Labour Relations Board
Saskatchewan

MARILYNNE MCEWAN, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975 and UNIVERSITY OF SASKATCHEWAN, Respondents

LRB File No. 001-06; September 7, 2007
Vice-Chairperson, Angela Zborosky

For the Applicant:	Benedict Nussbaum
For the Union:	Lois Lamon
For the Employer:	No one appearing

Duty of fair representation – Scope of duty – Union's obligation to represent member in grievance arbitration proceedings under collective agreement against employer, not against third party – Board declines to read s. 25.1 of *The Trade Union Act* as imposing statutory obligation on union to represent member against parties other than employer through procedures/legal actions other than grievance/rights arbitration proceedings.

Duty of fair representation – Scope of duty – Given definition of collective bargaining agreement, duty does not generally extend to disputes between union and third party or member and third party – No legal obligation on union to bring claims for members against third party such as disability insurer.

Duty of fair representation – Scope of duty – Duty applies to both administration and negotiation of collective agreement – Duty relating to administration arises by reason of union's ability to enforce employer's compliance with collective agreement's terms – Duty in negotiations speaks to union's obligations when entering into agreements with employer.

Duty of fair representation – Contract administration – When applicant raised issue with union, union made reasonably thoughtful assessment of situation, brought complaint to executive committee, assigned experienced representative to investigate claim and advised applicant that matter was between her and insurer – Union later filed policy grievance against employer cautiously reserving right to add more member names – Union did not act arbitrarily in handling of applicant's complaint.

***The Trade Union Act*, s. 25.1.**

REASONS FOR DECISION

Background:

[1] Canadian Union of Public Employees, Local 1975 (the "Union"), is designated as the bargaining agent for a group of employees of the University of Saskatchewan (the "Employer"). The Applicant, Marilynne McEwan, was at all material times a member of the bargaining unit. The Applicant filed an application with the Board alleging that the Union had violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the *"Act"*) by refusing to assist her in obtaining benefits from an insurer under a long term disability plan which was provided as a group benefit under the collective agreement between the Union and the Employer.

[2] In its reply to the application, the Union denied the allegation that it had failed to fairly represent the Applicant.

[3] The Employer responded to the application indicating that it would not be filing a reply nor attending the hearing but wished the opportunity to speak to the issue of remedy, if necessary.

[4] A hearing was held on April 12, 2006.

Evidence:

[5] The Applicant testified on her own behalf. Glen Ross, president of the local of the Union, testified on behalf of the Union.

[6] The Applicant was employed by the Employer as a clerk/stenographer for a period in excess of twenty years, until her retirement in June 2005. The Applicant stated that, during her employment, she was a member of the Union and that through her Union and Employer she had the coverage of a group benefit plan which included long-term disability insurance.

[7] The Applicant entered into evidence a copy of a pamphlet, personalized for her, titled "University of Saskatchewan Personal Benefits Report as at January 1, 2001" which contained basic information on all benefit plans to which she was entitled,

including a dental plan, health care plan, sick leave, short term disability, long-term disability, a pension plan and other retirement benefits and a death benefit.

[8] On May 12, 2000, the Applicant suffered a back injury that necessitated her absence from work. She was in receipt of sick leave and short-term disability benefits pursuant to the terms of the collective agreement from the date of her injury to May 1, 2001, the date the benefits expired. This time period also represented the "qualifying period" for coverage under the long-term disability plan. The Applicant immediately applied for long-term disability benefits but was denied those benefits by the insurer, Clarica Life Insurance Company (the "Insurer"). In approximately November 2001 the Applicant attempted to return to work on a gradual basis, starting with one hour per day, with the intention of eventually returning to work full-time.

[9] In the Applicant's application, she states that on November 15, 2001 she asked the Union for assistance with her claim with the Insurer but the Union refused to provide her with assistance and advised her that the claim for benefits was a matter between her and the Insurer. At the hearing, the Applicant testified that she first went to the Union in the summer of 2001 to get some help, although she did not provide detail concerning these discussions. Then the Applicant stated that, through the winter of 2001 until the spring of 2002, she had four to five informal meetings at her workplace with the Union's president at the time, Jim Sharman, about her injury and her claim against the Insurer. These meetings occurred following the Applicant's phone calls to Mr. Sharman and she felt that each time she spoke to Mr. Sharman she was "telling her story for the first time" and he was supposed to be doing things for her but he was not. Upon further questioning about the specific details of what she had asked the Union's representative to do at that time, the Applicant stated that she had asked him "to deal with them [the Insurer]" and he had agreed to talk to them to make a complaint. The Applicant stated that, as a co-signer of the policy, the Union should be able to "take them on" but she said she did not ask the Union to take any legal action against the Insurer. The Applicant stated that Mr. Sharman told her that other employees were having similar problems and that they were thinking of changing insurance carriers. They discussed the possibility of filing a grievance but the Applicant did not want Mr. Sharman to do that.

[10] The Applicant stated that, during the summer of 2001, she finally had a meeting with the Union's legal counsel and she asked him to look into her claim and try to help her. The Applicant stated that, despite her efforts to contact the Union's legal counsel, he provided no assistance to her. On a later occasion, the Applicant again raised the issue with Mr. Sharman who she says told her to charge the Union with a "failure to represent."

[11] Also during the time period between November 2001 and the spring of 2002 the Applicant was meeting with a number of representatives of the Employer concerning her gradual return to work and, following a relapse of her condition in February 2002, it was determined that she could only work a maximum of four hours per day.

