The Labour Relations Board
Saskatchewan

KATHY CHABOT, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4777 and PRINCE ALBERT PARKLAND HEALTH REGION, Respondents

LRB File No. 158-06; September 28, 2007
Vice-Chairperson, Catherine Zuck, Q.C.

The Applicant:	Kathy Chabot
For the Union:	Sharleen Haarstad and Vicki O'Dell
For the Employer:	No one appearing

Duty of fair representation – Scope of duty – *The Trade Union Act* prohibits union from acting in arbitrary, discriminatory or bad faith manner and Board must find this very narrow and specific behaviour by union before finding violation of *The Trade Union Act.*

Duty of fair representation – Scope of duty – Board has no jurisdiction to take action against union if complaint is that union was wrong, could have given better representation or did not do what member wanted – Board does not sit in appeal of decisions made by union and does not minutely assess and second guess every union action.

Duty of fair representation – Arbitrary conduct – Union ensured it was aware of relevant information, made reasonable decisions about how to deal with harassment complaints, considered results of informal and formal investigations, considered interests of other members and intended throughout to help member return to work - Board finds union's conduct not arbitrary.

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

REASONS FOR DECISION

Background:

[1] The Applicant, Kathy Chabot, filed an application on October 12, 2006 for an order that the Respondent, Canadian Union of Public Employees, Local 4777 (the "Union"), violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") by failing to represent the Applicant in accordance with the *Act*. The Union filed a reply on November 6, 2006, denying the allegation. The hearing of this matter was originally scheduled for April 10, 2007. At that time, the Board was requested to order production of

particulars from the Applicant and disclosure of documents from both parties and such an order was made on April 16, 2007. There was a conference call among the parties and the Board's Executive Officer on August 16, 2007 relating to the production of documents and particulars. Particulars of the Applicant's claim were provided to the Union by letter dated August 16, 2007. The Applicant was relying on the Union's behaviour in meetings on June 8, 2006 and June 20, 2006, in two harassment investigations and on a communication breakdown with the Union after August 10, 2006. The Union filed an amended reply on August 24, 2007, responding to the particularized claim and denying these specific allegations. The matter was heard on September 6 and 7, 2007.

Facts:

The Applicant's Evidence

[2] The Applicant testified. She was employed as a casual licensed practical nurse by the Prince Albert Parkland Health Region (the "Employer") from and after April 2004. She was represented by the Union as her bargaining agent. She was originally employed at Victoria Hospital in the renal unit and the ambulatory care unit and in April 2006 both obtained a temporary part-time position and worked as a casual in the emergency department. The temporary position was to last until December 2006 and guaranteed the Applicant a shift of work every second weekend. The Applicant was also taking a registered nursing program that would lead to a degree from the First Nations University in Prince Albert, Saskatchewan and, by the time of the hearing of this application, had obtained her degree and was employed as a registered nurse.

[3] In April 2005 the Applicant had a meeting with the nursing unit managers (NUMs) of the renal unit and the ambulatory care unit about her entitlement to work, which the Applicant regarded as being degrading, humiliating and upsetting. She reported this to the president of the Union, Carol McKnight, who arranged a meeting with each of the two NUMs, the Applicant and herself. After these meetings, the Applicant had no more problems with the NUM of ambulatory care but continued to have difficulties with the renal unit's NUM. In January 2006 the Union's president arranged another meeting with the renal unit's NUM, the Applicant, someone from the Employer's human resources department and herself. They tried to establish ground rules for how the Applicant could deal with what she perceived as the NUM's harassment of her.

[4] In the meantime, the Applicant started working in the emergency department and was having problems with two nurses in that department. This caused her to file a formal harassment complaint against these two nurses dated June 8, 2006 that dealt with incidents on April 2, 2006 and on May 28, 2006.

[5] Because of the formal harassment complaint, the Applicant was called in the afternoon of June 8, 2006 to a meeting at 7:15 p.m. that evening with Donna Longpre, the Employer's human resources manager. This was right after the Applicant would start her night shift in the emergency department. The Applicant was advised by Ms. Longpre that David Miller, an executive member of the Union, was also called to this meeting. The purpose of the meeting was to discuss the Applicant's harassment complaint. At the meeting, Ms. Longpre advised the Applicant as to the harassment complaint procedures. At one point, Ms. Longpre advised the Applicant that she would be moved to level 5 for the rest of her shift on June 8, 2006 and subsequent shifts while the complaint was being investigated. The Applicant was not happy with this, as she did not understand why she should have to move when she had done nothing wrong and had a short argument with Ms. Longpre about this. Ms. Longpre said that the move was for the Applicant's protection. The Applicant thinks that Ms. Longpre also said "it looks like you might be part of the problem here." Ms. Longpre asked Mr. Miller to "explain this" to the Applicant and he told the Applicant that "they have the right to direct the workforce." Mr. Miller did not say anything else during the meeting. The Applicant wished that Mr. Miller would have helped her in her argument with Ms. Longpre but otherwise had no criticism of his conduct during the meeting. Mr. Miller and the Applicant met briefly for coffee after the meeting. The Applicant testified that she smelled alcohol on Mr. Miller's breath and he seemed slow in answering her questions. It was therefore the Applicant's opinion that Mr. Miller was inebriated. Mr. Miller told the Applicant that she had to work on Level 5 if ordered to do so and, if she needed more training to do the work there, she should inform the manager. Mr. Miller said that the Applicant was entitled to receive any training she needed to work there. They discussed some unrelated matters and the Applicant went back to work.

