms. Kilgour is an "elected representative" who may file a grievance under the terms of the Union's policy, the Union argued that she certainly cannot file a grievance with a different employer in a different bargaining unit. With respect to the evidence of Mr. Armbruster-Barrett, the AAA assigned to the FAIR Committee, it was the Union's view that Mr. Armbruster–Barrett, while providing Ms. Kilgour with language for a grievance, simply wanted Ms. Kilgour to investigate whether a grievance should be filed, and that he had not directed Ms. Kilgour to actually file a grievance. Alternatively, if it appears that an AAA (including Mr. Armbruster Barrett) has the authority to file a

grievance, the Union takes the view that the grievance still must be filed with the local and it is the local that must decide whether to pursue the grievance. The Union argued that it should not be responsible for those of its members who act outside the scope of their authority -- in the Union's view, the Applicant was "shopping" for a favourable response from the officials of the Union and, while he got that from the FAIR Committee, there was no evidence what he told the FAIR Committee that prompted its response.

[70] The Union pointed out that article 19 of the collective agreement suggested that the Applicant could personally have filed a grievance and that he did not need someone else to do it for him, although the Union acknowledged that, ultimately, the local would be examining the grievance through its processes and the grievance would need the support of the bargaining unit in order to proceed.

[71] The Employer did not take a position with respect to the merits of the application.

Statutory Provisions:

[72] Relevant provisions of the *Act* include the following:

> *25(1) All differences between the parties to a collective bargaining agreement or persons bound by the collective bargaining agreement or on whose behalf the collective bargaining agreement was entered into respecting its meaning, application or alleged violation, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective bargaining agreement.*
>
> *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 and Decision:

[73] The Applicant’s duty of fair representation case is premised on the fact that either the Union did not file a grievance on his behalf in relation to his failure of probation or that the Union, through its FAIR Committee, did file a grievance but through

neglect it failed to process his grievance after promising to do so. The Union replied by indicating that the Applicant's complaint could not be grieved due to his probationary status and, in any event, it was unmeritorious. The Union further replied that the FAIR Committee had no authority to file a grievance or represent to the Applicant that it did or could file a grievance on his behalf.

[74] An analysis of the general principles applicable to duty of fair representation cases by the Board begins with the oft-cited decision of the Supreme Court of Canada in *Canadian Merchant Services Guild v. Gagnon*, [1984] 1 S.C.R. 509 (S.C.C.), the principles of which were approved by the Supreme Court of Canada in *Gendron v. Supply & Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, and *Centre Hospitalier Regina Ltee. v. Quebec (Labour Court)*, [1990] 1 S.C.R. 1330. In *Gagnon*, *supra*, the Court stated at 527:

> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *1. The exclusive power conferred on a union to act as a 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 its consequences for the employee on the 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 employees.*

[75] In *Deb Hargrave, Joan Hayes, Jan Kapacila, Sandra Sawatsky and Hazel Anderson v. Canadian Union of Public Employees, Local 3833 and Prince Albert Health District*, [2003] Sask. L.R.B.R. 511, LRB File No. 223-02, the Board set out the principles applicable to an analysis of the duty of fair representation, with a particular focus on arbitrariness and the scope of the Union's duty. The Board stated at 518 to 526:

> *[27] As pointed out in many decisions of the Board, a succinct explanation of the distinctive meanings of the concepts of arbitrariness, discrimination and bad faith, as used in s. 25.1 of the Act, was made in Glynna Ward v. Saskatchewan Union of Nurses, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at 47, as follows:*
>
> > *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 favoritism. 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 what to do.*
>
> *[28] In Toronto Transit Commission, [1997] OLRD No. 3148, at paragraph 9, the Ontario Labour Relations Board cited with approval the following succinct explanation of the concepts provided by that Board in a previous unreported decision:*
>
> > *. . . a complainant must demonstrate that the union's actions were:*
> >
> > *(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
> >
> > *(2) "Discriminatory – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*

> *(3) "in Bad Faith" – that is, motivated by ill-will, malice hostility or dishonesty.*
>
> *The behaviour under review must fit into one of these three categories. …[M]istakes or misjudgments are not illegal; moreover, the fact that an employee fails to understand his rights under a collective agreement or disagrees with the union's interpretation of those rights does not, in itself, establish that the union was wrong – let alone "arbitrary", "discriminatory" or acting in "bad faith".*
>
> *The concept of arbitrariness, which is usually more difficult to identify than discrimination or bad faith, is not equivalent to simple errors in judgment, negligence, laxity or dilatoriness. In Walter Prinesdomu v. Canadian Union of Public Employees, [1975] 2 CLRBR 310, the Ontario Labour Relations Board stated, at 315:*
>
> > *It could be said that this description of the duty requires the exclusive bargaining agent to "put its mind" to the merits of a grievance and attempt to engage in a process of rational decision making that cannot be branded as implausible or capricious.*
> >
> > *This approach gives the word arbitrary some independent meaning beyond subjective ill will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.*

. . . .

[34] There have been many pronouncements in the case law with respect to negligent action or omission by a trade union as it relates to the concept of arbitrariness in cases of alleged violation

of the duty of fair representation. While most of the cases involve a refusal to accept or to progress a grievance after it is filed, in general, the cases establish that to constitute arbitrariness, mistakes, errors in judgment and "mere negligence" will not suffice, but rather, "gross negligence" is the benchmark. Examples in the jurisprudence of the Board include Chrispen, supra, where the Board found that the union's efforts "were undertaken with integrity and competence and without serious or major negligence. . . ." In Radke v. Canadian Paperworkers Union, Local 1120, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, at 64 and 65, the Board stated:

> *What is expected of trade union officials in their representation of employees is that they will 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.*

[35] Most recently, in Vandervort v. University of Saskatchewan Faculty Association and University of Saskatchewan, [2003] Sask. L.R.B.R. 147, LRB File Nos. 102-95 & 047-99, the Board stated, at 193:

> *[215] Arbitrariness is generally equated with perfunctory treatment and gross or major negligence. This standard arose from Canadian Merchant Service Guild v. Gagnon . . . .*

And further, at 194-95, as follows:

> *[219] In Rousseau v. International Brotherhood of Locomotive Engineers et al., 95 CLLC 220-064 at 143, 558-9, the Canada Labour Relations Board described the duty not to act in an arbitrary manner as follows:*
>
> > *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct*

any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.

Negligence is distinguishable from arbitrary, discriminatory or bad faith behaviour. The concept of negligence can range from simple negligence to gross negligence. The damage to the complainant in itself is not the test. Simple negligence may result in serious damage. Negligence in any of its variations is characterized by conduct or inaction due to inadvertence, thoughtlessness or inattention. Motivation is not a characteristic of negligence. Negligence does not require a particular subjective stage of mind as does a finding of bad faith. There comes a point, however, when mere/simple negligence becomes gross/serious negligence, and we must assess when this point, in all circumstances, is reached.