[12] The Applicant says she again sought the assistance of the Union when Glenda Graham was elected its president. The Applicant stated that, when she first contacted Ms. Graham, Ms. Graham had been unaware of the Applicant's situation, even though she had been on a committee that assisted other members.[1] The Applicant contacted Ms. Graham by phone on a few occasions over the next six to eight months asking Ms. Graham what she could do and if she would help the Applicant with the Insurer. The Applicant stated that she asked Ms. Graham to talk to the Insurer but that after awhile Ms. Graham got busy and did not help her. The Applicant testified that she received a package of documents from Ms. Graham although she could not recall what they were. The Applicant acknowledged that they had no discussions about taking legal action against the Insurer or about filing a grievance.

[13] The Applicant testified that she felt that the Union "couldn't be bothered" because the Union's representatives did not think the Applicant would be successful with her claim. She stated that the Union's representatives did not even tell her what to do or how to handle the matter. Having not received any assistance from the Union, the Applicant retained legal counsel and brought a civil action against the Insurer in approximately June 2002. During the course of those legal proceedings the Applicant and the Insurer reached a settlement that provided the Applicant with payment for lost

[1] Although Mr. Ross of the Union testified that, while Ms. Graham had held the position of president of the local for 2003-2004, she was not previously involved in any committees of the Union.

benefits. The Insurer also agreed to continue to provide benefits for the Applicant. In order to take legal action to recover these benefits, the Applicant personally incurred legal fees and expenses in excess of $12,000. The Applicant feels she would not have incurred these costs if the Union had assisted her with her claim and the Union had a positive duty to act fairly and represent the Applicant in her dealings with the Insurer whose insurance policy was negotiated and placed by the Union. Given the Union's failure to represent her, the Applicant feels that the Union should reimburse her for her legal costs.

[14] The Applicant also stated that she met with the Union's new legal counsel, Mr. Barnacle, at some later time although it was unclear exactly when this meeting took place. It was the Applicant's understanding that Mr. Barnacle was putting together a class action suit against the Employer for unpaid disability claims such as hers. When Mr. Barnacle told her she could proceed against the Employer, she declined. She told Mr. Barnacle she did not want to proceed against the Employer because she had no problems with the Employer. The Employer had accommodated her disability in the workplace by rebuilding her office, getting new equipment and allowing her to lie down or walk around during the workday as needed. The Applicant told Mr. Barnacle that she only wanted someone to help her with the Insurer, though she did not specifically ask the Union to sue the Insurer. Mr. Barnacle responded that he did not think the Union could deal directly with the Insurer and the Applicant was therefore "on her own."

[15] The Applicant also entered into evidence a letter dated May 20, 2005 from her lawyer to Glen Ross, a representative of the Union. In the letter the Applicant's lawyer outlined the background of the Applicant's denied claim for long term disability benefits, that a civil suit was commenced against the Insurer and that the Insurer and the Applicant entered into a settlement agreement to resolve her claim. In the letter it was asserted that the Union had a positive duty to act fairly to represent the Applicant in her dealings with the Insurer, whose insurance policy was negotiated and placed by the Union, and that the Union’s failure to fulfill that duty had caused the Applicant to incur legal expenses in excess of $12,000. The letter indicated that the Applicant sought recovery of those expenses failing which an unfair labour practice application pursuant to s. 25.1 of the *Act* would be brought. The Applicant testified that Mr. Barnacle

responded on behalf of the Union by letter dated June 14, 2005. That letter indicated that the Union was not prepared to pay for the legal expenses the Applicant incurred in her civil action against the Insurer, taking the position that the Union's representation obligations under s. 25.1 of the *Act* are concerned with the negotiation and administration of the collective agreement conducted through the grievance arbitration process and not through civil actions in the courts.

[16] The Applicant also entered into evidence a copy of the group insurance policy that names the University of Saskatchewan and the University Employees' Union Local 1975 C.U.P.E. as the "policyholder."

[17] In cross-examination, the Applicant acknowledged that she did not ask that a grievance be filed against the Employer on her behalf and did not want to do so because she felt the Employer was helping her. She indicated she wanted the Union's support and information. She also said the Employer said it could not help her with the Insurer - that any assistance had to come from the Union. The Applicant testified that she was aware that human resources personnel of the Employer had talked to the Insurer but "they got the same runaround as me and dropped it."

[18] Mr. Ross, on behalf of the Union, testified that he was familiar with the Applicant's circumstances because he sat as the chair of the Union's grievance committee at the time Mr. Sharman brought the Applicant's concerns to the committee in 2001. Mr. Ross also recalled discussing the Applicant's situation with the grievance committee again in 2004. The grievance committee, composed of the Union's executive and table officers, meets on a weekly basis to hear any members' concerns brought forward by members themselves or by those on the committee. The grievance committee makes a decision on what further action, if any, will be taken and, if a member disagrees with the committee's decision, he or she can appeal the decision to the membership.

[19] In 2001, when Mr. Sharman brought forward the Applicant's concerns to the grievance committee, the committee referred the matter to Jim Holmes, a service representative employed by the Union, to investigate and report back to the committee. Mr. Holmes reported back to the committee a couple of months later and it was Mr.