[6] According to the Applicant's testimony, the next thing that happened was on June 20, 2006. That day she filed a second formal harassment complaint about an incident that happened on June 16, 2006 between herself and the renal unit's NUM. She

also attended (with the Union's national representatives, Vicki O'Dell and Sharleen Haarstad) a meeting called by the Employer. The Applicant did not want Mr. Miller to represent her and the Union assigned Ms. O'Dell and Ms. Haarstad to her. Ms. Longpre was at this meeting and so was John Piggott, vice-president of the Employer's acute care services. Ms. Longpre informed those present that the harassment complaint had been investigated and was found to not be harassment. Ms. Longpre said that the Applicant was not a team player and, referring to other complaints made and letters written by the Applicant, that the Applicant seemed like a person who liked to make complaints. The Applicant had complained about Ms. Longpre saying "you are part of the problem" at the last meeting and they debated about whether this in fact was said. The Applicant's memory of this meeting was that Ms. Longpre was "extremely abusive" to her. She recalled Ms. O'Dell saying that the Employer must admit that there must be a problem in these units. Ms. O'Dell also questioned whether any witnesses to the emergency department incidents were interviewed and Ms. Longpre said no. Ms. Longpre suggested that perhaps the Applicant had a problem with authority and said that, if the Applicant had personal problems, she should seek out EFAP. At one point the Applicant tried to leave the meeting because she did not want to listen to any more, but Ms. Longpre stopped her. Ms. Haarstad told the Applicant to sit down and said that they would talk later. The Applicant thought that Ms. O'Dell and Ms. Haarstad should have defended her against what Ms. Longpre was saying. The meeting ended with Ms. Longpre saying "You are a valuable employee to our health region and we want to help you all we can with your problems." Mr. Piggott said that maybe the Applicant's situation was not handled in the best way but they were all learning. There would be further investigation to see if the complaint was filed in bad faith and, if it was, the Applicant would be reprimanded. The Applicant was given paid leave for a week, during which time she and the Union should come to a decision on how the Applicant would deal with her issues.

[7] After this meeting, the Applicant testified that she felt verbally abused, totally helpless and unsupported by the Union. The two national representatives of the Union and the Applicant met briefly. The Applicant said that Ms. Haarstad told her to stop making statements about Mr. Miller and the Applicant responded that she would not stop because what she was saying was true. The Applicant also felt that Ms. Haarstad chastised her for standing up during the meeting because it made her look uncooperative. The Applicant did not file a harassment complaint against Ms. Longpre. On cross-

examination, she admitted that the possibility of mediation was also discussed at this meeting.

[8] The Applicant did not present any evidence about a "first" investigation, saying that she did not know anything about it.

[9] After the June 20, 2006 meeting Ms. O'Dell caused the Employer to conduct a formal investigation of the two formal harassment complaints filed by the Applicant. The formal investigation was conducted by Mike Keith, who was a national representative from the Union's Regina office, and Diane Jamison, who was in human resources in another health region. The Applicant said that because Mr. Keith was from the Union, he "must have been directed by CUPE." The result of the formal investigation was that both investigators found that the incidents did not constitute harassment and also that the complaints were filed in good faith.

[10] The Applicant's complaint about the investigators' findings was essentially that they did not agree with her that the incidents constituted harassment. Specifically, the Applicant thought that the investigators should have interviewed five witnesses whose names she provided. The Applicant herself was interviewed by the investigators and Ms. O'Dell accompanied her on that interview as her union representative. The Applicant admitted that she did not have any evidence that the Union had interfered with or directed the harassment investigation and that Mr. Keith was not acting as her representative but as a neutral. Ms. O'Dell was acting as her representative.

[11] In the meantime, in July 2006 the Applicant moved to North Battleford where her husband was already living and took a casual licensed practical nurse job with the Battlefords Union Hospital. She said that she gave her new telephone number to the Union and the Employer.

[12] Initially, the Applicant had difficulties obtaining the investigators' reports, which were sent to Ms. Longpre and Ms. O'Dell on July 24, 2006. Apparently, the Employer did not provide the Applicant with the results. Ms. O'Dell was uncertain if she could give out the results without discussing it first with a supervisor but, some days later, the Applicant did receive them from Ms. O'Dell.

[13] According to the Applicant's testimony, she had no contact from the Union after August 10, 2006. It was later clarified that the Applicant spoke to various of the Union's personnel after that date but they did not initiate the contact; she did. The Applicant said that on several occasions she called the Union's local office and/or the national office and got an answering machine. She would get a response days later, which was of no use if she wanted an immediate answer. The Applicant also said that, whenever she found out that the Union wanted to talk to her, she called in. She did telephone Ms. O'Dell on August 23, 2006 and was first kept on hold and then listened to the telephone ringing for a long time before she finally spoke to Ms. O'Dell but did not mention these problems to Ms. O'Dell. She also said nothing about whether Ms. O'Dell would be representing her. The Applicant did not say why she was contacting the Union on any of these calls.

[14] Ms. Longpre sent the Applicant a letter dated July 31, 2006 asking for a meeting on August 9, 2006 to discuss both the harassment investigation reports and the Applicant's request for a leave of absence. Ms. Longpre asked the Applicant to discuss with Ms. O'Dell if they would be available for the meeting.

[15] By registered letter dated August 22, 2006 Ms. Longpre wrote to the Applicant, indicating that, during the previous two months, Ms. Longpre had tried to contact the Applicant and schedule a meeting to discuss her return to work. A meeting was scheduled for August 9, 2006 but the Applicant denied receipt of notice of it. Ms. Longpre and the Applicant agreed on an August 15, 2006 meeting date but no representative of the Union was available. August 22, 2006 was agreed upon. On Saturday, August 18, 2006 at 8:17 p.m. the Applicant left a message that she would not attend the August 22, 2006 meeting because "an issue came up." This behaviour was interpreted as insubordination by the Employer. The parties needed to discuss the Applicant's leave of absence as well as the results of the harassment investigation. Ms. Longpre was not prepared to meet at the Applicant's suggested time of September 5, 2006 after business hours and instead set the date of the meeting at August 31, 2006. Ms. Longpre's letter setting the meeting date was copied to Ms. O'Dell and the Union's president. It was also copied to SAHO and to the Employer's CEO. The Applicant said

that she had some difficulties during this time communicating with the Union and Ms. Longpre, because she worked nights and she returned their calls in the off hours.