When does negligence become "serious" or "gross"? Gross negligence may be viewed as so arbitrary that it reflects a complete disregard for the consequences. Although negligence is not explicitly defined in section 37 of the Code, this Board has commented on the concept of negligence in its various decisions. Whereas simple/mere negligence is not a violation of the Code, the duty of fair representation under section 37 has been expanded to include gross/serious negligence . . . The Supreme Court of Canada commented on and endorsed the Board's utilization of gross/serious negligence as a criteria in evaluating the union's duty under section 37 in Gagnon et al. [[1984] 1 S.C.R. 509]. The Supreme Court of Canada reconfirmed the utilization of serious negligence as an element to be considered in Centre

> *Hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330.*

[36] In North York General Hospital, [1982] OLRB Rep. Aug. 1190, the Ontario Labour Relations Board addressed the relation of negligence to arbitrariness as follows, at 1194:

> *A union is not required to be correct in every step it takes on behalf of an employee. Moreover, mere negligence on the part of a union official does not ordinarily constitute a breach of section 68. See Ford Motor Company of Canada Limited, [1973] OLRB Rep. Oct. 519; Walter Princesdomu and The Canadian Union of Public Employees, Local 1000, [1975] OLRB Rep. May 444. There comes a point, however, when "mere negligence" becomes "gross negligence" and when gross negligence reflects a complete disregard for critical consequences to an employee then that action may be viewed as arbitrary for the purposes of section 68 of the Act. In Princesdomu, supra, the Board said at pp 464-465:*
>
> > *Accordingly at least flagrant errors in processing grievances--errors consistent with a "not caring" attitude--must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so, implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint.*

[37] In a subsequent decision, Canada Packers Inc., [1990] OLRB Rep Aug. 886, the Ontario Board confirmed this position as follows, at 891:

> *A review of the Board's jurisprudence reveals that honest mistakes, innocent misunderstandings,*

> *simple negligence, or errors in judgment will not of themselves, constitute arbitrary conduct within the meaning of section 68. Words like "implausible", "so reckless as to be unworthy of protection", "unreasonable", "capricious", "grossly negligent", and "demonstrative of a non-caring attitude" have been used to describe conduct which is arbitrary within the meaning of section 68 (see Consumers Glass Co. Ltd., [1979] OLRB Rep. Sept. 861; ITE Industries, [1980] OLRB Rep. July 1001; North York General Hospital, [1982] OLRB Rep. Aug. 1190; Seagram Corporation Ltd.. [1982] OLRB Rep. Oct. 1571; Cryovac, Division of W.R. Grace and Co. Ltd., [1983] OLRB Rep. June 886; Smith & Stone (1982) Inc., [1984] OLRB Rep. Nov. 1609; Howard J. Howes, [1987] OLRB Rep. Jan. 55; George Xerri, [1987] OLRB Rep. March 444, among others). Such strong words may be applicable to the more obvious cases but may not accurately describe the entire spectrum of conduct which might be arbitrary. As the jurisprudence also illustrates, what will constitute arbitrary conduct will depend on the circumstances.*

[38] The British Columbia Labour Relations Board has taken a similar view with respect to matters of process. In Haas v. Canadian Union of Public Employees, Local 16, [1982] BCLB No. L48/82, that Board stated as follows:

> *... similarly, the Board will be reluctant to find a breach of Section 7 by virtue of the manner in which particular grievances are pursued. As stated earlier, a complainant must demonstrate shortcomings in the union's representation beyond the areas of mere negligence, inadvertent errors, poor judgment, etc. The shortcomings must be so blatant as to demonstrate that the grievor's interests were pursued in an indifferent or perfunctory manner.*
>
> *Too often the intended purpose and limits of Section 7 are not well understood. A union is afforded wide latitude in the manner in which it deals with individual grievances; the Board will only find violations of Section 7 where a union's manner of representation of an individual grievor is found to be an obvious disregard for his rights or for the merits of the particular grievance. Broadening the scope of Section 7 beyond the areas described in earlier pages of this decision would not be in*

> *keeping with the purpose and objects of the Labour Code; it would encourage the filing of a myriad of unfounded and frivolous Section 7 applications to the Board and it could also force unions to untenable positions in grievance handling because of the weight they would have to give to possible Section 7 complaints hanging over their heads.*
>
> *. . .*
>
> *Each case must be decided on its own merits; suffice to say, however, that the Board may well find shortcomings in the manner in which the union dealt with a particular matter without finding that such shortcomings support a Section 7(1) complaint. The Board may well find that a union could have been more vigourous and thorough in its investigation of the facts in a particular case; it may even question the steps taken in dealing with a grievance and the ultimate decision made with respect to that grievance. However, that does not necessarily mean that a complaint under Section 7(1) will be substantiated. To substantiate a charge of arbitrariness, there must be convincing evidence that there was a blatant disregard for the rights of the union member.*

[39] As noted above, the Canada Labour Relations Board took a similar view in Rousseau v. International Brotherhood of Locomotive Engineers et al., supra. In Johnson v. Amalgamated Transit Union, Local 588 and City of Regina, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96, the Board referred to the evolution of the treatment of the issue of arbitrariness by the Canada Board. At 31-32, the Board observed as follows:

> *The Canada Labour Relations Board initially accepted the notion that, in the case of what were termed "critical job interests," the obligation of a trade union to uphold the interest of the individual employee affected would be close to absolute. What might constitute such critical job interests was not entirely clear, but loss of employment through discharge was clearly among them.*
>
> *The Board continued to hold the view that the seriousness of the interest of the employee is a relevant factor. In Brenda Haley v. Canadian Airline Employees' Association, [1981] 81 C.L.L.C.*

16,096, the Canada Board made this comment, at 609:

> *This concept (i.e. critical job interests] is a useful instrument to distinguish circumstances where the balance between the individual and union or collective bargaining system interests will tilt in one direction or another. A higher degree of recognition of individual interests will prevail on matters of critical job interest, which may vary from industry to industry or employer to employer. Conversely on matters of minor job interest for the individual the union's conduct will not receive the same scrutiny and the Board's administrative processes will not respond with the same diligence or concern. Many of these matters may not warrant an expensive hearing. Examples of these minor job interests are the occasional use of supervisors to do bargaining unit work, or isolated pay dispute arising out of one or a few incidents and even a minor disciplinary action such as a verbal warning.*

They concluded in the Brenda Haley case, however, that this factor should be evaluated along with other aspects of the decisions taken by the trade union. The decision contains this comment, at 614:

> > *As frustrating as duty of fair representation discharge cases may be and as traumatic as loss of employment by discharge may be, we are not persuaded mandatory discharge arbitration is the correct response. It is an easy response but its effect on the group and institutional interests is too harsh. With the same view of the integrity of union officials and the merits of the grievance procedure shared by Professor Weiler we say unions must continue to make the difficult decisions on discharge and we must continue to make the difficult decisions complaints about the unions' decisions often require.*

They went on to summarize the nature of the duty imposed on the trade union, also at 614:

> *It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.*

[40] Thus, there is a line of cases that suggests that where "critical job interests" are involved (e.g., discharge from employment), depending upon the circumstances of the individual case, a union dealing with a grievance may well be held to a higher standard than in cases of lesser importance to the individual in determining whether the union has acted arbitrarily (including whether it has been negligent to a degree that constitutes arbitrariness). The Board has taken a generally favourable view of this position as demonstrated in Johnson and Chrispen, supra.