Ross's understanding that Mr. Holmes had spoken to the Union's legal counsel at that time. It was reported that the Applicant was only entitled to benefits if she was 100% disabled and that the long term disability plan was carried by a third-party insurer as a result of the Union's negotiations with the Employer to include long term disability benefits in the collective agreement. It was also reported that the Union could not force the Insurer to provide long term disability benefits to the Applicant. The provision in the collective agreement that speaks to long term disability benefits states as follows:

> 19.3.4 Long Term Disability Plan
>
> Each permanent and seasonal employee shall be covered by a Long Term Disability Plan which makes payments to employees after one year of approved disability or illness.
>
> This insured plan is paid for by the employees covered.
>
> It is administered according to the terms of the **Policy**.

[20] In cross-examination, although Mr. Ross said that he felt frustrated because of the difficulties members were having with the Insurer in part because of the requirement that they be 100% disabled, he acknowledged that the information the Union had was that the Applicant was not 100% disabled within the meaning of the policy. Mr. Ross stated that even though Mr. Holmes had noted this after his investigation the reason the Union could not assist the Applicant was because it was not possible for the Union to proceed against the Insurer.

[21] Mr. Ross testified that on April 1, 2004 the Union filed a policy/group grievance against the Employer in relation to the Employer's decision to deny the Union's members their rights under article 19 of the collective agreement, resulting in the members being denied access to the long term disability plan. The grievance indicated that the Union reserved the right to submit names of members who had been denied those benefits and it sought, as a remedy, management adherence to the collective agreement ensuring that benefits were received according to the collective agreement and that those affected were made whole in all respects. Mr. Ross explained that the Union had made a decision to file this grievance because representatives were getting frustrated by the number of members who were having problems qualifying for benefits. The representatives had asked their legal counsel, Mr. Barnacle, to look into the issue

and he and the representatives would collect names of the affected employees. It appears this occurred in approximately February 2004. Mr. Ross also stated that it was indicated in his notes, in relation to a grievance committee meeting in February 2004, that in reviewing the concerns/grievances of members the Applicant's name came up for discussion. In his notes he indicated that he knew nothing about her case but that the Union's lawyer would be speaking to her lawyer. Also, according to his notes, Mr. Ross indicated that he was preparing a grievance against the Employer concerning the denial of long term disability benefits for several employees noting that he had a number of names but asking to be advised if committee members were aware of any other affected employees.

[22] The Union entered into evidence an e-mail from Mr. Barnacle to the Union's representatives: Mr. Ross, Ms. Graham, Don Moran and Colleen Leier dated March 16, 2004. In that e-mail, Mr. Barnacle indicated that he had had an opportunity to speak to the Applicant's lawyer in an attempt to determine where they were on her claim for long term disability benefits and, although the Applicant's legal counsel appeared to not want to provide much information, he did confirm that legal proceedings were underway. Mr. Barnacle stated that he told the Applicant's legal counsel that the Union was considering whether the Applicant's claim could be advanced under the collective agreement and, if so, whether there was any merit in doing so. Mr. Barnacle indicated in his e-mail that the Applicant's legal counsel commented that he was not sure that the Union could do anything.

[23] Mr. Ross also testified about a first stage grievance meeting the Union had with the Employer on October 7, 2004 concerning the group/policy grievance on the denial of long term disability benefits. At this meeting the Union advanced the position that, even if the Insurer denied an individual long term disability benefits, the Union should be able to grieve that decision against the Employer as the plan formed part of the collective agreement. The Employer denied the grievance and in response indicated that its responsibilities under the collective agreement were twofold: (i) to ensure that there was a long term disability plan for employees; and (ii) to remit premiums to the third party administering the plan. The Employer took the position that the insurance plan did not form part of the collective agreement and that disputes related to it were not grievable. The Employer also indicated that employees who had been denied benefits

could dispute the denials by taking action against the Insurer. As a basis for its position, the Employer referred to arbitration law and, specifically, *Saskatchewan Union of Nurses, Local 75 and Saskatoon District Health operating the Royal University Hospital*, a decision of arbitrator Bob Pelton dated April 19, 2001, where it was determined that, in circumstances where a collective agreement only mentions that an employer will provide a long term disability plan and remit premiums for that plan, the essential character of the dispute is not rooted in the collective agreement and the dispute is not arbitrable. Mr. Ross testified that the Employer's position was in line with previous advice the Union had received from Mr. Barnacle, who had also advised the Union of the *Royal University Hospital* arbitration decision. Mr. Ross indicated that the grievance has been "on hold" since that meeting.

[24] Mr. Ross also entered into evidence a copy of an e-mail he sent to Lois Lamon dated November 24, 2004 in which he indicated that the Applicant had phoned him to request that the Union pay for lawyer's fees she incurred to obtain a settlement with the Insurer over the denial of long term disability benefits. In the e-mail, Mr. Ross indicated that the Applicant advised him that she had spoken to Mr. Sharman, to the Union's prior legal counsel and, at some point, to Mr. Barnacle and, because none of these individuals would help her with her claim, she was required to hire her own lawyer. Mr. Ross indicated that he told the Applicant that the Union had an ongoing grievance against the Employer to recover benefits for members but that he would refer her request to one of the Union's service representatives because he was uncertain whether she could be included in the grievance, having already collected benefits owing to her. In his e-mail to Ms. Lamon, Mr. Ross asked Ms. Lamon to review the matter and contact the Applicant.