[16] By both telephone call and letter dated August 23, 2006, the Applicant did a lengthy critique of the investigators' reports to Jim Swaok, who is the Union's regional director for Saskatchewan. She also outlined her complaints with respect to her representation by the Union so far, including complaints about a lack of support from Ms. Haarstad and Ms. O'Dell. The Applicant asked Mr. Swaok to take over her representation himself or give her another representative to attend a proposed upcoming meeting with Ms. Longpre. The Applicant received no reply to this letter or to a follow up letter sent by the Applicant on September 8, 2006.

[17] The Applicant sent Ms. Longpre a letter dated August 24, 2006, wherein the Applicant explained that she did respond to messages left for her, reminded Ms. Longpre of the cancellations of meetings at Ms. Longpre's request and advised Ms. Longpre that the letter telling her of the first meeting date had been sent to Prince Albert instead of North Battleford. The Applicant proposed meeting dates after she returned to Prince Albert for her schooling. This letter was copied to Ms. O'Dell and the Union's president.

[18] There were further difficulties in the scheduling of a meeting among all of the participants to discuss the investigation results and the Applicant's plans with respect to her work at Victoria Hospital. The meeting was eventually arranged for September 11, 2006 but, as the meeting time came closer and the Applicant had not been advised of her replacement union representative, the Applicant was reluctant to attend another meeting with Ms. Longpre and more representatives of the Employer without a representative of the Union. The Applicant felt backed into a corner and had no choice but to resign her position with the Employer.

[19] On cross-examination, the Applicant agreed that she knew that Ms. O'Dell would be at the meeting but she did not want Ms. O'Dell to represent her -- as she had advised Mr. Swaok -- and she expected Mr. Swaok to comply with her wishes. The Applicant was asked if she could have used her seniority to bid into another position instead of resigning and she answered that it did not occur to her. The Applicant said that

she could not have gone to this meeting with Ms. O'Dell instead of resigning. She did not discuss any options or anything else with the Union before she resigned.

[20] In a letter dated September 6, 2006 addressed to the Employer's CEO, Cecile Hunt, the Applicant reported that her reason for resigning was that she still believed that she had been harassed and a proper investigation would have established this. She felt that both the Employer's human resources staff and the Union were more concerned with maintaining the status quo rather than doing anything to uphold the Employer's policies, values and the collective agreement.

[21] The Applicant called two witnesses to testify on her behalf. The first, Pauline Thiel, saw an incident between the Applicant and the charge nurse in the emergency department and her opinion was that the charge nurse did not act appropriately. Ms. Thiel was listed as a witness by the Applicant on her formal harassment complaint of June 8, 2006 but was not interviewed about this incident by anyone.

[22] The second witness was Susan Gail Stobbs, who witnessed the incident on April 2, 2006 involving the Applicant and two nurses. She did not believe that the Applicant was treated fairly by the two nurses and thinks the two nurses treated the Applicant disrespectfully. Ms. Stobbs was not listed on the formal harassment complaint and was not interviewed about this incident by anyone.

The Respondent Union's Evidence

[23] Mr. Miller was the first witness who testified on behalf of the Union. At the relevant time, he was a first vice-president of the Union, which is certified to represent employees in the Prince Albert Parkland Health Region. In this position Mr. Miller had represented the employees at Victoria Hospital in grievance matters. On June 8, 2006 he was phoned by Ms. Longpre to come into a meeting, which he did. The Applicant was the other person at the meeting and she had filed a formal harassment complaint. Ms. Longpre explained to the Applicant what the process would be with respect to her complaint and gave her a copy of the Employer's harassment policy. Ms. Longpre also told the Applicant that she would have to be moved from the emergency department for

her own protection until the investigation was complete. The Applicant questioned why it was her that was moved rather than the other person. Mr. Miller's notes of the meeting indicate that the Applicant asked many questions about the process and where she was going to work and Ms. Longpre answered those questions. He did not think that Ms. Longpre was being abusive; she was just explaining the policy. She did not raise her voice. Mr. Miller recalled that he talked with the Applicant after the meeting but his recollection was that the conversation was about the chain of command within the Union. It is common practice with the Employer to move the complainant during a harassment investigation and it was not considered disciplinary to the complainant.

[24] Mr. Miller also stated that he had a glass of wine with his dinner before the meeting but he was not inebriated or incapable of representing the Applicant. If Mr. Miller had felt that he was incapable of representing the Applicant, he would not have gone to the meeting.

[25] Ms. O'Dell then testified. She is usually a special care aide in Weyburn and president of Canadian Union of Public Employees, Local 5999, which represents employees of the Sun Country Health Region. She is currently working as a temporary national representative and was working in that capacity from June 18, 2006 to August 31, 2006 in the Prince Albert office. She was the staff advisor to a number of locals, including the Union. She was also covering a Saskatoon assignment, which required her to be in Saskatoon often. For the first week of her Prince Albert job, she overlapped with Ms. Haarstad, as she was taking over Ms. Haarstad's work while she was off. This was the first time that Ms. O'Dell had done the work of a national representative.

[26] On June 18, 2006 Ms. O'Dell and Ms. Haarstad received a telephone call from Ms. McKnight, president of the Union. Ms. McKnight said that the Applicant had filed a formal harassment complaint but did not want Ms. McKnight to represent her, so she was asking the national representatives to take over representation of the Applicant. The Applicant sent them a lengthy, detailed and well-written statement of all that had happened to date that she considered to be harassment. The two representatives also spoke to Ms. Longpre to determine what would be happening at the meeting.