[41] However, in Haley, supra, a case involving the missing of a time limit for referral to arbitration, the Canada Board also recognized that the experience of the union representative and available resources are relevant factors to be considered in assessing whether negligence is assumed to be of a seriousness that constitutes arbitrariness, stating as follows:

> *…The level of expertise of the union representative and the resources the union makes available to perform the function are also relevant factual considerations. These and other relevant facts of the case will form the foundation in each case to decide whether there was seriously negligent, arbitrary, discriminatory or bad faith, and therefore unfair, representation.*

[42] In Chrispen, supra, the Board approved of this position also, stating, at 150, as follows:

> *The reason why cases involving allegations of arbitrariness are the most vexing and difficult is because they require the Board to set standards of quality in the context of a statutory scheme which contemplates that employees will frequently be represented in grievance proceedings by part-time union representatives or even other co-workers. Even when the union representatives are full-time employees of the union, they are rarely lawyers and may have few qualifications for the responsibilities which this statutory scheme can place upon them.*
>
> *In order to make this system work, the legislature recognized that union representatives must be permitted considerable latitude. If their decisions are reversed too often, they will be hesitant to settle any grievance short of arbitration. Moreover, the employer will be hesitant to rely upon any settlement achieved with the union if labour boards are going to interfere whenever they take a view different from that of a union. The damage this would do to union credibility and the resulting uncertainty would adversely affect the entire relationship. However, at the same time, by voluntarily applying for exclusive representative status, the union must be prepared to accept a significant degree of responsibility for employees, especially if an employee's employment depends upon the grievance.*

[76] The Applicant bears the onus of proof in the present application: see, *Chrispen*, *supra*.

[77] In the present case, there are essentially three aspects to the allegation that the Union violated its duty of fair representation toward the Applicant. The first relates to the responses to the Applicant's workplace problems by Mr. Haydukewich and the Union's local executive prior to the Applicant's termination, the second relates to the handling by the FAIR Committee of the concerns raised by the Applicant and the third relates to the local union's response to the FAIR Committee's position. In examining these allegations, it is necessary for us to discern what information was available to the Union at various stages of the Applicant's workplace problems. As there are a number of areas where the evidence of the witnesses is in conflict, or is incomplete, it is necessary for us to make some findings of fact. We do note, however, that the primary areas of conflict in the evidence were not with respect to the substance of what occurred but rather, *when* it occurred. The witnesses who testified struck us as, for the most part, honest and forthright, however, there appeared to be much confusion on the part of a number of witnesses concerning the dates or times upon which certain events occurred and, in fact, there are also appeared to be confusion on the part of those questioning the witnesses at the hearing regarding various dates upon which events had occurred. Where these conflicts in timing arose, we have attempted to reconcile the time lines rather than completely reject the evidence given by one or the other of the witnesses.

[78] It is apparent that, in the fall of 2002, the Applicant made it known to the Union, through its shop steward, Mr. Haydukewich, that he was displeased with his interim performance evaluation which was performed by the Applicant's supervisor, Mr. Munroe. The evidence of Mr. Haydukewich lacked detail and a clear timeline, however, it was clear that the Applicant did speak to Mr. Haydukewich on two occasions – once following the Applicant's initial performance evaluation in October 2002 and again just prior to the Applicant's termination in May 2003. Although Mr. Haydukewich does not recall the Applicant specifically asking him to file a grievance in October 2002, he did testify that, at some point in his dealings with the Applicant, he consulted the local union chair, Ms. Cowan. Although the Applicant testified that it was his recollection that in October 2002 Mr. Haydukewich indicated he would talk to Mr. Munroe about the Applicant's problems, Ms. Cowan's evidence was very clear that Mr. Haydukewich

consulted with her in October 2002 after the Applicant asked Mr. Haydukewich to file a grievance. For these reasons, we accept the evidence of Ms. Cowan that the Applicant specifically asked Mr. Haydukewich to file a grievance on his behalf and that Ms. Cowan spoke to Mr. Munroe to determine whether the proper processes were used in Mr. Munroe's evaluation of the Applicant as well as to determine the issues involved and to assess Mr. Munroe's approach to assisting the Applicant. In view of this course of conduct by Mr. Haydukewich and Ms. Cowan, we find that the Union considered the Applicant's concerns in a non-perfunctory manner by making an inquiry into whether a grievance could be filed concerning the interim evaluation and arriving at a thoughtful decision. Ms. Cowan also stated that she told Mr. Haydukewich to advise the Applicant to attend the evaluation meeting with Mr. Munroe and listen to his suggestions for improvement. While there was no corroborating evidence that Ms. Cowan communicated this to Mr. Haydukewich (except that Mr. Haydukewich indicated he told the Applicant to "work on his weaknesses") or that, if she did, Mr. Haydukewich communicated this message to the Applicant (the Union did not cross-examine Mr. Haydukewich at the hearing, nor did it cross-examine the Applicant on this point), the evidence indicated that the Applicant did in fact attend the meeting with Mr. Munroe and listened to his concerns and suggestions. Even if we did not accept that Ms. Cowan's advice made its way to the Applicant, at most, the Union would be guilty of some laxity in communication. Given that a critical job interest was not at stake (the Applicant's employment was not in direct jeopardy at this point), that laxity is not sufficient for us to find that the Union failed in its duty to fairly represent the Applicant. Furthermore, it is apparent that the laxity had no detrimental impact on the Applicant since he did in fact attend the meeting with Mr. Munroe.

[79] A troublesome aspect of the Applicant's dealings with Mr. Haydukewich in October 2002 (for reasons that follow) concerns Mr. Haydukewich's response to the Applicant that he could not file a grievance for the Applicant because the Applicant was a probationary employee. The Applicant's evidence on this point appeared to be consistent with the evidence given by Mr. Delorme, chair of the FAIR Committee, who stated that the message left by the Applicant on the hotline was that he was being denied union representation and that the FAIR Committee was very concerned with the clause in the collective agreement that denied or limited a probationary employee's right to grieve. However, in our view, that aspect does not affect our conclusion that the

Union acted fairly in its representation of the Applicant in October 2002. Based on Ms. Cowan's testimony, it appears that in October 2002 the Applicant's probationary status was not a factor in her determination that a grievance could not be filed on his behalf.

[80] According to the evidence of the Applicant, in the spring of 2003 he came to believe that he would not pass his probationary period. The Applicant stated that he raised this issue with Mr. Haydukewich and that Mr. Haydukewich responded that the Union could not grieve something that had not yet happened. Mr. Haydukewich testified in similar terms saying that the Applicant did not have a valid grievance but that he should wait and see what happened. In our view, the Union's determination that it could not proceed with a grievance until something actually happened, that is until the Applicant had in fact failed his probationary period, was a reasonable view of the situation and a thoughtful decision. A timely request for assistance is a critical element of a claim pursuant to s. 25.1 of the *Act* and, because the Applicant did not contact Mr. Haydukewich or another member of the Union's local executive following the failure of his probationary period to request that a grievance be filed on his behalf, the Union cannot be held responsible for its failure to assess a possible grievance at that point in time. Had it not been for the Applicant's contemporaneous dealings with the FAIR Committee, this would have been the end of any claim by the Applicant against the Union for a failure to fairly represent him. We must therefore consider the action that the Applicant took in relation to having a grievance pursued through the FAIR Committee.

[81] Although we have found that the Union did not violate the *Act* in relation to Ms. Cowan's and Mr. Haydukewich's dealings with the Applicant in October 2002 and early May 2003, Mr. Haydukewich's position that the Applicant could not grieve because he was a probationary employee along with the laxity of communication with the Applicant, assist us in understanding the reason why the Applicant approached the FAIR Committee for assistance. It is apparent that the nature and results of Ms. Cowan's assessment of his situation in October 2002 were not communicated to the Applicant and he felt he had received little advice or guidance from the Union concerning his perceived problems with his evaluation. In these circumstances, it is understandable that the Applicant believed that the Union was not considering the merits of his complaints concerning his performance evaluations in part because he was a probationary employee.