[25] In cross-examination, it was suggested to Mr. Ross that the Union was directing its attention to the wrong party (the Employer) and that it appeared the Union would only take action against the Employer. Mr. Ross confirmed that this was true and that the Union had attempted to do so by way of the policy/group grievance. When it was suggested that there was a process to claim against the Insurer, Mr. Ross indicated that the Union does not deal with civil court actions. Counsel for the Applicant suggested that the Insurer could resolve the matter with the claimant directly, that it could be (and was) resolved short of civil trial, and that there was a process in the policy

to allow disputes to be referred to an independent doctor. To this, Mr. Ross responded that the Union could only represent employees with regard to provisions in the collective agreement – that is its jurisdiction. The Union has no jurisdiction to proceed against the Insurer, according to the advice of its legal counsel. Mr. Ross indicated that it is not the Union's position to advise employees of other processes available to them to solve their problems outside of the grievance procedure and collective agreement, although he acknowledged that the Union wants the benefit plans to work well for the employees. When asked why the Union could not have at least sent a letter of support, Mr. Ross indicated that it was a matter for the Applicant to handle and, aside from bringing the problem to the attention of the Employer, there was nothing the Union could do to be of assistance as it only enforces terms agreed to in the collective agreement against the Employer.

[26] In response to further questioning by the Board and both counsel, Mr. Ross clarified that the legal advice the Union had received was that it had no jurisdiction to act on behalf of a claimant against the Insurer, that the Union merely negotiated the provision of a plan by the Employer and that it only remitted the employees' premium payments to the Employer - the matter therefore falls outside the jurisdiction of the collective agreement. Mr. Ross denied that the Union negotiated a plan with the Insurer.

Arguments:

[27] Mr. Nussbaum, counsel for the Applicant, filed a written argument that we have reviewed. He argued that, pursuant to s. 25.1 of the *Act*, the Union owed a duty to the Applicant to represent her and assist her with a difficult and complex claim against the Insurer. He urged the Board to apply s. 25.1 in a broad and liberal manner and suggested that the nature of the obligation to represent fairly has been changing over time. He argued that the duty was now much broader than how the Board had defined it in the past.

[28] The Applicant relied on *Rodney McNairn v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 179* (2004), 240 D.L.R. (4th) 358 (Sask.C.A.) in support of the proposition that s. 25.1 is to be "interpreted as remedial" and "given the fair, large and liberal construction and interpretation that best ensures attainment of its objects." Cited

in *McNairn* is the Board's decision in *Lien v. Chauffeurs, Teamsters and Helpers Union, Local 395*, [2001] Sask. L.R.B.R. 395, LRB File No. 203-00, which states that the duty of fair representation "refers to the representation of employees by unions with regard to disputes that arise under the terms of the collective agreement."

[29] The Applicant also argued that the Union's obligation extends to both administration and negotiation of the collective agreement (*Hotchkiss, Young, et. al. v. The United Mine Workers of America, Local 7606* (1989), 76 Sask. R. 102 (Sask. Q.B.)). In the words used in the written argument, the Applicant submitted "that in a situation where the Union negotiates the terms of the insurance policy, it owes a duty to the member to ensure the member can adequately navigate through the policy and deal with the insurer, if possible, without the necessity of having to retain and instruct outside counsel." The Applicant argued that the Union and Employer, as policyholders having a vested interest in the workings of the policy and the Insurer's treatment of the claimants, were obligated to assist a claimant in making sure the insurance policy was properly applied. By pooling their resources, the Employer and Union should be assisting claimants.

[30] The Applicant also relied on *Mary Banga v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93, where the Board indicated that the duty applies to union membership, collective bargaining and the grievance procedure. The Applicant argued that *Banga* supports its position that in rare cases the Board would impose a duty to provide legal representation. The Applicant argued that this was one such case because "there has been a complete and callous disregard for the needs of a member."

[31] The Applicant suggested that the dispute involving the Insurer arose under the terms of the collective agreement. The Applicant also suggested that the policy was incorporated by reference into the collective agreement. The Union, as a policyholder, was obligated to retain and instruct outside counsel for the Applicant however, in this case, instead of assisting the Applicant with the Insurer the Union filed an ill founded grievance against the Employer.

[32] The Applicant also argued that as a minimum the Union should have advised the Applicant that it could not represent her and should have provided advice on her options and alternatives. As a result of its failure to do these things, the Applicant was required to seek outside legal counsel and incurred significant cost.

[33] Finally, the Applicant argued that the appropriate remedy in this case was an order that the Union pay her monetary loss, pursuant to s. 5(g), which would include payment of the legal fees she incurred in relation to the disputed proceedings with the Insurer, as well her legal fees incurred in bringing this application to the Board. In this regard, the Applicant relied on *Banga*, *supra*.

[34] Ms. Lamon, on behalf of the Union, denied that the Union had violated s. 25.1 of the *Act* and said that it did not act arbitrarily, in bad faith or with discrimination with regard to representation in grievance or rights arbitration proceedings under the collective agreement.

[35] The Union submitted that it did not have the legal ability to challenge the Insurer's decision on the Applicant's claim; it could not sue the Insurer, a third party, on the Applicant's behalf. The Union had no jurisdiction to pursue a grievance on the Applicant's behalf against the Insurer. The Union has no control over external processes such as employment insurance or workers' compensation benefits and the claim against the Insurer was similar in nature.