[27] Ms. O'Dell and Ms. Haarstad attended the June 20, 2006 meeting on behalf of the Applicant with Ms. Longpre. Ms. Longpre did most of the talking. The harassment complaint had been investigated although Ms. Longpre did not reveal any details of how and by whom this was done. It was determined by the Employer that the impugned behaviour did not constitute harassment. Ms. Longpre had concerns that the Applicant was not a team player and perhaps had personal issues that EFAP could assist with. Ms. Longpre warned the Applicant that a false complaint could lead to discipline. Ms. O'Dell thought that Ms. Longpre was direct and some of the things she said were not flattering to the Applicant but Ms. Longpre was not abusive. Ms. O'Dell also did not like Ms. Longpre's threat of discipline because the Applicant made a complaint but Ms. O'Dell did not find this to be abusive. If Ms. Longpre had been abusive, Ms. O'Dell would have stopped the meeting. The Applicant was placed on paid leave for a week and was told to contact Ms. Longpre when she was ready to return to work.

[28] The two representatives met with the Applicant immediately after this meeting. The Applicant was very upset because she still felt that she was being harassed and the Employer disagreed. The representatives were trying to suggest some other way of dealing with the Applicant's complaints, i.e. mediation and/or an independent investigation. The Applicant did not see how she could go through mediation unless harassment was found. Ms. O'Dell disagreed, as she thought mediation was always a good idea. The Applicant was interested in an independent investigation. The representatives were suggesting an informal investigation by the Union. The Applicant wanted compensation for her pain and suffering and there was discussion as to whether the Union's lawyer would sue for her. She was advised that the Union's lawyer did not do that for members. The Applicant indicated that she was unhappy with the representation of the Union's president and Mr. Miller and she again made the accusation that the latter had been drinking. She was told that both of the representatives had asked Ms. Longpre about this and Ms. Longpre had not observed any indication of inebriation. As the Applicant's story was not corroborated, the representatives asked her to stop saying this about Mr. Miller. She refused. The representatives told the Applicant that the Employer was making it a condition of her return to work that she consult EFAP. The Applicant did not want to do this because this would be admitting that she had a problem. Throughout this meeting, the Applicant was upset, crying at times, and kept asking what she should do. The meeting ended with the promise that the Union would do its own informal

assessment of the Applicant's complaints. Ms. O'Dell's notes of this meeting confirm these discussions.

[29] Ms. Haarstad and Ms. O'Dell had a telephone conversation on June 21, 2006 and discussed basically the same matters again according to Ms. O'Dell's notes.

[30] The Union received a letter from the Applicant dated June 22, 2006 requesting that it "commence the grievance procedure immediately" and if it believed there were no grounds for a grievance, to "commit those reasons in writing as soon as possible." Ms. O'Dell responded to the Applicant verbally that she thought a formal investigation of the harassment complaint should be done first, as this is what the collective agreement provided for in article 17.05 which says:

> *The Employer(s) shall ensure a policy is developed jointly with the Local of the Union to address the issue of workplace harassment. The policy shall ensure that:…*
>
> - *Incidents are jointly investigated in a prompt, objective sensitive, and confidential manner not precluding the use of a third (3rd) party…*

[31] The Employer's policy does say that if a resolution of a formal complaint is not possible an investigation should be initiated.

[32] Ms. O'Dell also wanted to wait for the results of the assessment by the Union, which was being done by a co-worker, Anne St. Dennis, with more experience in these matters. Ms. St. Dennis' opinion was that harassment had not occurred. Ms. O'Dell did not tell the Applicant at the time who had done this assessment because she felt that Ms. St. Dennis did this as a favour to Ms. O'Dell and she did not want Ms. St. Dennis bothered by the Applicant. Ms. O'Dell now said that maybe this was wrong but, at the time, she thought this was the right thing to do.

[33] Ms. O'Dell said that it was not easy to convince Ms. Longpre that there should be a formal investigation by a third party, because Ms. Longpre felt the matter was over. Ms. O'Dell threatened to file a grievance and Ms. Longpre eventually agreed to a formal investigation. Ms. Longpre did not want to incur any costs, so they agreed they would each use one of their own representatives with no knowledge of the situation. Ms.

Longpre appointed a human resources person from another health region and the Union appointed Mr. Keith, a national representative from the Regina office. They agreed that the investigation would include both the June 8, 2006 and June 20, 2006 harassment complaints. They jointly requested the investigators to conduct the investigation in writing dated July 12, 2006 and provided them with the harassment complaints which included the Applicant's full story of what had happened. They provided written statements from a number of other people, including some of the alleged harassers. The investigators were told to conduct the investigation as they wished and to provide a report with their determination as to whether or not harassment occurred and their recommendations. Ms. O'Dell had no other communication with the investigators other than accompanying the Applicant to her interview with them on July 18, 2006.

[34] The report of the investigators were done by July 24, 2006. They found no harassment but also found that the complaints were not made for malicious purposes and that the Applicant believed that she had been harassed. Ms. O'Dell was relieved to see that statement because she was worried about the repercussions that Ms. Longpre had threatened. There were recommendations, some of which were that all employees should be made aware of clear lines of authority and the requirement of respectful dialogue in the workplace.

[35] A memo from Mr. Keith to Mr. Swaok dated September 21, 2006 was filed as evidence. In this memo, Mr. Keith explained how the investigation was conducted. They conducted the investigation by both interviewing some people including the Applicant and by reviewing written statements made by others. In one case, the Applicant's own statement did not substantiate harassment and that, coupled with contradicting statements from witnesses, led to the conclusion of no harassment. In the second case, statements of witnesses, including those suggested by the Applicant, did not corroborate the Applicant's version of the events and the conclusion was that a supervisor had given the Applicant a clear direction and the Applicant continually challenged that direction. Therefore, the investigators concluded that no harassment had occurred. For the third incident, the investigators interviewed the only witness that the Applicant named at the time. This witness, and others, denied the Applicant's version of the conversations alleged. Based on this evidence, the investigators could not conclude that harassment had taken place.