[82] As stated, at some time contemporaneous to the Applicant's pursuit of his workplace problems with Mr. Haydukewich, the Applicant was also pursuing them with a standing committee of the Union, the FAIR Committee. With respect to the initial contact that the Applicant had with the FAIR Committee hotline, the Applicant's evidence was inconsistent with the information he swore to in his application and gave in his opening statement. While testifying, the Applicant stated that he first phoned the hotline in December 2002, however, in his application and opening statement, he stated that he made such contact in February 2003. The manner in which the FAIR Committee dealt with the Applicant's problems was the subject of a significant amount of evidence and many conflicts, particularly with respect to the timeline for the handling of the Applicant's issues. What appears not to be in dispute is that, some time prior to the Applicant's failure of probation, Mr. Delorme, president of the FAIR Committee, received a message from the Applicant that he had been denied the assistance of a shop steward. Mr. Delorme then assigned Ms. Kilgour, a member of the FAIR Committee, to meet with the Applicant to determine the nature of his workplace problems and the allegation that the Union's local executive was not assisting the Applicant because he was a probationary employee. While the Applicant and Ms. Kilgour believed that this occurred early in 2003, we must consider the evidence as a whole to determine precisely what occurred with the FAIR Committee in the handling of the Applicant's concerns.

[83] The Union urged us to accept that the FAIR Committee provided no assistance to the Applicant until June 2003 because the minutes of the FAIR Committee meetings introduced into evidence by the Union appear to indicate that the first meeting at which the Applicant's issues were discussed was June 9, 2003, whereas the minutes for the April meeting contained no such reference. The minutes from the June 9, 2003 meeting indicated that several members of the FAIR Committee were present including Mr. Delorme and Mr. McCorriston (the AAA assigned to the Committee), although not Ms. Kilgour. Possible courses of actions were discussed at this meeting, including that (i) the Applicant get a letter from the Employer outlining the reasons for his failure; (ii) the Committee talk to "McNeill" (presumably a AAA with the Union) to seek advice and guidance and hopefully for assistance from the staff person assigned to this local; and (iii) the Committee write to the Union's membership committee about the concern that article 8.1.3 (the provision denying a probationary employee the right to grieve a

termination) was in violation of the *Act*. In contrast to the evidence contained in the June 9, 2003 minutes, we have the evidence of Ms. Kilgour who believed it was January or February of 2003 when she was assigned by Mr. Delorme to meet with the Applicant and that she brought his concerns and a grievance to a FAIR Committee meeting shortly thereafter. Unfortunately, the Union was unable to produce the minutes for the FAIR Committee meeting held in January 2003. Although we are faced with this conflicting evidence, it would be unreasonable to dismiss Ms. Kilgour's evidence in its entirety, as the chronology of events she testified to was supported by other evidence and she had no personal interest in testifying as she did. In our view, it appears that the evidence can be reconciled by finding that the call Mr. Delorme made to Ms. Kilgour likely occurred after the June 9, 2003 FAIR Committee meeting. Ms. Kilgour, who admitted uncertainty concerning the months in which events had transpired, did indicate that, in addition to dealing with Mr. Delorme concerning this issue, she also dealt with Mr. Armbruster-Barrett, whom she stated was the AAA assigned to the FAIR Committee at the time she was involved with the Applicant's matter. Her recollection would be consistent with the evidence that Mr. Armbruster-Barrett was not assigned to the FAIR Committee until just prior to its meeting in August 2003. This timeline for Ms. Kilgour's involvement is also consistent with the memo she sent to Mr. McCorriston dated July 18, 2003 in which she indicated that she was sending a package of documents by mail to Mr. McCorriston which she obtained through her meeting with the Applicant in Weyakwin, along with an expense claim for her trip to Weyakwin. Included in this package of documents, which Mr. McCorriston acknowledged receiving, were various documents related to the Applicant's evaluations as well as the four page typewritten document which had been attached to the Applicant's application and which outlined some of the Applicant's concerns. The four page typewritten document itself is addressed to Mr. McCorriston and is dated June 20, 2003. Based on the evidence of the Applicant and Ms. Kilgour, we find that the information in the document was compiled by Ms. Kilgour through her meetings with the Applicant. While Ms. Kilgour testified that she made handwritten notes and that Mr. Armbruster-Barrett typed these notes, it is not necessary to our determination that we make a finding of who actually typed those notes. It is sufficient for the purposes of this decision that the FAIR Committee was in possession of those notes, in a typed format, at least by July 18, 2003. Mr. McCorriston indicated that the package of documents he received from Ms.

Kilgour would have been presented at the next FAIR Committee meeting which, by its records, appears to have been August 2003.

[84] Mr. Armbruster-Barrett attended at the next FAIR Committee meeting held on August 20-21, 2003 as the FAIR Committee's AAA. He acknowledged receiving the package of documents sent by Ms. Kilgour to Mr. McCorriston. The minutes for this August 2003 meeting indicate the following planned actions by the Committee: (i) Ms. Kilgour was to contact the Applicant about submitting a grievance; (ii) Ms. Kilgour should speak to Vern Wicks (the AAA assigned to that local bargaining unit) for the language for the grievance; and (iii) Mr. Delorme was to arrange for a three-way telephone call between himself, Mr. Wicks and Ms. Kilgour. At the hearing, Mr. Armbruster-Barrett attempted to clarify the planned actions of the FAIR Committee. His testimony was somewhat inconsistent in places in that he first indicated that Ms. Kilgour was advised to submit a grievance and work with Mr. Wicks on the language of a grievance, while later he indicated that Ms. Kilgour was to advise the Applicant to submit his own grievance. Later still, Mr. Armbruster-Barrett testified that the FAIR Committee stated that Ms. Kilgour and Mr. Wicks were to file a grievance. Mr. Armbruster-Barrett also testified that the three-way call that Mr. Delorme was to arrange was for the purposes of determining whether it was Mr. Wicks or Ms. Kilgour who was to file a grievance but that he assumes that this did not occur as he has no recollection of Ms. Kilgour returning to the FAIR Committee with a grievance.

[85] Ms. Kilgour's evidence of the FAIR Committee's planned course of action with regard to the filing of a grievance substantially differs from Mr. Armbruster-Barrett's. Ms. Kilgour testified that, the day before the FAIR Committee meeting (following her meeting with the Applicant), she gave Mr. Armbruster-Barrett her notes which were to be attached to the Applicant's grievance and that Mr. Armbruster-Barrett was to type the notes. Ms. Kilgour further stated that, at the FAIR Committee meeting the next day, Mr. Armbruster-Barrett gave her a copy of the typed notes but that he had the grievance with the notes attached and that he was to file the grievance with the Employer. Mr. Delorme's evidence supports Ms. Kilgour's in this regard. Mr. Armbruster-Barrett denied that he typed the notes or that he had the grievance and was responsible for filing the grievance. He did acknowledge that, at some point, he had a lengthy telephone

conversation with Ms. Kilgour about the proper wording for a grievance and that he may have mailed her the grievance forms.