[36] The Union submitted that the insurance policy was not incorporated by reference into the collective agreement; the collective agreement only says that a long term disability plan will be provided to employees with a certain level of benefits and that the Employer will obtain the plan. In assessing the Applicant's claim, the Union determined that, even though a grievance against the Employer was unlikely to be successful, one would be filed. The Applicant was invited to be involved in the grievance process but chose not to be.

[37] The Union submitted that it was entitled to control its processes and that decisions about whether and how to proceed with matters were not the employees' decisions.

[38] In reaching the conclusion that it did, the Union argued that its executive committee did not fail to direct its mind to the merits of the issues, had properly conducted an investigation and sought legal advice and had taken into account relevant factors. In no way did the executive committee act in a capricious or perfunctory manner. The Union also argued that was there was no bad faith or discrimination shown by Mr. Ross or the grievance committee that assessed and made a decision regarding this matter. The Union took the Applicant's concerns seriously and simply determined it could not help her with her claim against the Insurer.

[39] In making these arguments, the Union relied on the following Board decisions: *Lawrence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65 and 193, LRB File No 134-93; *Glynna Ward v. Saskatchewan Union of Nurses and South Saskatchewan Hospital Centre*, [1988] Winter Sask. Labour Rep. 44, LRB File No. 173-94; *Deb Hargrave et al. 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; and *Gordon W. Johnson v. Amalgamated Transit Union, Local 588 and City of Regina*, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96. The Union also relied on the Supreme Court of Canada's decision in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.

[40] The Union distinguished the *Banga* case, *supra*, relied on by the Applicant on the basis that, in that case, the member's issue in relation to her seniority rights fell within the scope of the collective agreement. It clearly involved a matter between the union and employer under the provisions of their collective agreement.

[41] While the Union indicated that the Applicant's matter had been discussed at a grievance committee meeting, it was unsure what, if anything, was communicated to the Applicant concerning the Union's decision not to get involved with her matter. The Union acknowledged that the Union's decision and reasons should have been communicated to the Applicant but said that, in any event, the failure to communicate the decision and reasons does not amount to a violation of s. 25.1 of the *Act*.

[42] Lastly, the Union suggested that if it was liable to the Applicant then on the basis of the Applicant's arguments the Employer should be equally responsible.

Analysis and Decision:

[43] The central issue before us is whether the Union breached the duty of fair representation as a result of its failure to assist the Applicant in her claim against the Insurer, including the retaining and instructing of legal counsel to pursue the Insurer. The Applicant argued that this obligation to assist arose as a result of the collective agreement providing for a long term disability plan. Also at issue is the process followed by the Union in handling the Applicant's workplace problems including whether the Union should have advised the Applicant that it could not represent her and provided her with her options for pursuing the Insurer.

[44] The issues before us necessarily require the Board to determine the scope of a union's duty of fair representation under s. 25.1 of the *Act*. Section 25.1 reads as follows:

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

[45] The wording of s. 25.1 makes it clear that, in a unionized workplace, an employee's statutory right to be fairly represented by his or her union relates only to "grievance or rights arbitration proceedings under a collective bargaining agreement." While "grievance arbitration proceeding" and "rights arbitration proceeding" are not defined in the *Act*, a "collective bargaining agreement" is. Section 2(d) provides as follows:

> *2 In this Act:*
>
> *(d) "**collective bargaining agreement**" means an agreement in writing or writings between an employer and a trade union setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions of employees;*

[46] Therefore, considering ss. 25.1 and 2(d) together, it is the Board's view that the Union's only obligation to the Applicant is to represent her in any grievance arbitration proceedings under the collective agreement between the Union and the Employer and that, by definition, the grievance must be against the Employer and not against someone who is not party to the collective agreement. Although we agree with the Applicant that s. 25.1 should be given a fair, large and liberal interpretation, to read into s. 25.1 a statutory obligation upon the Union to fairly represent a member against parties other than the Employer and through procedures or legal actions other than grievance/rights arbitration proceedings, would be an expansion of the duty well beyond the plain and obvious wording of s. 25.1.

[47] This conclusion is supported by observations of the Board in *Carolyn McRae v. Saskatchewan Government and General Employees' Union*, [2002] Sask. L.R.B.R. 11, LRB File No. 002-02, a case which involved an applicant seeking to have a union's internal structure changed as a result of the applicant's difficulties in obtaining long term disability benefits through a union run benefit plan. While concluding that matters of internal union structure were not reviewable under s. 36.1 of the *Act*, the Board commented on the scope of s. 25.1 as follows at 13:

> *[9] The duty of fair representation provision contained in s. 25.1 of The Trade Union Act refers to the right to be fairly represented in grievance or rights arbitration proceedings under a collective agreement, that is, in disputes between a union member and the employer, not between a union member in the union itself: see Lien v. Chauffeurs, Teamsters and Helpers Union, Local 395, [2001] Sask. L.R.B.R. 395, LRB File No. 203-00.*