[36] Ms. O'Dell advised the Applicant of the results over the phone but did not know what to do about the Applicant's request for the investigation reports until she talked to several co-workers and supervisors who advised her that it was the correct thing to do. Ms. O'Dell then sent the reports to the Applicant.

[37] Ms. Longpre then sent out her July 31, 2006 letter to the Applicant requesting a meeting and Ms. O'Dell received a copy. She then received a letter from the Applicant dated August 2, 2006 (showing a Prince Albert return address that was the same used by Ms. Longpre). The Applicant again asked Ms. O'Dell to file a grievance for harassment and added the failure to grant a leave of absence.

[38] Ms. O'Dell sent a letter dated August 4, 2006 to the same Prince Albert address and said:

> *As a result of an initial assessment by an experienced National Servicing Representative and a second more comprehensive investigation with a senior National Servicing Representative, no harassment was found. The Local is satisfied there was a full and complete investigation and will therefore not take any further action with respect to the matter.*
>
> *There were no findings of harassment in any of the three incidents that were investigated. Nor were there findings of malicious behaviour on your part. We anticipate that you will be able to put these incidents behind you and continue with your educational pursuits and your current career as an LPN.*
>
> *Should you need to consult with us please do not hesitate to call.*

[39] Ms. O'Dell then replied to the letter from the Applicant, requesting a grievance be filed by repeating that an initial and then a thorough investigation was done that did not substantiate any harassment. A grievance could not be filed about the leave of absence because the Employer had not denied it; it was asking for further information before making the decision to grant or deny. Ms. O'Dell had asked Ms. Longpre to grant the leave without any further information but Ms. Longpre was adamant that the information had to be provided. Ms. O'Dell also testified that she did not think a grievance

would benefit the membership as a whole. She herself thought that the formal investigation was fair and thorough.

[40] Ms. O'Dell then received several e-mails from Ms. Longpre dealing with Ms. Longpre's efforts to contact the Applicant to set up a meeting. Eventually, Ms. Longpre told Ms. O'Dell that she had talked to the Applicant who would meet with them on August 22, 2006 and Ms. O'Dell replied that she would be there. She felt that she had a long way to go to get the Applicant back to work and that was her goal. Ms. O'Dell had conversations with Ms. Longpre where Ms. Longpre said that the Applicant could return but not to the same units. Ms. O'Dell vigorously fought this and said the Union would not agree to a return to anywhere other than the same units. Ms. O'Dell had no idea that the Applicant was unhappy with her representation and she thought that she continued to represent the Applicant which is why she continued to discuss the Applicant's case with Ms. Longpre. The Applicant did not contact Ms. O'Dell when she did not want to attend the August 22, 2006 meeting.

[41] On August 23, 2006 the Applicant phoned Ms. O'Dell and her notes of the conversation indicate that all that the Applicant said was that she heard that Donna was sending a letter and she wanted to know whether it was going to Prince Albert or North Battleford. She was told that it was going to North Battleford and that was the end of the conversation.

[42] Ms. O'Dell had absolutely no idea that the Applicant was planning to resign and did not think she needed to do that. Ms. O'Dell was and is confident that the Union could have returned the Applicant to her positions and she is not happy at all about the way the file ended. Ms. O'Dell would have preferred to have had the meeting with Ms. Longpre and the Applicant and to have returned the Applicant to her job, which Ms. O'Dell thought was the Applicant's right.

[43] The Union's final witness was Ms. Haarstad. She has been a national representative since September 2002 and was the person assigned to servicing the Union.

[44] Around June 9, 2006 Ms. Haarstad received a phone call from Mr. Swaok with respect to the Applicant's complaints about Mr. Miller and her harassment complaints. Ms. Haarstad talked on the telephone with the Applicant, who told her that she felt that Ms. McKnight and Mr. Miller had "hung her out to dry" and Mr. Miller represented her when he was drunk. Ms. Haarstad said she would go with the Applicant to an upcoming meeting and asked the Applicant to e-mail her details of her situation, which the Applicant did.

[45] Ms. Haarstad said that she met briefly with the Applicant before the June 20, 2006 meeting and told her that they were there to hear what the Employer had to say, to take notes and to listen. Then, they would meet without the Employer and discuss how to respond to what the Employer said.

[46] Ms. Haarstad and Ms. O'Dell attended the meeting of June 20, 2006 and Ms. Haarstad had notes of the meeting that she went through in her testimony. She said that Ms. Longpre was blunt and to the point but Ms. Haarstad did not think Ms. Longpre was abusive. If Ms. Longpre had been abusive, had raised her voice and yelled at the Applicant or had used an improper tone of voice, Ms. Haarstad would have stopped the meeting. Ms. Longpre made numerous statements about the Applicant not accepting supervision and challenging authority. Ms. Haarstad did not think this was flattering to the Applicant but did not think it was abusive. Ms. Longpre made several statements of her expectations, i.e. that she expected teamwork and she expected an employee to obey now and grieve later. Ms. Haarstad did not perceive these comments as insults or abusive. Ms. Longpre was concerned that the complaints of harassment were unfounded and thought that maybe the Applicant had some of her own issues that she could see EFAP about and made numerous statements to this effect. Ms. Haarstad did not see this as abusive or an insult or an insinuation but as a question asking the Applicant if she did have any such problems because if she did there was help for her. If Ms. Haarstad thought Ms. Longpre was accusing the Applicant of being emotionally disturbed, she would have stopped the meeting. Ms. Haarstad also believes that if an employer thinks there are "other issues" the employer has a duty to ask and offer help. The Applicant was angry about this suggestion and interrupted Ms. Longpre. Ms. Haarstad told the Applicant to just listen and they would talk together later. Both representatives of the Employer said that this could have been handled better at the time and that they would deal with the

NUMs and nurses. Ms. Haarstad did not say anything to Ms. Longpre because she never thought that Ms. Longpre went "over the line."