[86] While it is impossible to reconcile all of the evidence of Mr. Armbruster-Barrett with that of Ms. Kilgour and Mr. Delorme, either version of the evidence leads us to conclude that the Union violated its duty of fair representation to the Applicant. The result is the same whether we accept either (1) the evidence of Ms. Kilgour and Mr. Delorme that Ms. Kilgour handed the grievance to Mr. Armbruster-Barrett and they discussed that the grievance would need to be signed by an out-of-scope manager of the Employer and that Mr. Armbruster-Barrett undertook to do so, or (2) that the FAIR Committee developed an action plan to file a grievance and all that remained to be determined was who should actually file the grievance and the nature of the involvement of the local in such filing. Ultimately, there was a shared intention by representatives of the Union on the FAIR Committee and a staff member of the Union to file a grievance on the Applicant's behalf in relation to his failure of probation and termination of employment. The Applicant was told that a grievance was filed (or would be filed) and, at one point, was told by Ms. Kilgour that his grievance was between steps two and three of the grievance procedure. There was no explanation by the Union as to why the grievance was not filed by or with the assistance of the FAIR Committee or, if it was filed, why it was not processed or "registered" by the Union, except by way of a partial answer through the evidence of Ms. Cowan, which will be discussed further below. The Union did not introduce into evidence the minutes of any FAIR Committee meetings subsequent to the August 2003 meeting and we must therefore draw the conclusion that the FAIR Committee simply did not follow-up on the Applicant's matter. Somehow, it fell through the cracks. Although Mr. Delorme believed that a grievance had been filed, he also admitted that he was unable to contact Ms. Kilgour following her departure from employment in August 2003. As previously stated, Mr. Armbruster-Barrett acknowledged that the three-way call Mr. Delorme was to arrange must not have occurred because he heard nothing further on the issue and Ms. Kilgour did not return to the FAIR Committee with a grievance.

[87] Although it appears that the Union, through the FAIR Committee, took a reasonable view of the problem and engaged in thoughtful consideration of the matter, it acted in a cursory manner and without any reasonable care by simply abandoning its

plan of action without explanation. In our view, whether this resulted from lack of attention, miscommunication or dilatoriness, it amounts to arbitrariness and thus a violation of the duty to represent the Applicant fairly. This is not to say that the Union was required to carry out its action plan by filing a grievance and processing it to arbitration but, once it had decided to file a grievance and it represented to the Applicant that it had filed or was filing a grievance, it was incumbent upon it to either do so or at least to further direct its mind to the matter and make a thoughtful decision of what to do. On the evidence before us, it did neither. In light of the fact that the Union was addressing a "critical job interest" of the Applicant's and the fact that the representatives of the Union were not inexperienced and, in fact, one was a full-time staff member of the Union, we cannot characterize the Union's inaction as mere laxity or negligence. Also, it could not be considered as a simple error in judgment as there was no actual judgment or decision made to abandon the intended course of action – the Union simply did not put its mind to the issue.

[88] The evidence of Ms. Cowan suggested that in late August/early September 2003 Mr. Wicks contacted her to determine whether a grievance had been filed. It seems that it was at that point that consideration of the Applicant's matter fell off of the FAIR Committee's radar. It was also at this time that Ms. Kilgour left her employment and efforts by Mr. Delorme to contact her were futile. There was no explanation, however, of any follow-up done by the FAIR Committee, despite its plan of action as stated in the minutes of the August 2003 meeting and as testified to by Mr. Armbruster-Barrett. Furthermore, there was no explanation of the reasons why no follow-up had been done. Had Mr. Wicks testified, we might have had some evidence of how he carried out the planned actions of the FAIR Committee or, if he did not, why he did not. Mr. Delorme, testifying on behalf of the Applicant, alleged that Mr. Wicks was involved in the matter and that he and Mr. Armbruster-Barrett should have knowledge of what had occurred with the grievance. In light of this testimony as well as the testimony of Mr. Armbruster-Barrett and Ms. Cowan concerning Mr. Wicks' involvement, it was incumbent upon the Union to answer those allegations and lead his evidence. All we have is the evidence of Mr. Armbruster-Barrett that, at some point, he checked to see if a grievance was registered, but could not find that it had been. While it was unclear on the evidence when he did that, there was no evidence that anyone on the FAIR Committee did anything to remedy the situation. Mr. Armbruster-Barrett did not contact

the Employer to see if a grievance had been filed and stated that he simply believed that Mr. Delorme was assigned to check with the Applicant. Mr. Delorme was not questioned on that point in cross-examination, although his evidence appeared to suggest that he thought Mr. Armbruster-Barrett was responsible for follow-up as he was surprised to hear that the grievance was not registered with the Union.

[89] The Union argued that the involvement of the FAIR Committee, including its attempts to file a grievance and its representation to the Applicant that it was pursuing the matter on his behalf, cannot lead to a finding that the Union was in violation of s. 25.1 of the *Act* because the FAIR Committee simply does not have the authority to do these things. Much evidence was led and argument made concerning the authority of a standing committee, and the FAIR Committee in particular, to file grievances. While the Union appeared to acknowledge that a FAIR Committee member could be an "elected member" entitled to file a grievance on an employee's behalf under its policy or that an AAA could direct a local to file a grievance, it is not necessary that we conclude that the FAIR Committee had that authority. The fact is, it represented to the Applicant that it did have that authority and the Applicant relied on those representations. It is obvious that the Applicant was frustrated with the evaluation process and its perceived unfairness. The Applicant was not aware of the efforts Ms. Cowan made in October 2002 to investigate his concerns, as this was not communicated to him by Mr. Haydukewich. The Applicant's only response from a representative of the Union was Mr. Haydukewich's comments that the Applicant could not grieve while on probation and that the Applicant did not appear to have a valid grievance. In these circumstances, it was reasonable that the Applicant felt that the Union was not addressing his concerns. The Union argued that the Applicant, having received an unfavourable response from the local union executive to pursue a grievance on his behalf, simply "shopped around" until he found someone who would listen to him. While that may be so and would not be behaviour we would encourage, the Applicant did find someone to listen to him – the FAIR Committee – and, in our view, it was not incumbent upon him to go behind its actions and representations to examine whether it had the actual authority to do what it did or said it would do. In our view, the elected members of the FAIR Committee, who had an AAA assigned to assist them, can bind the Union by their actions.

[90] The Union also appeared to suggest that the Applicant could have filed a grievance on his own. In light of the response he received from the FAIR Committee, there was no apparent reason for him to do so. It is therefore unnecessary for us to consider what would have happened if the Applicant had filed a grievance on his own.

[91] Finally, in addition or in the alternative to the above, we must consider the third aspect of the allegation that the Union failed to fairly represent the Applicant. If we were to accept the evidence presented at the hearing that the Union actually made a decision not to allow a grievance to be filed by or with the assistance of the FAIR Committee as a result of the discussion of the matter by Mr. Wicks with local union chair, Ms. Cowan, it is necessary to analyze how the local union responded to the suggestions by the FAIR Committee that the local file a grievance on the Applicant's behalf. Again, we have only the evidence of Ms. Cowan on this aspect, given the failure to call Mr. Wicks as a witness.

[92] Ms. Cowan testified that she felt that the late August/early September 2003 telephone conversation she had with Mr. Wicks was more in the nature of an inquiry by him as to why a grievance had not been filed, rather than a request that the local file a grievance on the Applicant's behalf. The whole of Ms. Cowan's evidence appeared to indicate her view that the local would not have approved of a grievance going forward, because of the Union's intention to strictly abide by the terms of article 8.1.3 of the collective agreement and because she believed there was just cause for the Applicant's termination. There are several difficulties presented by the evidence of Ms. Cowan that lead us to conclude that the Union failed to fairly represent the Applicant, in violation of s. 25.1 of the *Act*.