[48] In our view, given the definition of "collective bargaining agreement," it is a logical extension to the observation in *McRae, supra*, that the duty also does not generally extend to disputes between the Union and a third party or a union member and a third party such as the Insurer in this case. Although the Applicant did not specifically ask the Union to take legal action against the Insurer, the Union's failure to do so is the basis for one of the claims in her application before us. As a general rule, it is not arbitrary for a union to decline to assist with and pursue employees' claims against third parties using legal procedures or processes other than the grievance procedure contained in the collective agreement, given the limited scope of a union's statutory duty

under s. 25.1 as explained above. In the Board's view, there is no legal duty upon a union to bring claims against third parties - whether that third party is, for example, the Workers' Compensation Board, the Labour Standards Branch, a professional licensing body, or a disability insurer (such as the one before us), to name but a few third parties which might have an impact on or involvement with an employee concerning his or her terms and conditions of work or employment relationship but are outside the collective bargaining relationship between the union and the employer and deal with matters that are not specifically contained the collective agreement or claims that are not enforceable by the union against the employer. Indeed, it is arguable that a union has no legal status to bring such claims against third parties on behalf of a member. Under the *Act*, the representative status of a union flows from the certification order which designates the union as the exclusive representative of employees and which obligates the employer to negotiate terms and conditions of work with the union. Under the *Act*, a union has no right to represent employees outside the union/employer relationship and the specific terms in the collective agreement. It would be unusual if a union had no statutory right to represent its members against third parties such as an insurer yet was statutorily required to provide such representation if a member so requested.

[49] There is one additional issue concerning the scope of the duty in s. 25.1 which is raised by the Applicant's arguments in this case. We agree with the Applicant's assertion that the duty applies to both administration and negotiation of the collective agreement, however, the duty relates to the Union's administration or negotiation of the terms of the collective agreement *with the Employer*.

[50] The Union's duty with regard to administration of the collective agreement arises by reason of its ability to enforce the Employer's compliance with the collective agreement's terms and conditions of employment through the grievance/arbitration procedure contained in a collective agreement. In circumstances where a union fails to file or process a grievance against an employer on behalf of a member, consideration is given to whether the union failed to fairly represent the member as required under s. 25.1. This is the most common type of duty of fair representation complaint heard by the Board.

[51] As stated, the Board also accepts the Applicant's argument that the duty of fair representation extends to the negotiation of a collective agreement, however, not in the sense put to us by Applicant's counsel. In *Young, supra*, the Court indicated that, while negotiating a collective agreement with the employer, a union must fairly represent the interests of its members. A union cannot negotiate provisions that have the effect of being arbitrary or discriminatory to an employee or groups of employees or are made in bad faith. In our view, the proposition of the Court in *Young* does not apply in the manner suggested by the Applicant, that once the Union negotiated the terms of an insurance policy (a conclusion of fact not supported by the evidence) or negotiated a term which obligated the Employer to provide disability coverage, the Union owed a corresponding duty to a member to help the member with the policy and take proceedings against the Insurer to enforce the terms of the policy. The duty of fair representation in negotiations speaks to a union's obligations when entering into agreements with an employer and not to the union's subsequent conduct concerning those provisions - that would be an issue relating to the union's duty of fair representation in the administration of the collective agreement. The Board does not believe it was suggested, nor can it be concluded, that there was some type of obligation on the Union in this case to negotiate a certain type of policy with the Employer or that the Union was required to clearly incorporate the policy by reference into the collective agreement which would make members' claims against the Employer more clearly arbitrable.

[52] Given the scope of a union's duty as we have defined it above, the Board concludes that the statutory duty of fair representation in s. 25.1 does not give rise to a duty requiring a union to represent its members against an insurer for failure to obtain disability benefits because: (i) the insurer is not a party to the collective agreement and grievance/rights arbitration proceedings pursuant to the collective agreement cannot be taken against it; and (ii) the dispute is not one that arises under the collective agreement, as it would have to be adjudicated under the terms of the disability policy and not under the terms of the collective agreement.

[53] Having determined that the scope of the Union's duty in s. 25.1 does not extend to representation of its members in legal proceedings against a party who is not the Employer (and therefore not a party to the collective agreement), it is still necessary

for us to consider whether the Union violated the duty of fair representation to the Applicant, according to the ordinary principles for assessing such claims.

[54] The Board's general approach to applications alleging a violation of s. 25.1 of the *Act* was summarized as follows in *Lawrence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, at 71-72:

> *This Board has discussed on a number of occasions the obligation which rests on a trade union to represent fairly those employees for whom it enjoys exclusive status as a bargaining representative. As a general description of the elements of the duty, the Board has indicated that it can do no better than to quote the principles outlined by the Supreme Court of Canada in the case of Canadian Merchant Services Guild v. Gagnon, [1984] 84 CLLC 12,181:*
>
> > *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.*

The terms "arbitrary," "discriminatory," and "in bad faith," which are used in the legislative description of the kind of conduct on the part of a trade union which is to be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:

> *... **The union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favoritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.***

This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:

> *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.*

[**emphasis added**]

[55] The ground of arbitrariness can often be more difficult to apply than those of bad faith and discrimination. The concept of arbitrariness has been described in *Walter Prinesdomu v. Canadian Union of Public Employees*, [1975] 2 CLRBR 310, a decision of the Ontario Labour Relations Board which has often been followed by the Board. In that case, the Ontario 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****.*
>
> [**emphasis added**]

[56] In *Radke v. Canadian Paperworkers Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, the Board outlined the nature of representation an employee might reasonably expect from his or her union. The Board stated at 64-65:

> *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 interest of those they represent.*** *In making decisions about how or whether to pursue certain issues on behalf of employees,* ***they should certainly be alert to the significance for those employees of the interests which may be at stake.*** *Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully.* ***The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.***
>
> [**emphasis added**]

[57] In the present case, the Board must answer whether the Union acted in a manner that was arbitrary, discriminatory or in bad faith in its consideration and handling of the Applicant's workplace problem, including the Union's consideration of whether the Applicant's claim was grievable under the terms of the collective agreement and generally how it handled the Applicant's complaint over her denial of long term disability benefits.