[47] After the meeting, the Applicant was crying hysterically at times and calm at times. She was angry at Ms. O'Dell and Ms. Haarstad for not sticking up for her at the meeting. Ms. Haarstad reminded the Applicant that they were there to listen and they would have stopped the meeting if Ms. Longpre was abusive. She said they discussed the same things that Ms. O'Dell testified to. She added that the Applicant talked about feeling victimized and said she felt like a rape victim. They decided that the next step would be for the Union to conduct an informal investigation to determine if there was in fact harassment.

[48] The next day, Ms. Haarstad's notes confirm that there was a lengthy telephone conversation with the Applicant, where all the possible courses of action were again discussed.

[49] Ms. Haarstad then went on vacation and, when she returned, Ms. O'Dell told her that they were trying to set up a meeting with the Applicant for a return to work discussion. As it was the end of Ms. O'Dell's temporary position, Ms. Haarstad would have attended the September 11, 2006 meeting. Instead, on September 6, 2006 she was told by the Employer that the Applicant had resigned. Ms. Haarstad did not contact the Applicant upon her return because she expected if the Applicant needed anything, she would ask.

Relevant statutory provision:

[50] The duty of fair representation is described in s. 25.1 of the *Act*:

> *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.*

Arguments:

Applicant's Argument

[51] The Applicant's argument was that the Union had not adequately or fairly represented her and had acted arbitrarily and in bad faith.

[52] Specifically, Mr. Miller had acted arbitrarily in being drunk when he was supposed to represent the Applicant in the June 8, 2006 meeting with the Employer.

[53] Ms. O'Dell and Ms. Haarstad acted in bad faith in defending Mr. Miller's actions. Ms. O'Dell and Ms. Haarstad were not acting in a *bona fide* manner because they trivialized the Applicant's complaints and took the Employer's part against the Applicant. They stood by while Ms. Longpre harangued her, made false accusations and abused her in the June 20, 2006 meeting. Ms. O'Dell should not have withheld information on the two investigations and had been evasive about providing the investigation report.

[54] The Union failed to support the Applicant by making sure that the formal investigation was done properly. If they had interviewed her two witnesses, the result would have been that she had been harassed. She was being harassed and the Union did nothing to help and neither supported her nor protected her rights.

[55] Mr. Swaok was acting arbitrarily when he did not respond to the Applicant and when he did not replace Ms. O'Dell with another representative.

[56] The Union also acted arbitrarily and not in good faith when it refused to file a grievance on the Applicant's behalf and go to arbitration.

[57] The Union could not be trusted and only acted to protect itself, instead of supporting the Applicant and acting in her interest. The Union was not there when she needed it to protect her rights.

[58] All of this caused the Applicant to resign her job, because she had no choice but to quit.

Union's Argument

[59] The Union argued that the Board's jurisdiction is to determine if there has been a violation of the *Act* and not to decide if harassment occurred or to minutely assess all of the actions of the Union.

[60] The testimony of the witnesses and the notes of the meetings prove that there was no abuse of the Applicant at the meetings on June 8, 2006 and June 20, 2006. The Applicant was offended but Ms. Longpre did not abuse her and there was therefore nothing that the Union was required to do, other than what it did. Evidence in support of the lack of abuse by Ms. Longpre is the fact that the Applicant did not file a formal harassment complaint against Ms. Longpre and did not refuse to meet with her.

[61] There were no symptoms that Mr. Miller was drunk during the meeting according to the Applicant's testimony and the information the Union received from Ms. Longpre. Mr. Miller explained why he had alcohol on his breath but this did not mean he was drunk.

[62] The formal investigation that was done was fair and complete. It was done by two people at arm's length from the Employer and the Applicant. There was no evidence that the Union interfered in the process and the Applicant had union representation during the investigation.

[63] The Applicant's testimony was inaccurate in several instances, for example, when she claimed that she did not receive information but it was proved that she did.

[64] With respect to communication problems, the Union's position was that the Applicant was being evasive or, at a minimum, not making the return of telephone calls a priority. The Applicant agreed in her testimony that she was hard to contact. The Union did contact the Applicant when she said they did not. Mr. Swaok contacted her. She claimed that she did not know who or if she would have union representation for the September, 2006 meeting but admitted on the stand that she knew Ms. O'Dell would be there.

[65] With respect to the allegation that the Applicant was forced to resign, she testified that in July 2006 she was already working in North Battleford, where her husband was living. The Applicant had numerous options other than resigning that she did not want or pursue. The Union played no part in the Applicant's resignation as she did not consult the Union prior to resigning.

[66] The Union referred to the definition of the duty of fair representation as contained in *Lawrence Berry v. Saskatchewan Government Employees' Union* [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93. The Union also relied on *Judd v. Communications, Energy and Paperworkers' Union of Canada, Local 2000* [2003] B.C.L.R.B.D. No 63, which sets out the same definition of the duty and goes on to particularize what is meant by "representation in bad faith," "discriminatory representation" and "arbitrary representation." The case also states that a union is not in violation of statute merely because the applicant thinks that it was "wrong" in what it did. And, finally, the Union argued that the Board must examine all of the Union's actions as a whole, not whether its isolated acts violated the *Act.*

[67] The Union referred the Board to its own recent decision relating specifically to harassment in *E.A. v. CAW-Canada and Hotel Saskatchewan*, [2006] Sask. L.R.B.R. 369, LRB File No. 076-04 where the Board held that the union had conducted a reasonably detailed investigation and made a reasonably thoughtful assessment of the situation and, therefore, was not in violation of the *Act.*

[68] The same result occurred in the most recent case referred to by the Union, which was *Hinks v. Construction and General Workers' Union, Local 280 and Jacobs Catalytic Ltd.*, [2007] Sask. L.R.B.R. 1, LRB File No. 067-05.