[93] Firstly, while Ms. Cowan suggested that she had undertaken an investigation and that the results of this investigation led her to conclude that the local would not have filed a grievance, it is not clear to us when she would have conducted that investigation or whether that was primarily based on a retrospective examination of the situation. Although Ms. Cowan was aware of the Applicant's concerns in October 2002 through a conversation with Mr. Haydukewich and investigated those concerns with Mr. Munroe at the time, she stated that the Applicant's concerns did not come to her attention again until the particular conversation with Mr. Wicks in late August/early

September 2003. While we accept that Ms. Cowan had obtained some information about the Applicant's situation throughout the intervening time period, it appears to have been limited. She stated that she had received some information from Mr. Munroe both before and after the Applicant's final evaluation, that she had viewed the evaluation forms and had spoken to Mr. Munroe about his reasons for the Applicant's failure (which appears to have occurred prior to Mr. Munroe's meeting with management where the decision was made to fail the Applicant) and that she had previously received student complaints during the Applicant's period of employment. She stated that all of this information led her to conclude that the Applicant had not made the required behavioural changes to pass his probation. In our view, at the time Mr. Wicks contacted Ms. Cowan in late August/early September 2003, she could not have carried out a proper investigation and analysis of the issues, let alone discussed the same with the local union executive, in order to arrive at a decision not to file a grievance.

[94] Secondly, there is a problem with the manner in which the local made the decision not to file a grievance. Although Ms. Cowan suggested that she could make that determination on behalf of the local executive (and that she did make that determination when she spoke to Mr. Wicks), it appears that it was the practice of the Union for the local executive, as a whole, to make these decisions. In our view, that would have been particularly important in this situation because Mr. Munroe, as a vice chair of the local executive, was also the Applicant's supervisor. Given that Mr. Munroe evaluated the Applicant's performance during his probationary period and must have had significant input into management's decision to fail the Applicant in his probationary period, it would have been important for the Union to ensure that this potential conflict of interest did not play any part in the refusal to file a grievance. One way to have addressed that issue was for the Union to undertake a thorough investigation and to have the local executive committee as a whole involved in the decision-making process. This it did not do.

[95] Thirdly, in our view, a proper assessment of the merits of the situation could only be made by the local executive through a complete investigation, which would include, at a minimum, speaking to the Applicant to determine the reasons why he felt the evaluations were unfair and his termination improper. In the circumstances of this

case and because the Applicant had a critical job interest at stake, the failure of the Union to do so is of significant concern.

[96] The most difficult aspect of Ms. Cowan's conclusion that the Union would not grieve the Applicant's failure of probation concerns the Union's reliance on the restriction in article 8.1.3 of the collective agreement. As previously stated, this provision of the collective agreement allows a probationary employee access to the grievance procedure for anything but a failure of probation. On the whole of the evidence, and given the lack of a proper investigation into the merits of a possible grievance at the time the decision was made, it is our view that this article of the collective agreement formed the primary basis for Ms. Cowan's decision that a grievance could not be filed for the Applicant.

[97] The appropriateness of such a restriction on a probationary employee's right to grieve his or her dismissal was the subject of two Board decisions dealing with the imposition of a first collective agreement. In *Off the Wall Productions Ltd. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1999] Sask. L.R.B.R 393, LRB File No. 209-98, the Board found that the scope of s. 25(1) of the *Act* required access to the grievance procedure for probationary employees. At 394, the Board stated:

> *[5] Our second concern arises with Article 7.01 to the extent that the present provision prohibits the ability of a probationary employee to grieve his or her dismissal. While the Board agrees that the standard of "just cause" is not ordinarily applied to probationary employees, we do not think that a reduced standard can be imposed by removing probationary employees' access to grievance and arbitration procedures. Section 25(1) of the Act requires that "all differences between the parties to a collective bargaining agreement . . . are to be settled by arbitration." Arbitral caselaw, such as United Food and Commercial Workers v. Canada Messenger/Canada Truck Lease Ltd., October 24, 1997 (Ish), supports our view that the collective agreement cannot limit access to the grievance and arbitration procedure without running afoul of s. 25(1) of the Act. We would amend Article 7.01 by changing the second sentence to read as follows:*
>
> > *Article 7.01 – 2nd sentence: Probationary employees may be dismissed for unsuitability.*

[98] In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Loraas Disposal Services Ltd.*, [2000] Sask. L.R.B.R. 663, LRB File No. 037-99, the Board imposed the same term in a first collective agreement and, with reference to *Off the Wall, supra*, stated at 666 and 667:

> *[17]. . . In that case, the Board was concerned with the imposition of a provision removing probationary employees' rights to grieve a termination of their employment. Section 25(1) of the Act requires that "all differences between the parties to a collective agreement . . . be settled by arbitration." This provision has been interpreted by arbitration boards as prohibiting the practice of restricting probationary employees' right of access to grievance and arbitration procedures. In Off the Wall, supra, the Board imposed an agreement that permitted probationary employees access to grievance and arbitration procedures while recognizing that the grounds on which they could be terminated from their employment are a lower standard than would be applied to a permanent employee.*

[99] While the Board has not previously dealt with the connection between ss. 25(1) and 25.1 of the *Act,* as it relates to a union's duty of fair representation when there is a restriction on a probationary employee's right to grieve, other Boards across Canada interpreting provisions similar to those contained in the *Act* have done so. In *Larry Elliston v. United Steelworkers of America and Boreal Navigation Limitee, Quebec City, Quebec*, [1982] 2 Can LRBR 241, the Canada Labour Relations Board determined that the union had breached its duty of fair representation by taking no action with respect to the complainant's dismissal grievance in circumstances where the union relied on the existence of a provision in the collective agreement denying probationary employees access to the grievance procedure to excuse its lack of representation. The Canada Board ruled that the provision in the collective agreement denying such access to probationary employees was invalid because the Canada Labour Code required that every collective agreement contain a provision for final settlement without stoppage of work, of all differences between the parties to, or employees bound by, the agreement, concerning its interpretation, application, administration or alleged violation. The article in the collective agreement which the Canada Board declared invalid read as follows:

> *9.02 Seniority is acquired after a probationary period of at least twenty-five (25) days with the company or at the end of the first long voyage. During this period, the employee is considered on probation and may not avail himself of the grievance procedure in*

> *the event that he is dismissed or laid off. Following this probationary period, an employee's seniority is retroactive to the date on which he was last hired by the company.*

[100] In determining that it could not uphold the legality of article 9.02 in view of s. 155(1) of the Canada Labour Code (a provision substantially similar to that contained in s. 25(1) of the *Act*), the Canada Board considered the following jurisprudence at 245:

> *This question is precisely the one that the British Columbia Labour Relations Board has to answer in Cassiar Asbestos Corporation, [1974] 1 Can LRBR 428, upheld at [1975] 1 Can LRBR 212. This Board has already indicated, in Transair Limited, [1978] 2 Can LRBR 354, 27 di 739, that it subscribed to the conclusions reached in the former case:*
>
> > *"The crucial question is what occurs when the parties fail to provide a provision for final settlement that accords with s. 155(1). This may occur in a variety of ways. For example, the agreement may be totally silent on the matter or silent in part.* ***Again, the parties have provided generally for final settlement in accordance with s. 155(1) but then specifically exempted certain matters from that procedure.***
> >
> > *…This brings us to a consideration of the second circumstance set out above -- what is the situation if the parties specifically restrict the arbitrability of certain matters?* ***Specifically, what if the collective agreement states that the discharge of a probationary employee is not arbitrable?***
> >
> > *This was the issue squarely faced by the British Columbia Board in the Cassiar Asbestos case, supra. In that case the collective agreement contained the following provision:*
> >
> > > *The Company may at any time during his period of probation terminate the employment of a probationary employee. Such employee shall have the right to grieve in respect of any matter* ***other than his discharge*** *or seniority.*
> >
> > *The logic of both of the Cassiar cases, as we understand it, is as follows. The first sentence of the quoted clause is capable of several*