[58] In the Board's view, the Union did not act in an arbitrary, discriminatory or bad faith manner in its handling of the Applicant's complaint. It is apparent that when the Applicant raised the issue with the Union the Union made a reasonably thoughtful assessment of her situation. In 2001, Mr. Sharman brought the Applicant's complaint to the Union's executive committee at which time the Union assigned an experienced representative (and employee of the Union) to investigate the Applicant's claim and report back to the Union. Mr. Holmes did so and after consulting the Union's legal counsel identified two problems with the Union pursuing the Applicant's complaint: (i) that the insurance policy required the employee to be 100% disabled and the indications were that the Applicant did not meet this criteria; and (ii) that the Union could not force the Insurer, which was not a party to the collective agreement, to pay long term disability benefits to the Applicant, in circumstances where the collective agreement only required the Employer to provide a long term disability plan and pay premiums for the plan. While the evidence on both sides was sketchy as to exactly what was communicated to the Applicant about the reasons why the Union could not "deal with the Insurer" on the Applicant's behalf, the Board is satisfied that the Applicant was sufficiently informed of these reasons and was clearly told that the Union could not assist her and that it was a matter between her and the Insurer.

[59] The matter came before the Union's grievance committee a second time in 2004 (which appears to have coincided with the Applicant's raising of her complaint with Ms. Graham) and again the Union considered the Applicant's problem. At that point in time, the Union had been considering the filing of a grievance against the Employer over the Insurer's denial of long term disability benefits to several employees. The Union wished to consider including the Applicant's complaint in a grievance and to that end instructed its legal counsel to approach the Applicant's lawyer. It appears that the

Union's counsel did so but was advised by the Applicant's lawyer that the Applicant had taken legal action against the Insurer and the Applicant's lawyer did not see how a grievance could help the Applicant. The Union then filed a grievance against the Employer and cautiously reserved the right to add more names of employees affected by the Insurer's denials. At the first stage hearing of the grievance, the Employer denied the grievance on the basis that the issues were not grievable under the collective agreement, a position anticipated by the Union, as it had come to the same conclusion at least as early as 2001 when the matter was first raised with the Union by the Applicant.

[60] Based on the foregoing, it is the Board's view that the Union did not simply dismiss the Applicant's claim out of hand but rather approached her concerns in a thoughtful manner, taking an informed, reasonable and rational view of the problem and seeking legal advice before taking any action or making any decision with regard to the Applicant's complaint. The Union therefore did not act arbitrarily in its handling of the Applicant's complaint.

[61] It is important to note that the Board does not sit in judgment of a union's legal opinions which form the basis for its decisions. In *Denis Duperreault v. Unite HERE, Local 41 and West Harvest Inn*, [2007] Sask. L.R.B.R. 257, LRB File No. 181-06, the Board stated at 266:

> *[24] With respect to the Union's decision not to file a grievance on the Applicant's behalf, the Board does not decide the merits of the purported grievance itself but rather assesses the reasonableness of a union's conduct in the context of evidence concerning the nature of the grievance and the steps the union took in handling the employee's problem. As the Board stated in Banga v. Saskatchewan Government Employees' Union, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93, at 98:*
>
> > *It is clear from the jurisprudence which has accumulated concerning the duty of fair representation that it is not the task of a labour relations board to second guess a trade union in the performance of its responsibilities, or to view the dealing of that union with a single employee without considering a context in which numerous*

> *other employees and the union itself may have distinct or competing interests at stake.*

[62] It is therefore not up to the Board to determine whether the Union's opinion about its prospects for success was legally correct. In other words, it is not for the Board to decide whether the Union was legally correct that it could not file a grievance against the Insurer or that the Applicant did not appear to meet the criteria for disability under the policy nor in its initial opinion that it could not successfully pursue a grievance against the Employer. It is only for the Board to determine whether the Union's handling of the Applicant's problem and its decision not to pursue the Insurer was free from arbitrariness, discrimination or bad faith. In the Board's view, the Union did not act in a cursory or perfunctory manner when it assessed whether it could proceed against the Insurer or the Employer over a dispute concerning the terms of the disability benefit policy. We also find that the Union's conclusion that the Applicant's matter was one between the Applicant and the Insurer and that the Union would not become involved in that legal problem was free from arbitrariness, discrimination and bad faith.

[63] While the Applicant based her complaint before us on the failure of the Union to take action against the Insurer, we note that the Union did file a policy/group grievance against the Employer over denial of long term disability benefits by the Insurer. While it appears the Union did not believe that the grievance had a high chance of success, it appeared to the Union to be the only available option to address the Union's frustrations over the increasing numbers of employees being denied benefits by the Insurer. While the Applicant made it clear to Mr. Sharman and later to Mr. Barnacle that she did not want the Union to involve the Employer and file a grievance against the Employer on her behalf, the Union appropriately canvassed the Applicant's legal counsel in 2004 about her inclusion in the group grievance. However, the Union then took the precautionary step of indicating to the Employer that it reserved the right to add additional names to the grievance, presumably to "leave the door open" for the Applicant and others to be included at a later time. In our view, the manner in which the Union approached the problem further demonstrates the Union's thorough and thoughtful treatment of this issue for both the Applicant and other members. That the Applicant would have preferred that the Union proceed against the Insurer and believed a grievance against the Employer was ill founded is of no consequence, the Union having

acted within the legal processes available to it to attempt to address the problem with the Employer. Again, it is not for the Board to determine the merits or legalities of such a grievance against the Employer but only to assess whether the processes undertaken by the Union in making the decision it did ran afoul of s. 25.1. In this regard, the Union did not act in an arbitrary, discriminatory, or bad faith manner.