[69] The Union therefore requested that the application be dismissed because the Applicant had not established that the Union violated s. 25.1 of the *Act.*

Analysis and Decision:

[70] As stated in both the *E.A.* and *Hinks* decisions, *supra*, the Board consistently approaches applications alleging a breach of s. 25.1 of the *Act* as summarized in *Berry, supra,* at 71 and 72:

> *This Board has discussed on a number 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 Ranonier Canada (B.C.) Ltd. (1975) 2 [B]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 a particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*

This Board as 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 favouritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*

[71] The Board's interpretation of the duty of fair representation is the same as that applied by labour relations boards in other Canadian jurisdictions. The British Columbia *Labour Relations Code* also prohibits unions from acting in a manner that is "arbitrary, discriminatory or in bad faith." As discussed in *Judd, supra,* it is this very narrow and specific behaviour by a union that a labour relations board must first find before it can find a violation of the statute. The Board has no jurisdiction to take action against a union if the complaint is, for example, that the union was wrong, could have

given better representation or did not do what the member wanted. The Board does not sit in appeal of decisions made by unions, does not decide if a union's opinion of the likelihood of success of a grievance was correct and does not minutely assess and second guess every union action. (See, for example, *Datchko v. Deer Park Employees' Association* [2006] Sask. L.R.B.R. 354, LRB File Nos. 262-03 & 263-03.)

[72] The very narrow, specific behaviour that the Board must find was described in *Judd* at paragraphs 49 through 70 as:

> *(a) Representation in Bad Faith*
>
> *[49] Representation in bad faith will typically involve either representation with an improper purpose or representation with an intention to deceive the employee.*
>
> *[50] Some examples…are listed in Rayonier…*
>
> *[51] Another example of an improper purpose would be if the union conspired with the employer to have an employee terminated: for example, if the union agreed to attempt to bring about circumstances in which the employee was likely to be disciplined. However, the mere fact that the union makes an agreement with an employer that the employee feels is detrimental to his or her interests is neither a conspiracy or bad faith. It is perfectly legitimate for a union to reach decisions (or make agreements) based on its view of the merits of a case or based on the interests of other employees…*
>
> *[52] Similarly, it is not a conspiracy simply because the union, after assessing a situation, reaches the same view as the employer. For example, there may be tensions in the workplace between one employee and others. The employer may conclude it is the employee's fault. The union, after assessing the situation, may agree. That does not make it a conspiracy against the employee.*
>
> *[53] The second sub-category of bad faith – representation with an intention to deceive the employee – addresses "dishonesty"…[The Act] does not give the Board any general authority to intervene when someone lied to someone else. However, if a union's dishonesty directly affects the quality of the union's representation of an employee's interests, that could be representation in bad faith.*
>
> *(b) Discriminatory Representation*

[55] Rayonier gives examples of grounds on which representation could be considered discriminatory…
[56]…Of course, not every instance where people are treated differently amounts to discrimination. The different treatment may be due to some relevant differences in their circumstances…

(c) Arbitrary Representation

[58] The word "arbitrary" has been defined as conduct that is "not [based] upon any course of reason [and] exercise of judgment…or "based on…uninformed opinion or random choice"... In [the Act's] context, the Board has held that a union's decision to abandon a grievance is not arbitrary if the union 'makes sure it is aware of the circumstances, of the possible merits of the grievance, puts its mind to the case and comes to a reasoned decision whether to proceed"…

[61] Arbitrariness essentially encompasses three requirements. The union must:

- *(i) ensure it is aware of the relevant information;*
- *(ii) make a reasoned decision; and*
- *(iii) not carry out representation with blatant or reckless disregard.*

(i) Union must ensure it is aware of the relevant information

[62] The requirement that the union must "make sure it is aware of the circumstances [and] the possible merits of the grievance' is often referred to in shorthand form as "conducting an adequate investigation". It is important to note, however, that not every case will necessarily require an "investigation". There may be some grievances where the relevant information is already in the union's possession.

[63] In the more typical case, however…gathering the relevant information will require an "investigation". An adequate investigation may include considering the sequence of events, learning, the grievor's point of view, obtaining information from potential witnesses, and offering the grievor a chance to respond.

[64] The key is that the union must take reasonable measures to ensure it is aware of the relevant information. What is "reasonable" will depend on the particular circumstances – including the significance of the issues for the employee.

(ii) Union must make a reasoned decision

[65] Once it has the relevant information, the union must "put its mind to the case and come to a reasoned decision whether to proceed." In other words, the union's decision must be based on

> *reason. A reasoned judgment is demonstrated by a reasonable and rational connection between relevant considerations and the decision made. It may include considering collective agreement language, the practice in an industry or the workplace, taking into account how similar grievances have been handled in the past, and supplying reasons for a decision. A union may weigh the credibility of the grievor and potential witnesses in reaching its decision…*
>
> *[66] Typically, where a union gives reasons for its decision it will not be arbitrary…*
>
> *(iii) Union must not carry out representation with "blatant or reckless disregard"*
>
> *[69] However, that does not mean it is a violation of [the Act] for a union to make a mistake or to handle a matter poorly. ..*
>
> *[70] As well, unions are not law firms. Unions are not expected to meet the standards required of a lawyer in respect to either procedural or substantive matters…*

[73] The onus is on the Applicant to prove that the Union acted in such a way that the *Act* was violated. This means that the evidence that the Applicant has presented must prove or, at least, make it more probable that the Union violated the *Act* by representing her in a manner that was arbitrary, discriminatory or in bad faith.

Did the Union act arbitrarily?

[74] The Board does not minutely examine each and every action by a union but looks at the whole course of conduct to see if the union failed in its duty of fair representation. Thus, it is not the duty of the Board to assess the performance of a union in each meeting, telephone conversation and correspondence undertaken in the course of representation of a member. The Board must look at the Union's representation of the Applicant in its entirety and determine if the Union acted arbitrarily in not filing a grievance with respect to the Applicant's complaints of harassment.

[75] Despite this, the Board will state that it found nothing arbitrary in the Union's conduct with respect to the meetings of June 8, 2006 and June 20, 2006. The Applicant did not prove that Mr. Miller was inebriated and incapable of representing her. As Mr. Miller admitted, he had a glass of wine and this probably would result in the smell of alcohol on his breath. There was absolutely no evidence that Mr. Miller did anything

wrong in the meeting with the Employer. Ms. Longpre's explanation of the Employer's harassment policy was not objectively abusive regardless of whether or not the Applicant took offence at what was being said.

[76] Similarly, it has not been proven that there was abusive conduct by Ms. Longpre at the June 20, 2006 meeting. The testimony of Ms. O'Dell and Ms. Haarstad, supported by the notes of the meeting, was that they would have prevented Ms. Longpre from being abusive but she never crossed that line. Therefore, there was nothing more for them to do at this meeting than proceed with their plan to find out the Employer's position. It is obvious that the Applicant, who was more emotionally involved in the situation, took Ms. Longpre's statements more insultingly than they were in fact delivered. But this does not make the situation an abusive one which necessitated any intervention by the Union.

[77] In addition, the failure from time to time to respond to correspondence or a telephone call or the refusal to change the person acting as the Union's representative does not, in and of itself, constitute arbitrary action.

[78] In analyzing the representation of the Applicant in its entirety, the Board must look for conduct that is arbitrary, as defined by the jurisprudence. That is conduct that is "disregarding the interests of one of the employees in a perfunctory manner," "capricious or cursory…or without reasonable care" or "not based upon any course of reason and exercise of judgment." The Union did not act in this way at all. It had in depth information of the problems that the Applicant was experiencing in the workplace provided in great detail by her own extensive statements. This meets the requirement that the Union must ensure that it is aware of the relevant information.

[79] When the Union was advised that the Employer's initial assessment of the first harassment complaint was that it did not constitute harassment, both Ms. O'Dell and Ms. Haarstad had two lengthy conversations with the Applicant to discuss all possible next steps. They decided together that the first next step would be to get an informal assessment of the situation by a more experienced union staff representative. This was a reasonable decision. There is no evidence at all that this informal investigation was done in an arbitrary manner.

[80] In the experienced opinion of that person, the complaints did not constitute harassment. However, the Union did not stop at this stage. Ms. O'Dell successfully pressured the Employer to agree to a formal harassment investigation pursuant to the Employer's policy and the collective agreement. Two individuals who had no connection with the Applicant or the Employer conducted this investigation in a proper manner. An examination of both the investigation reports and the explanation of Mr. Keith shows that the investigators received relevant information and made reasoned and reasonable conclusions. They interviewed and/or read the statements of eleven people, including the Applicant, and their failure to interview two more does not make the investigation perfunctory, cursory or lacking reasonable care. The characterization by the two witnesses of an incident being inappropriate, unfair or disrespectful does not usurp the unanimous opinion of the two unbiased investigators that all the incidents were not harassment as defined in the Employer's policy and the collective agreement.

[81] The Union now had the additional information of two investigations to add to the information provided by the Applicant. This additional material included information from potential witnesses and put the Union in a better position to assess whether or not to proceed with a grievance. The Union relied on all of this information and several opinions in addition to that of the Employer that the incidents did not meet the definition of harassment. It also considered the interests of the other members of the Union. The decision not to proceed with a grievance for the harassment was made in a reasoned manner. The decision not to proceed with a grievance about a denial of leave because no denial had yet occurred is also a reasoned decision.

[82] In addition, the effort that Ms. O'Dell and Ms. Haarstad put into canvassing alternatives that would help the Applicant in their meeting on June 20, 2006, the telephone conversation the next day and frequent discussions with Ms. Longpre and their intention throughout to help the Applicant in a return to work and to attend the September meeting do not support a finding that the Union's representation was characterized by blatant or reckless disregard.

[83] In conclusion, the Board finds that the Union did not act in a way in its total representation of the Applicant that was arbitrary.

Did the Union act in a manner that was discriminatory?

[84] The Applicant did not allege discrimination nor did she present evidence that the Union treated her unequally or differently than other members and therefore the Board finds that there was no discrimination in the Union's representation of the Applicant.

Did the Union act in bad faith?

[85] The Applicant made several allegations that the Union represented her with bad faith but there was no evidence that the Union treated the Applicant with personal hostility or animosity, political revenge or dishonesty. There was no indication that there was an improper purpose or an intention to deceive the Applicant. The Union came to the same conclusion about the existence of harassment in the workplace as the Employer had but there is no evidence at all of any sort of agreement between the Employer and the Union to act together against the Applicant. The Applicant testified that she felt like she was alone with no one to help her with her harassment allegations but did not attribute this to a conspiracy between the Employer and Union against her nor was there any evidence that would support such a conspiracy theory. Rather, the evidence was that the Union was motivated throughout by a desire to help the Applicant albeit not in the manner that she wanted.

Conclusion:

[86] The Board finds that the Union did not fail in its duty to fairly represent the Applicant and dismisses the duty of fair representation application in LRB File No. 158-06.

DATED at Saskatoon, Saskatchewan, this **28th** day of **September, 2007**.

LABOUR RELATIONS BOARD

Catherine Zuck, Q.C.,
Vice-Chairperson