> *interpretations and there has been much debate among arbitrators as to the standards of review to be administered by arbitrators in cases of discharge of probationers. Thus problems of interpretation arise. The parties cannot therefore in the face of the British Columbia provisions corresponding to section 155(1) of the Canada Code then purport to exclude arbitration of these issues.* ***They cannot create problems by inserting provisions in the collective agreement and then deny any permissible outlet for their resolution.*** *Thus the second sentence cannot stand in the face of the legislation. Implicit in this logic is the assertion that the second sentence cannot be read as providing the answer to the question of interpretation posed by the first sentence. The first sentence raises the question of what is the standard of review. This cannot be answered by invoking the second sentence to arrive at the answer 'the standard of review is no review at all'. That is precisely what the statute prohibits.* ***The discharge of probationary employees must be arbitrable****. We agree with this conclusion and find the same conclusion is required under the provisions of the Canada Code.*
>
> (***emphasis original***)

[101] The Canada Board went on to point out certain practical considerations and in, particular, the harmful consequences that might arise if probationary employees were denied the right to arbitration, as described by the British Columbia Board in *Cassiar Asbestos*, *supra*, at 217-218:

> *First of all, there are a number of contexts in which management may decide to terminate a probationer. Ordinarily, this is based on the judgment, made at or near the end of the probation period, that the probationer will not prove a suitable employee. Sometimes it is due to management's belief that a probationer has committed some employment offence which gives cause for dismissal. Occasionally, it is actuated by ill will or discrimination directed at the probationer by his supervisor. . . . the point of the probation period is to give management the leeway it needs in making the first type of judgment, about the quality of employees it wants on its permanent staff. The effect of a ban on arbitrability, such as is contained in this collective agreement, is to put a blanket immunity around errors or abuses of the latter kind -- and it is grievances about these which have generated the major share of reported cases going to arbitration.*

> *There is a further problem. Ordinarily a collective agreement which excludes a dispute from arbitration effectively excludes the matter from the grievance procedure as well. If management does not agree to review the dispute as a grievance, it will likely prejudice its ability to argue that the matter is non-arbitrable later on. This denial of access to the grievance procedure means that the most satisfactory vehicle for canvassing probation problems is unavailable.*

[102] The Canada Board continued in the *Elliston* case, *supra*, by noting what the British Columbia Board stated in the *Cassiar* case at 215 – 216, concerning its interpretation of s. 93 of the British Columbia Code which led it to conclude that the provision of the collective agreement denying a probationary employee the right to grieve dismissal was invalid at 248:

> *The legal principle implicit in s. 93 (1)(b) is this: when the parties negotiate certain provisions in a collective agreement, they must permit all disputes between persons bound by the agreement respecting the interpretation, application, etc. of those provisions to be conclusively settled by arbitration or such other method as may be agreed to by the parties. That principle was applied under the analogous language of the Ontario statute in the case of American Motors (Canada) Ltd. (1974), by CLLC 14, 217 (Ont. C.A.). There the parties first created an insurance program by their collective agreement and then agree to exclude that part of their contract from their arbitration procedure. This they could not do under the statute.* ***By the same token, the parties here could not create the status of probation in their agreement, and then exclude disputes about its operation from arbitration, the method they have adopted to settle disputes arising under the collective agreement.***
>
> (***emphasis original***)

[103] The Canada Board in *Elliston*, *supra*, determined that the article of the collective agreement denying a probationary employee the right to grieve a dismissal was invalid for two reasons. Firstly, it denied probationary employees the mandatory recourse provided for in s. 155(1) as a means of enforcing the right not to be dismissed except for just and sufficient cause. Secondly, once special status for newly hired employees was created in the collective agreement, a "difference" arising over that status becomes a possibility and therefore it became mandatory that the employee have access to the grievance and arbitration procedure. The Board did however note that the

parties would be free to set a different standard of review for arbitrating the dismissal of a probationary employee. After determining that the article in question was invalid, the Canada Board determined that the union had breached its duty of fair representation, for the following reasons at 260:

> *In the instant case, however, the initial reason behind the respondent's lack of action on Mr. Elliston's grievance was the negation of the right of employees on probation to arbitration, contained in article 9.02 of the collective agreement**. In the case of Mr. Elliston's complaint, the union did not take the steps which, had it not been for the presence of article 9.02, it normally should have taken. . . .***
>
> ***We cannot agree that a total lack of representation can be fair, whatever the cause.***
>
> (***emphasis added***)

[104] In *Bradley v. C.P.U., Local 212*, [1983] OLRB Rep. Mar. 323 (OLRB), the complainant had alleged that the union acted in an arbitrary way because its representatives were "unresponsive" to the complainant's inquiries regarding his termination. The union's defence was that, since the complainant was a probationary employee, he could not file a grievance and the union could not or would not represent him formally if he did. Further, they maintained that the complainant did not contact any stewards or officials of the union. The clause at issue in the proceedings in *Bradley* read as follows:

> *4(b) New employees . . . will serve a probationary period of ninety (90) days and after the first thirty (30) day period, the Union shall represent such employees in every capacity except for discharge and layoff.*

[105] In *Bradley*, the Ontario Board concluded as follows at 331 and 332:

> *22. The key question is whether Section 68 was breached by Mr. Poirier acting on behalf of the respondent. In this connection, the Board must interpret what Mr. Poirier may have meant when he advised Mr. Bradley 'to forget it because of 90 days'. In the absence of Mr. Poirier's testimony and considering Mr. Oliver's representations, I find that he meant the respondent would not represent Mr. Bradley in the grievance procedure because of*

Section 4 (b). The failure to advise Mr. Bradley that he could individually file a grievance indicates also that Mr. Poirier thought that without representation by the respondent he had no individual right to file a grievance. Mr. Oliver's statement that if Mr. Bradley had filed a grievance the respondent would have 'taken it up' does not change this conclusion because it was made ex post facto and contradicts his submissions as to the meaning of the respondent attached to section 4 (b).

. . . .

25. In order to prove 'arbitrariness', it is not necessary to show that there was subjective ill will. The Board has in other cases found arbitrariness where the union has taken a totally unresponsive position (i.e., the analysis of the meaning of 'arbitrary' in Section 68 in CUPE, Local 1000, [1985) OLRB Rep. May 444, at p. 462), or has totally ignored the merits of a complaint (see I.A.W. Local 2-700, [1972] OLRB Rep. Oct. 916). ***Mr. Poirier believed that Section 4 (b) released him and the respondent from any obligation to consider representing Mr. Bradley using the normal channels of the grievance procedure and eliminated Mr. Bradley's right to file a grievance of his own. Assuming, without finding, that Section 4 (b) indeed meant that, I find that Mr. Poirier conducted himself in an arbitrary manner.*** *One of the most fundamental ways in which trade union represents bargaining unit members is through negotiation of a grievance procedure and through the participation of its officials in some or all of the steps in the grievance procedures. The respondent in this case negotiated a grievance procedure accessible to all bargaining unit members and did not negotiate a clause excluding probationary employees from the substantive right of having their discharge or suspensions subject to the standards set out in the Mill Rules.* ***But in the same collective agreement, the respondent stipulated through Section 4 (b), that it would not represent probationary employees who have been discharged. This stipulation, in the context of this collective agreement, is an arbitrary one because it sanctions an unresponsiveness and the totally ignoring of the merits of a probationary employees discharge simply because he/she is probationary. Without any explanation as to why probationary employees should not represented by the respondent when they are discharged or why the merits of their discharge should not be considered. I must conclude that the respondent has arbitrarily abdicated its duty to represent Mr. Bradley because he was a probationary employee.***

[*emphasis added*]

[106] In our view, the analyses of the Canada Board and Ontario Board in the *Elliston* and *Bradley* cases, both *supra*, is equally applicable here in light of the fact that the legislation under consideration in those jurisdictions is substantially the same as in Saskatchewan, as are the probationary clauses under consideration, particularly that in the *Bradley* case, *supra*. Under s. 25(1) of the *Act*, all disputes or differences between the parties must be resolved through the grievance and arbitration provisions; thus the prohibition in article 8.1.3 of the collective agreement is invalid. This is so whether one considers (i) the protection afforded to employees in article 18 of the collective agreement which prevents dismissal without just cause; or (ii) that the parties have created a special status for newly hired employees (the probationary provisions in article 8) thereby allowing for the possibility of a "difference" arising concerning that status, yet the parties have removed the procedures to deal with issues of status when a probationary employee is dismissed. Our interpretation is consistent with the Board's recognition in the *Off the Wall* case and the *Loraas Disposal* case, both *supra*, that s. 25(1) of the *Act* has been interpreted by arbitration boards as prohibiting the practice of restricting probationary employees' right of access to grievance and arbitration procedures and led to the Board imposing as a term in a first collective agreement the right of a probationary employee to grieve a dismissal (albeit at a lower standard).

[107] It logically flows from these conclusions that a union that fails to represent a member on the basis of such an illegal clause could be found in violation of the duty to fairly represent its member pursuant to s. 25.1 of the *Act*. In our view, this is what occurred in the case before us. The Union's interpretation that article 8.1.3 prevented it from filing a grievance on the Applicant's behalf in relation to the failure of his probation related to the question of whether it was under a duty to represent him at all and not to the merits of a possible grievance. We do not accept that the Union took the steps it would have ordinarily taken when considering a grievance, had it not been for the existence of article 8.1.3. While the Board extends great latitude to a union to determine whether it will file a grievance or proceed to arbitration with a grievance once it has considered the merits of an issue, such latitude cannot be extended to a union's consideration of the question of whether it will represent a member at all, without a proper consideration of the merits of an issue. In other words, a total lack of representation cannot be considered fair representation within the meaning of s. 25.1 of the *Act*.

[108] We note that, at some point following the telephone conversation Ms. Cowan had with Mr. Wicks in August/September 2003, it came to Ms. Cowan's attention through the executive director of the Union that the restriction in article 8.1.3 of the collective agreement could be illegal and should be bargained out of the collective agreement. Ms. Cowan testified that it has since been bargained out, although the Board was not advised of the current wording of that provision. Although Ms. Cowan could not say whether this change came about at the time it did because of the Applicant's situation coming to light, in our view, it was a prudent course of action for the Union to take.

[109] Therefore, with respect to the third aspect of the claim, that is, how the local union responded to the FAIR Committee's suggestion that a grievance be filed on behalf of the Applicant, we find that the Union violated its duty to represent the Applicant fairly pursuant to s. 25.1 of the *Act*. In our view, the Union failed to conduct a meaningful investigation following the Applicant's failure of probation, which included the failure to make any inquiries of him regarding his concerns, a factor we have found to be particularly important given the potential conflict of interest with respect to Mr. Munroe. As stated, the substantive considerations given for not filing a grievance appeared to have been formulated in response to this claim, rather than thoughtfully considered at the time Ms. Cowan spoke to Mr. Wicks and were not discussed with the executive committee for the purposes of making a thoughtful decision in accordance with the local's usual practice. Finally, in our view, the lack of representation stemmed primarily from the Union's interpretation of article 8.1.3. which we have determined to be invalid. A total lack of any representation by the local on that basis is arbitrary within the meaning of s. 25.1 of the *Act*.

[110] Turning to the issue of an appropriate remedy, the Applicant urged the Board to order the Union to proceed to arbitration with his grievance, to pay for him to have independent legal representation of his choosing and that, if he is reinstated, to pay at least some of his monetary loss. While the Board has the power to order these remedies, we find that they are not appropriate in the circumstances of this case. In fashioning an appropriate remedy, one of the principles which guides us is that commonly utilized in contract law – that is, to place the wronged party in the position he

or she would have been in had a breach not occurred. In this case, the Union breached s. 25.1 of the *Act* by failing to properly direct its mind to the merits of the issue, failing to conduct a meaningful investigation into the Applicant's concerns regarding his failure of probation and erroneously relying on an illegal clause in the collective agreement as the reason for not filing a grievance on the Applicant's behalf. To place the Applicant in the position he would have been in had the Union not breached s. 25.1 in the manner that it did, would compel us to make certain orders requiring the Union to comply with its duty to fairly represent the Applicant. In finding the Union in breach of s. 25.1, we specifically make no finding as to whether the Applicant's concerns legitimately form the basis of a grievance – that is for the Union to assess. Our determination is limited to determining whether the Union acted in a manner that was arbitrary, discriminatory or in bad faith, in its representation of the Applicant. Here we found that the Union acted arbitrarily, primarily in the sense that it failed to take appropriate factors into account while taking into account inappropriate considerations. In our view, because there was no evidence of any bad faith, discrimination or ill will shown to the Applicant by the Union, we find it entirely appropriate to allow the Union the opportunity to represent the Applicant fairly and our order will reflect that. Accordingly, the Board will order as follows:

(a) That the matter will be referred back to the Union which, through its local executive committee and with the assistance of the AAA assigned to the local, shall conduct and conclude a meaningful investigation into the merits of the Applicant's claim within sixty (60) days of the date of the order;

(b) That in conducting its investigation, the Union shall:

(i) obtain the written reasons from the Employer for the Applicant's termination, as required by article 8.1.3 of the collective agreement;

(ii) speak to the Applicant regarding his concerns as they relate to the failure of his probationary period and the possible breach of the collective agreement; and

(iii) take other such steps necessary to conduct a meaningful investigation;

(c) That within thirty (30) days of the completion of its investigation, the local executive committee, with the assistance of its AAA, shall study the merits of a possible grievance and make a determination whether to file a grievance concerning the Applicant's failure of probation. In making this determination the Union shall:

(i) not rely on the restriction in article 8.1.3 of the collective agreement prohibiting a probationary employee from grieving a failure of probation, the Board having found this clause invalid; and

(ii) not involve Mr. Munroe, if he currently remains on the local executive committee, in the decision-making process given the potential for a conflict of interest in his role as a vice-chair of the local and as the supervisor who evaluated the Applicant during his probationary period;

(d) That if the Union determines not to file a grievance on behalf of the Applicant with respect to his failure of probation or if the Union files a grievance and determines not to continue to proceed with such a grievance, to advise the Applicant forthwith, in writing, of the determination and the reasons for the determination;

(e) That if the Union so advises the Applicant of its determination not to file or proceed with a grievance on his behalf, it shall also advise the Applicant in writing of any rights of appeal he has under the Union's constitution;

(f) That any of the time limits referred to above may be waived or extended by the agreement of the parties;

(g) That should the Union decide to proceed with the grievance through the grievance procedure or to arbitration, pursuant to the terms of the collective agreement, the time limits will be waived to permit the arbitrator jurisdiction to hear and determine the grievance.

DATED at Regina, Saskatchewan, this **16th** day of **November, 2006**.

LABOUR RELATIONS BOARD

Angela Zborosky
Vice-Chairperson