[64] In this case, the Board also finds that there is no evidence of bad faith or discrimination on the part of the Union in handling the Applicant's problem. In reaching the conclusion it did, there was no evidence that the Union was motivated by bad faith. The issue of discrimination does not arise from the facts because there was no evidence that the Union treated the Applicant's complaints any differently than the complaints of other members who had been denied long term disability benefits by the Insurer. It is arguable that, had the Union developed a practice of representing or providing financial assistance to individuals for claims against the Insurer, not doing so for the Applicant could be discrimination under s. 25.1, however, there was no such practice by the Union in this case.

[65] In making its arguments, the Applicant relied on *Banga* as support for the proposition that in some cases there is a duty on a union to provide independent legal representation for a member. The *Banga* case is clearly distinguishable from the facts before us. In the *Banga* case, the matter in dispute was very clearly a matter under the collective agreement where the interests of two members were in conflict. In the unique circumstances of that case, the Board required the union to provide independent legal representation to one of the members at the arbitration hearing. While the Board also ordered reimbursement of the applicant's legal fees for the Board hearing, that order resulted from a finding of a violation of s. 25.1. In the case before us, we are not dealing with an issue and legal proceeding under a collective agreement as was the situation in *Banga*, nor have we found a violation of s. 25.1 which would potentially entitle the Applicant to reimbursement of legal fees for the Board hearing.

[66] The Applicant also argued that the Union should have at least advised her of her options upon the denial of long term disability benefits, including that she should seek legal counsel. Given the Union's position on the Applicant's problem from the outset (which we accept was generally communicated to her), we are not convinced

that the Applicant did not know that her only option was to pursue the Insurer on her own through legal proceedings or to seek the advice and assistance of legal counsel to do so. By stating to the Applicant that the matter "was one between her and the Insurer" and that the Union could not assist her, it may be (and in this case was) reasonably inferred that to pursue such a claim the Applicant would be left to her own devices which could (and in this case did) include retaining a lawyer to provide legal assistance. Although advice from the Union on options outside the grievance procedure might have been helpful, such advice is gratuitous and beyond the scope of the statutory duty of fair representation. In addition, it cannot be expected that union representatives would have the background or legal knowledge to be in a position to advise of such options. In *Barbara Metz v. Saskatchewan Government and General Employees' Union*, [2003] Sask. L.R.B.R. 323, LRB File No. 164-00, a case involving a duty of fair representation complaint by a member against her union concerning its handling of her workplace problems arising out of the employer's duty to accommodate, the Board stated at 336 and 337:

> *Should the Union have informed Ms. Metz of the Court of Appeal decision in the Cadillac Fairview case, supra? The Union encouraged Ms. Metz to file a human rights complaint as part of the overall strategy in getting Ms. Metz back into the workplace. The Human Rights Commission informed Ms. Metz that she would need to choose to be represented by the Union or the Human Rights Commission. Overall, we conclude that the Union provided Ms. Metz with considerable information and support in relation to her rights under both the collective agreement and The Saskatchewan Human Rights Code. We do not read the duty to fairly represent an employee to impose on the Union a positive duty to provide legal advice to a member on a matter of the choice of forum in which to pursue a complaint. The Union can make reasoned suggestions and encourage a choice of forum strategy but, in our view, it is not obligated to advise the member of all of the alternative avenues in which her complaints may be pursued.*

[67] In any event, even if we were to find that the Union was required to provide the Applicant with options outside the filing of a grievance against the Employer and that the Applicant did not, in fact, know her options, the Applicant suffered no loss as a result of this failure. The Applicant did indeed retain and instruct outside legal counsel to successfully pursue the Insurer. We appreciate that the Applicant felt that no one was doing anything for her and that her complaints were, in a sense, "falling on deaf

ears." It appears that that perception may at least in part have resulted from the Union's lack of communication with the Applicant about the steps it took to investigate and consider her complaint. However, while the Union might have better communicated the details of its inquiries and its position to the Applicant, we do not find any failure in this regard to constitute arbitrary conduct in violation of the *Act*.

[68] We do not understand the suggestion by the Applicant that the Union could have merely sent a letter of support to the Insurer on her behalf. We are not sure what purpose this would have served or what the Union might have been in a position to comment about that would have had any effect whatsoever on the status of the Applicant's claim with the Insurer.

[69] Considering the overall conduct of the Union, we find that the Union put its mind fairly and reasonably to the circumstances before it, including the factual circumstances and the provisions of the collective agreement, and it made a decision and pursued a course of action free from arbitrariness, discrimination, or bad faith. The Union therefore did not breach its duty of fair representation contained in s. 25.1 of the *Act*.

[70] The application is dismissed.

DATED at Regina, Saskatchewan, this **7th** day of **September, 2007.**

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson