Labour Relations Board
Saskatchewan

ARKANGELO DAU AJAK, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondent and XL FOODS INC., Interested Party

LRB File No. 075-07, 076-07 & 077-07; November 12, 2008
Vice-Chairperson, Angela Zborosky; Members: John McCormick and Leo Lancaster

The Applicant:	Arkangelo Dau Ajak
For the Respondent Union:	Drew Plaxton
For the Interested Party:	Brian Kenny, Q.C.

Unfair Labour Practice – Reinstatement and Monetary Loss – Board lacks jurisdiction to assess merits of a grievance – Merits of grievance and resulting remedies within exclusive jurisdiction of arbitrator – Board cannot order reinstatement on duty of fair representation complaint – Board dismisses applications for reinstatement and monetary loss.

Duty of fair representation – Practice and Procedure - Delay – Board finds some delay but applicant has reasonable explanation and no excessive prejudice to the union – Board declines to dismiss application on basis of delay.

Duty of fair representation – Scope of Duty – Union's representatives fairly investigated facts and circumstances of applicant's grievance and arrived at informed and rational decision not to proceed to arbitration – Moved grievance through grievance procedure properly and in timely manner – Sought legal assistance and advice before making decision not to proceed to arbitration – Union assessed chances of success no better than settlement offer put forward by employer - Board finds union did not act in an arbitrary, discriminatory and bad faith manner in processing the grievance and deciding not to proceed to arbitration.

Duty of fair representation – Scope of duty – Independent legal advice – Union did not abdicate responsibilities by seeking assistance of and relying on advice of legal counsel.

***The Trade Union Act*, ss. 5(f) and (g), 18(o) and (p) and 25.1.**

REASONS FOR DECISION

Background:

[1] On July 18, 2007, Arkangelo Dau Ajak (the "Applicant") filed an application claiming that the United Food and Commercial Workers Union, Local 1400 (the "Union") failed to fairly represent him, in a manner that was arbitrary, discriminatory or in bad faith, contrary to s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "Act"). The Applicant's complaint against the Union arises out of the Applicant's dismissal from employment with XL Foods Inc. (the "Employer") in August 2005 and the failure of the Union to pursue his grievance to arbitration. Specifically, he asserts that the Union did not properly pursue his grievance through the grievance procedure to attempt to reverse his termination and the Union did not treat him fairly. The Applicant also filed two other applications at the same time he filed the duty of fair representation complaint: an application for reinstatement (LRB File No. 076-07) and an application for monetary loss (LRB File No. 077-07).

[2] The Applicant had been employed by the Employer for approximately eight months at the time of his dismissal and, at all material times, he was a member of the bargaining unit represented by the Union.

[3] In its reply to the duty of fair representation application, the Union denied that it had failed to fairly represent the Applicant, having fully investigated the allegations against the Applicant and having had discussions with the Employer. The Union says that based on its investigation, the Union determined that the grievance had no reasonable chance of success at arbitration and therefore recommended that the Applicant take one of the two offers of settlement provided by the Employer. The Union also advised the Applicant that he could appeal the Union's decision not to proceed with his grievance to arbitration. Even though the Applicant had filed an appeal many months too late, the Union's appeal body considered the appeal in any event, and ultimately, turned down that appeal. The Union requested that the application be summarily dismissed.

[4] The Employer also filed a reply to the duty of fair representation application, indicating that the Applicant did not have a "clean record" as alleged by the

Applicant in his application. He had received prior warnings for incidents involving "racist commentary and rude and aggressive interactions" with co-workers and management. The Employer also stated that the Applicant was fired "for cause" and that the Employer had negotiated with the Union following the Applicant's termination but that the Applicant rejected the settlement proposals.

[5] All three applications were heard by the Board on February 11, 2008.

[6] On February 19, 2008, following the hearing, the Board issued an order under ss. 5(f) and (g) and 18(o) and (p) of the *Act* summarily dismissing LRB File Nos. 076-07 and 077-07, being the applications for reinstatement and monetary loss.

[7] These Reasons for Decision include our reasons for dismissing LRB File Nos. 076-07 and 077-07 as well as our analysis and decision concerning the duty of fair representation application (LRB File No. 075-07).

Preliminary Issues:

[8] At the outset of the hearing, the Union raised a preliminary issue that the Applicant's applications for reinstatement and monetary loss should be summarily dismissed. It says that although it is not clear from whom the Applicant seeks such relief, such applications are not appropriately brought against the Union and the Board has no jurisdiction on a s. 25.1 application to make such an order against the Employer. The most the Applicant could get, the Union argued, was an order for the Union to prosecute the grievance.

[9] As pointed out at the hearing, the decision of the Board in *Marvin Taylor v. Regina Police Association Inc.,* [2003] Sask. L.R.B.R. 307, LRB File No. 016-03 is applicable. In that case, the applicant brought a duty of fair representation complaint to the Board along with an application for reinstatement. The Board dismissed the application for reinstatement, stating at 307:

> *[2] At the hearing of this matter, the Board summarily dismissed the application for reinstatement as the Board lacks jurisdiction to determine the substance of any grievance that may*

> *result in the Applicant's reinstatement. Section 25(1) of The Trade Union Act, R.S.S. 1978, c. T-17 (the "Act") assigns jurisdiction over collective bargaining disputes of this nature exclusively to arbitration boards.*

[10] We agree with the reasoning in *Taylor* and find that it also applies to the Applicant's application for monetary loss. Applications for reinstatement and monetary loss are remedial in nature and often accompany the filing of unfair labour practice applications. With respect to applications concerning a duty of fair representation complaint under s. 25.1 of the *Act*, the Board examines only the conduct of the union to determine whether it has acted in an arbitrary, discriminatory or bad faith manner in its representation of a member. In so doing, the Board does not determine whether the employer violated the collective agreement – that is a matter within the exclusive jurisdiction of an arbitration board. A union has no power to reinstate a member to his or her employment and the Board has no jurisdiction upon the finding of a violation of s. 25.1 of the *Act* to make such an order against the employer. To the extent that a union might be responsible to pay an applicant monetary loss in the form of lost wages (for example, if the union were ordered to proceed to arbitration with a grievance and the grievance was successful, the union may be responsible for a portion of the member's monetary loss) or costs (for example, upon a successful complaint, the Board might order the payment of costs incurred by the applicant in hiring legal counsel), such losses can be ordered by the Board in the context of the s. 25.1 application. For the foregoing reasons, we have summarily dismissed the applications for reinstatement (LRB File No. 076-07) and monetary loss (LRB File No. 077-07) filed by the Applicant, under ss. 18(o) and (p) of the *Act*.

[11] The Union also raised the issue of the delay by the Applicant in bringing this application to the Board. The Union noted that the events giving rise to the application occurred between the time of the Applicant's termination on August 18, 2005 and October 24, 2005, when the Employer made two settlement offers, yet the Applicant did not file this application with the Board until July of 2007, over 1 ½ years later, and gave no explanation for that delay. The Union also noted that the statutory declaration filed with the application indicates that it was sworn by the Applicant on February 26, 2007, yet there was no reason given for waiting an additional five months to file the application. The Union pointed out that the Applicant had also delayed in filing an appeal of the Union's decision not to proceed with his grievance. The Union advised the

Applicant of his right to appeal the Union's decision on October 24, 2005. Although the Union advised the Applicant that an appeal would have to be brought within 21 days of the date of the Union's letter of October 24, 2005, the appeal was not filed by the Applicant's lawyer until July 28, 2006, some nine months after the Union last dealt with the matter. Even though the appeal had not been timely, the Union forwarded it to its Grievance Appeal Committee which considered the appeal at its next meeting, responding on October 26, 2006 that his appeal was rejected both on its merits and on the basis that the matter had not been dealt with in the required time limits. The Union requested that the Board dismiss the application on the basis of the inordinate delay by the Applicant in filing his application with the Board, relying on the following cases: *Dennis Kinaschuk v. Saskatchewan Insurance Office and Professional Employees' Union, Local 397 and Saskatchewan Government Insurance,* [1998] Sask. L.R.B.R. 528, LRB File No. 366-97; *Bernie Neskar v. Civic Employees Union, Local 21 (CUPE)*, [1995] 4th Quarter, Sask. Labour Rep. 70, LRB File No. 122-95; and *Joseph Nistor v. United Steelworkers of America*, [2003] Sask. L.R.B.R. 15, LRB File No. 112-02.

[12] In response to the Union's objection concerning delay, the Applicant stated that the appeal and this application did not occur in a timely way because the matter was in the hands of his lawyer and he had been assured by the lawyer that he was "working on it" and was awaiting a response from the Union. The Applicant only found out that this was not the case when he attended at the Board's offices in July 2007 at which time he determined that his lawyer had not, in fact, filed this application. He stated that upon discovering this, he went to the Law Society to determine the procedure for filing a complaint against his lawyer and he then attended to the filing of this application. The Applicant asked that the Board proceed to hear the application despite the delay.

[13] The Employer also argued that the application should be dismissed for excessive delay.

[14] At the hearing, the Board determined that it would defer its decision whether to dismiss the application on the basis of delay. Having now considered the arguments of both counsel and the Applicant, the Board has determined that it will not dismiss the application for delay, although given the disposition of this application on its merits, it is not necessary to decide this issue. The primary test used to determine

whether an application should be dismissed for delay is whether justice can be done despite the delay. In examining that question, the Board considers several factors, including whether the delay is inordinate, whether the inordinate delay is excusable, and whether the parties to the application are seriously prejudiced by the delay. In this case, the delay is approaching inordinate, however, the delay is, in the circumstances, quite excusable. The Board is sympathetic to the position that the Applicant found himself in, having believed that his lawyer was taking care of things on his behalf. While, arguably, the Applicant could have taken steps earlier to determine the status of his appeal to the grievance committee or this application to the Board, we do not find it appropriate to penalize the Applicant for the difficulties he encountered in dealing with his lawyer. Other than the usual and expected prejudice accompanying any delay, such as the fading memories of witnesses, the unavailability of witnesses, possible lost documents, and the deterioration of evidence, there was no specific evidence of prejudice to the Union as a result of the Board proceeding to hear and determine the Applicant's complaint. Therefore, we will not dismiss the application on the basis that there has been excessive delay by the Applicant in filing it.

Evidence:

[15] At the hearing, the Applicant testified on his own behalf. In reply, the Union called the evidence of Paul Meinema, president of the Union and the person assigned responsibility for the handling of the Applicant's grievance.

[16] The Applicant testified at length concerning the circumstances leading up to his termination from employment and some other problems that he believed he was having with the Employer and with his co-workers. Unfortunately, much of the evidence was not necessary to our determination of whether the Union violated s. 25.1 of the *Act*. As explained, our focus is on the steps the Union took, or did not take, in its representation of the Applicant, in order to determine if the Union acted in a manner that was arbitrary, discriminatory or in bad faith.

[17] The Employer operates a beef packing plant in Moose Jaw, Saskatchewan. Mr. Meinema explained that the facility, and in particular, the kill floor, contains fast-moving heavy equipment and sharp tools, requiring employees to be alert at all times. He noted that there had been a shift in the meat packing industry to self-

policing and to that end, facilities have been required to develop quality control processes, the implementation of which was sped up because of the BSE problem. The quality control supervisor, which is an out of scope position, is the person working on the floor who is responsible for ensuring that the quality control processes are properly undertaken to ensure food safety. One of the goals of the processes is to ensure there is no cross-contamination between what is referred to as “mature animals” with those that are not so designated.

[18] The Applicant had been employed by the Employer since December 6, 2004, although he had previously worked in the facility from approximately 1998 to early 2001 when a different employer operated a boxed beef operation.

[19] On August 12, 2005, upon the filing of an incident report by a quality control supervisor (herein also referred to as “the complainant”) involving the Applicant, the Applicant was called into a meeting with shop steward, Byron Hudson, and plant manager, Ken Wiggins. Mr. Hudson was the first to arrive at Mr. Wiggins’s office and he was advised that a quality control supervisor had filed a complaint that the Applicant had pushed her in a threatening manner after she had told him that he had used the wrong spinal cord vacuum on a mature animal and that the vacuum now had to be sterilized. The complainant had reported that the Applicant responded by pushing her and telling her to “get the f--- out of my face.” At that point in the meeting, the Applicant had arrived, and Mr. Wiggins gave him a paper and pen, asking him to write out his side of the story. The Applicant had stated that he did not know what Mr. Wiggins was talking about. Mr. Hudson and the Applicant spoke after Mr. Wiggins had left the room, at which time the Applicant stated that he did not push the quality control supervisor, although he could have accidentally bumped into her – he did not remember. The Applicant wrote that down and upon Mr. Wiggins return to the office, the Applicant provided him with his statement. The Applicant then left to attend a medical appointment at which time Mr. Wiggins told Mr. Hudson that he found the Applicant’s statement hard to believe and asked Mr. Hudson to check with other employees on the floor to see whether they saw that the Applicant pushed the quality control supervisor.

[20] It was either at the end of this meeting, or shortly thereafter, that Mr. Wiggins advised the Applicant that he was suspended without pay in order to allow the

Employer an opportunity to investigate the alleged incident that occurred on the kill room floor earlier on August 12, 2005.

[21] At the request of both Mr. Wiggins and Mr. Meinema, Mr. Hudson proceeded to talk to other employees who were on the floor at the time of the alleged incident. He obtained six witness statements for the Union – four had not seen anything while one stated that he saw the Applicant push something but that the beef was in the way of seeing what it was that he pushed. Another employee said he saw the Applicant "push or shove her [the complainant] with his left arm 2 or 3 times." This witness stated that he had run over to find out why the line had been stopped. He said he first heard the quality control supervisor tell the Applicant to change the spinal cord vacuum to the mature one and then the Applicant pushed or shoved her. Mr. Meinema noted in his evidence that the kill line is not straight – it twists and turns.

[22] Following the Employer's investigation, on August 18, 2005, Mr. Wiggins called a meeting with the Applicant, Mr. Hudson and Corey Cozart (the Union's unit chair), at which time the Applicant was terminated. The Employer took the position with the Union, as also explained in its reply, that the Applicant was terminated as a result of a serious and potentially dangerous incident that occurred on the kill line on August 12, 2005, and involved a quality control supervisor. The Employer says that the Applicant would not admit his involvement in the incident and refused to acknowledge its seriousness nor would he apologize or take any responsibility. Mr. Meinema testified that although the termination letter given to the Applicant at that meeting did not state the reasons for his termination, it would have been obvious to all, including the Applicant, that he had been terminated for the incident involving his pushing the complainant. In his testimony, the Applicant stated that the problem he had is that he was not given an opportunity to tell his side of the story before he was terminated.

[23] Mr. Meinema explained the typical processes for the administration of discipline in the facility and the processing of grievances, processes which had been followed in this case. He stated that special practices had developed due to the good working relationship between the Employer and the Union and because the employees of the Employer were previously in a separate local of the Union. With respect to the administration of discipline, the Employer would have the shop steward present for all

meetings with employees. If discipline was issued and a grievance filed, the shop steward and unit chair for the Union participate in the 1st and 2nd steps of the grievance process (Mr. Meinema stated that 85 to 90% of grievances are resolved at these stages) and if matters proceed to the 3rd step of the grievance procedure, Mr. Meinema becomes involved. He stated that only a very small number of grievances are not resolved at the 3rd step.

[24] Following the Applicant's termination from his employment on August 18, 2005, the Union filed a grievance. The Union representatives then undertook an investigation of the allegations against the Applicant. As previously stated, Mr. Hudson investigated the matter by obtaining witness statements from other employees on the kill line that day.

[25] Mr. Meinema testified that on August 29, 2005, he was contacted by a labour standards officer from the Department of Labour who advised that the Applicant had filed a complaint over his termination with the labour standards office. Mr. Meinema testified that the labour standards officer advised him that the Applicant felt that the Employer had no just cause for the termination, that he was having difficulties with the Union and that he was terminated because of the "Chinese people" and the "women," including the quality control supervisor.

[26] Mr. Meinema testified concerning a telephone conversation he had had with the Applicant on August 31, 2005. In that conversation, the Applicant denied pushing the quality control supervisor and clearly stated that he did not touch her. Mr. Meinema stated that the Applicant expressed his belief that the Employer just wanted to get rid of him because he was on workers' compensation benefits and that the quality control supervisor just gets close to him because she wants to be his girlfriend. He also stated that if the Union did not get his job back, he would get his own lawyer. Mr. Meinema told the Applicant he would try to contact other employees working on the line to determine what they had seen.

[27] With respect to the Applicant's claim that the true reason for his termination was that he was on workers' compensation benefits, the evidence was very confusing. At one point the Applicant stated that his concern related to a head injury he

said he had suffered in approximately 1999 (while working for another company that previously operated in the facility) and that Mr. Wiggins was not happy when the Applicant told him he would be reporting that injury to the Workers' Compensation Board. However, there is nothing in the Employer's or Union's notes of the many meetings that were held that would indicate that the Applicant told the Employer this. Furthermore, the Applicant had not reported the matter to the Union and admitted in cross-examination that he had not really talked to the Union about that matter. At other points in his testimony, the Applicant had expressed concerns that he was recently being required to perform duties outside of his medical restrictions (at the time of his dismissal he was on light duty as a result of a different injury), however, the notes entered into evidence concerning such discussions with Mr. Wiggins and Mr. Hudson indicate that the Employer was cooperating in this regard and that Mr. Wiggins specifically told the Applicant to work within his restrictions and that if he was asked to do something outside his restrictions, he should refuse and come see Mr. Wiggins. Lastly, at the end of his testimony, the Applicant explained that the problem was that there is a law that says that he cannot be terminated while on workers' compensation benefits, unless there is just cause.

[28] Mr. Meinema had a further telephone conversation with the Applicant on September 7, 2005. On this occasion, the Applicant said that maybe he did touch the quality control supervisor, but that does not mean he pushed her. He expressed his continued belief that his termination had something to do with his being on workers' compensation benefits but he also went on to say that the people at work, including Mr. Wiggins, were calling him a racially derogatory name and discriminating against him. However, when Mr. Meinema told the Applicant that the Union has zero tolerance for racial discrimination, the Applicant responded that Mr. Wiggins had not actually called him that name but that he is guessing that that is how Mr. Wiggins feels. The Applicant also spoke in sexually derogatory terms about the quality control supervisor. Because Mr. Meinema was beginning to wonder if there was more behind the termination than the pushing incident, he asked the Applicant to provide him with a written statement.

[29] Approximately one hour after this telephone conversation on September 7, 2005, the Applicant faxed his written statement to Mr. Meinema. The Applicant made no mention of any racial discrimination in this statement nor did he mention any concerns he had in that regard. The statement primarily contained sexually derogatory statements

about the quality control supervisor to the effect that she stares at him and told him he is "sexy", but that he has tried to avoid her and she makes him nervous. With respect to the incident for which he was terminated, the Applicant said, "For sure her body had contact with my body but I did not push her."

[30] Mr. Meinema testified that on September 8, 2005, Mr. Hudson, shop steward, forwarded to him witness statements as well as his own notes concerning the meeting on August 12, 2005. Mr. Meinema stated that the information in these notes and documents were relied on by the Union in making its decision about what to do with the grievance. He had previously spoken to Mr. Hudson about the matter and had asked him to obtain witness statements. He obtained the statements of six employees working on the line, as noted above.

[31] A previous incident involving the Applicant was also relayed in Mr. Hudson's notes sent to Mr. Meinema on September 8, 2005. It concerned a dispute between the Applicant and a co-worker on July 28, 2005, where the Applicant's behaviour was said to be rude and threatening, however, this incident does not appear to have been considered by the Employer in its decision to terminate the Applicant.

[32] Mr. Cozart arranged a grievance meeting with Dianne Gray, human resources manager, for September 10, 2005. Mr. Meinema spoke with the Applicant in the afternoon of September 9, 2005, advising of the September 10, 2005 meeting and indicating that he should wait to talk to Mr. Meinema before going into the office. When they met, just prior to the grievance meeting, Mr. Meinema stated that he told the Applicant that he would have the opportunity to tell his side of the story at this meeting following which the Union would try to settle the grievance.

[33] At the grievance meeting on September 10, 2005,[1] the Applicant talked about the quality control supervisor making sexual advances toward him (again using sexually derogatory language). He also spoke about the incident that had occurred on August 12, 2005, making inconsistent statements about whether or not he had touched the complainant. The Applicant also expressed his view to the Employer that he had

[1] The evidence was unclear whether this meeting actually occurred on September 10, 2005 or September 14, 2005; however, the exact date of the meeting is of no relevance to our decision.

been terminated because he was on workers' compensation benefits. At the end of this meeting, the Union sought to have the Applicant reinstated to his employment but the Employer refused.

[34] The Union also had several other discussions with the Employer about the incident giving rise to the termination. Mr. Meinema testified that he requested that the Employer send to the Union all of its documentation and notes about the matter in order to determine whether the Employer's information was similar to what the Union had obtained. On September 14, 2005, the Union received a package of 24 pages of documents and notes from the Employer. The package of documents related primarily to the incident for which the Applicant was terminated as well as what occurred during the grievance process, but it also included other documentation concerning the Applicant's treatment of his co-workers, including his use of racially derogatory language. Mr. Meinema stated that the witness statements and notes of the meetings held with the Employer matched the information the Union had gathered. The package of documents also included the complainant's statement in which she indicated that after she corrected the Applicant about using the wrong spinal cord vacuum and asked him to wash it, he pushed her with his left arm to get her out of his way.

[35] Mr. Meinema testified that after gathering all of this information, he had some concerns that the termination may have had racial undertones, noting that the workplace is a racially diverse one. Mr. Meinema therefore involved the Union's legal counsel in the investigation. Mr. Meinema felt that the Applicant's evidence was a moving target – his statements went from no touching at all to touching her without meaning to. There was also a question about who initiated contact. In addition, the Union had his statement that if he had really pushed her, she would have fallen; as well as his statement that there was no incident of pushing at all, the quality control supervisor merely wanted a sexual relationship with him. In addition, the Union was aware that the Applicant claimed that his termination had to do with his being on workers' compensation benefits but also that the "Chinese people" were involved.

[36] At the hearing, the Applicant acknowledged that he did touch the complainant, but in a very different manner than alleged by the Employer. Firstly, he stated that while the machines were running, the complainant was holding his arm up in

the air, and because he did not want to fall on her, he held her hand with his other one, moving it away, not pushing it, and asking her to take her hand off him. He stated that she then walked away, swearing. Later in his testimony, the Applicant demonstrated what had occurred, stating that the complainant was holding up his left arm (he was holding the vacuum in his right hand) and that he pushed her away with that same arm (the left one). The Applicant also testified that he had in the past complained to Mr. Wiggins about the complainant's behaviour to him (the sexual advances) and that he wanted it to stop but that Mr. Wiggins had not done anything.

[37] Mr. Meinema stated that he had then lined up the Applicant and those individuals the Applicant suggested as witnesses, for the Union's legal counsel to review. Legal counsel also held a meeting in late September/early October with the complainant, Mr. Cozart, Ms. Gray and the Employer's legal counsel. Mr. Meinema stated that additional discussions were being held with the Employer's upper management (those not working at the facility), and that he also continued to discuss this matter with the shop stewards and obtain advice from the Union's legal counsel.

[38] The Union also discussed with the Employer whether there were any possible ways to resolve the grievance. On October 24, 2005, the Employer sent a without prejudice offer to the Union to settle the Applicant's grievance. The offer contained two alternate proposals: (i) that the Applicant would be reinstated according to terms of a "return to work" agreement which required the Applicant to provide a written apology to the complainant, that the time from the initial suspension (during the investigation) on August 12, 2005 to the date of the offer (October 24, 2005) be considered a suspension without pay but no loss of seniority, and that further incidents of a similar nature would be grounds for immediate termination; or (ii) a without prejudice payment to the Applicant of two weeks pay in lieu of notice in return for an agreement that no other action would be taken against the Employer.

[39] Ultimately, it was Mr. Meinema who made the decision that the Union would not proceed to arbitration with the Applicant's grievance. He made this decision after obtaining and reviewing the Applicant's statements, other witness statements, notes from several meetings, and the information and documents from the Employer's file. He had also interviewed the Applicant and witnesses, met with many of those involved, and

sought legal advice. Mr. Meinema had significant concerns over the witnesses' statements and how the Applicant's evidence would be received by an arbitrator. The witnesses' statements that supported the complainant's version were clear and consistent whereas the Applicant gave repeatedly inconsistent statements. The Union could find no evidence in its investigation to support the contention that the complainant had a sexual interest in the Applicant and that that was what motivated her to make a complaint against him. Furthermore, there was no evidence to support any suggestion that racism was involved in the incident or the Employer's decision to terminate. Although he felt that termination was a severe response to the alleged conduct and thought that the Union might have some chance of success at arbitration in getting the termination overturned as an excessive penalty, he was convinced that allegation would be proven true. He was also convinced that the Union would do no better through arbitration proceedings than the offers that had been put forward by the Employer, in particular, the offer that the Applicant return to work under certain conditions, including the making of an apology, and that the intervening time away from work being characterized as a suspension.

[40] Mr. Meinema testified that he first heard that the Applicant had retained a lawyer shortly before October 24, 2005 when he received the Employer's proposal for settlement.

[41] The Union sent a letter to the Applicant and his lawyer on October 24, 2005, attaching the Employer's correspondence containing its two proposals for settlement, and stating as follows:

> *Please find attached a settlement offer from XL Foods. The Union strongly advises you accept one of the two options.*
>
> *We have made a long and in depth look at your file, you have provided several inconsistent versions as to what occurred between you and [the complainant], none of which are reasonable. You have not accepted any responsibility in regards to this incident, for which there are a number of witnesses.*
>
> *Given our review of this matter we advise there is no reasonable chance of success in arbitration. The Union strongly advises you accept one of these two options and hereby notifies you, should you not accept either offer, the Union will not proceed to arbitration.*

> *If you do not agree with this decision you have the right to appeal to the Local 1400 Grievance Appeal Committee. To appeal please contact the appeals committee in writing stating the reasons for your appeal within 21 days of this letter to arrange for an Appeal Hearing. Please note that if no appeal is received by the above date, this will be the final resolve to this issue.*

[42] On November 7, 2005, the Applicant, through his lawyer, replied to the Union's October 24, 2005 correspondence. In that letter, the lawyer advised that the Applicant rejected the two offers made by the Employer because they have not been provided with any summaries of the evidence or witness statements. The lawyer also advised that he had been instructed to appeal the Union's decision and asked for contact information concerning where to send the appeal. Later in November 2005, during a telephone conversation, Mr. Meinema advised the Applicant's lawyer of the process for an appeal, indicating that the appeal committee is made up of three individuals including two senior members and a Union staff person. He explained that the appeal committee reviews the decision made by the representative and if it is not correct, will direct the Union to proceed to arbitration with the grievance.

[43] The Applicant did not file an appeal within the 21 day period allowed, however, an appeal was filed several months later, on July 28, 2006. In cross-examination, the Applicant had no explanation for the delay in appealing, stating only that he told his lawyer he wanted to appeal and left it in his hands. The Union acknowledged receipt of the appeal on August 9, 2006. Although it is somewhat difficult to discern the specific grounds for the appeal of the Union's decision, the letter appears to indicate that the primary bases of appeal were that the Applicant had been fired without reasons being given in the termination letter, that the grievance procedure had not been followed in that the Applicant did not have an opportunity to speak to his supervisor about the situation, and that there had been no report of any reasonable investigation having been done by the Union concerning the reason for the termination. Mr. Meinema disagreed with the statements made in the appeal letter – the Applicant knew the reasons for termination even if they were not set out in the letter; the Union had followed the grievance procedure and the Applicant was, in fact, permitted to talk to management; and the Union went beyond its usual practices in investigating the matter to the extent that it even had its legal counsel assist with that process. Mr. Meinema also stated that termination grievances are sometimes "fast tracked" at the beginning of the grievance procedure in

order to attempt to limit the economic impact of the termination on the employee. The Applicant acknowledged in cross-examination that he was aware that he was terminated because the Employer believed he had pushed the quality control supervisor three times; he just felt that without the reasons being stated in the letter, the Employer might be able to change it to other reasons at a later time. The Applicant also stated that he understood that the meeting with the Union and management was part of the grievance procedure.

[44] Also in this letter of appeal, the Applicant's lawyer requested copies of all notes of the investigation and witness statements. The Applicant's lawyer requested that the Union take the grievance forward by following the steps provided for in the collective agreement.

[45] The Grievance Appeal Committee, comprised of Norm Neault, and two other senior members of the Union, met in late summer or early fall 2006 and determined that the appeal would not be allowed. In correspondence to the Applicant's lawyer dated October 26, 2006, the appeal committee advised that it had examined the details of the case and determined that the Union met its obligations. The committee also concluded that the appeal had not been brought within the appeal process time limits.

[46] The Applicant testified that he would not accept the Employer's offer of reinstatement because if he apologized, that would mean he was admitting to the conduct and he did not want to do so. After discussing the matter with his lawyer, he believed he had not done anything wrong. He also believed the deal would fall through if he apologized to the complainant, however, he provided no reason for holding such a belief. Mr. Meinema stated that in his experience with the Employer, the Employer would not go back on a deal it had made.

[47] The Applicant complained that the Union did not do a proper investigation or follow the grievance procedure properly, although he acknowledged in cross-examination that he had attended meetings with the Union and management and that the Union contacted him several times while it was handling the grievance. He acknowledged that he met with the Union representatives after his suspension and his termination, that he had phone calls with Mr. Meinema, and that he met with Mr.

Meinema and the Union's legal counsel. He also acknowledged that there was nothing in the way that the Union representatives conducted themselves with him that caused him concern.

[48] The Applicant also filed with the Board a letter from the Labour Standards Branch of the Department of Labour dated October 5, 2006, directed to the Employer, which stated that it was unable to support the Employer's claim of just cause for the Applicant's dismissal. The labour standards officer stated that while it was clear that the Applicant "pushed or shoved [the complainant] while he was operating the spinal vacuum tool," the conduct did not warrant summary dismissal without notice and the labour standards officer therefore assessed one week's pay in lieu of notice. The Applicant acknowledged that he received a cheque for one week's pay from the Employer in November 2006.

[49] The Applicant also testified that he believes there was a police investigation regarding the incident and it was determined there was no proof that the incident had occurred.

[50] In addition, the Applicant filed a letter dated November 16, 2006, from the Office of the Worker's Advocate with the Department of Labour addressed to the Workers' Compensation Board. In that letter, the Worker's Advocate indicates that it is appealing that Board's decision to deny the Applicant benefits after he was terminated from his employment. The basis for this appeal was that it was not fair to expect him to find alternative light duty, part-time employment following his termination.

[51] The Applicant stated that he raised the evidence of the police investigation and the positions of the Worker's Advocate and the labour standards officer as proof that three other bodies accepted that there was no just cause for his termination and that the Union should have come to the same conclusion. He acknowledged that he never gave copies of these documents to the Union.

Arguments:

[52] The Applicant's argument was very brief. In his application, he had asserted that he does not believe the Union has treated him fairly in accordance with the *Act*.

[53] At the hearing, the Applicant argued that the Union did not represent him fairly because it did not conduct a full investigation into the matter and did not properly proceed through the grievance procedure. He stated that his termination was unfair because: there were no reasons stated in the termination letter; he should not have been terminated because he was on worker's compensation benefits; he should not have to apologize for what he did because he did nothing wrong; and, he had no prior discipline. He asserted that the Union did not explain why it would not go to arbitration. He also asserted he should not have had to take one of the settlement offers made by the Employer. He stated that he wanted the Board to determine that the Union represented him unfairly and remedy the time he lost. He also asked the Board to conclude that he should not have been fired because he was on workers' compensation benefits at the time of his termination.

[54] The Union's argument was also brief. The Union argued that it had met and even surpassed the duty of fair representation to the Applicant required by s. 25.1 of the *Act*, to the extent that it could even be concluded that its decision not to proceed to arbitration was a correct one. The Union says it conducted a very thorough investigation and took the issue seriously. The Union sought legal advice. It made a reasoned and rational determination on the basis of the information before it, specifically, that there was no realistic hope that it could achieve anything better for the Applicant through arbitration than the settlement proposals made by the Employer. The Union argued that it had complied with the duty of fair representation procedurally and otherwise. The Union suggested that the Applicant's real complaint is that he does not like the conclusions drawn by the Union. The Union asked that the Board dismiss the Applicant's complaint.

[55] In addition to the cases previously referred to, the Union relied on the following cases: *Beatty v. Saskatchewan Government and General Employees' Union and Northlands College*, [2006] Sask. L.R.B.R. 440, LRB File No. 086-04; *B.O. v. Canadian Union of Public Employees, Local 59 and City of Saskatoon*, [2001] Sask.

L.R.B.R. 1, LRB File No. 035-99; *Bussiere and Berndt v. Grain Services Union*, [1996] Sask. L.R.B.R. 475, LRB File Nos. 222-94 and 223-94; *Petty v. International Brotherhood of Electrical Workers, Local 529 and Bill's Electric City Ltd.,* [2005] Sask. L.R.B.R. 233, LRB File Nos. 009-03 and 010-03; *Stevenson v. United Food and Commercial Workers, Local 226, and Western Canadian Beef Packers Inc.,* [2000] Sask. L.R.B.R. 517, LRB File No. 006-99; and *Wionzek v. International Brotherhood of Electrical Workers, Local 2067 and SaskPower*, [1998] Sask. L.R.B.R. 765, LRB File No. 101-98.

Relevant Statutory Provisions:

[56] The following provisions of the *Act* are relevant:

> *5 The board may make orders:*
>
> *(f) requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice, or otherwise in violation of this Act;*
>
> *(g) fixing and determining the monetary loss suffered by an employee, an employer or a trade union as a result of a violation of this Act, the regulations or a decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or trade union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;*
>
> *18. The board has, for any matter before it, the power:*
>
> *(o) to summarily refuse to hear a matter that is not within the jurisdiction of the board;*
>
> *(p) to summarily dismiss a matter if there is a lack of evidence or no arguable case;*
>
> 25.1 *Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith*

Analysis and Decision:

[57] 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.*

[58] In *Gilbert Radke v. Canadian Paperworkers' Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57,LRB File No. 262-92, the Board considered the nature of the task before it when assessing the conduct of the union in light of a duty of fair representation complaint. At 64, the Board stated:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and*

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

[59] In the present case, the Applicant has not alleged any bad faith on the part of the Union in the sense that their representatives acted with personal hostility, political revenge or dishonesty. Although the Applicant has expressed some concerns to the Union about alleged discriminatory conduct by his co-workers or management, it was not in relation to the Union's handling of his grievance – the Applicant made no such allegations of discrimination against the Union, whether on the basis of a prohibited ground or personal favouritism. The Applicant's complaints center around the issue of arbitrariness and we will therefore focus on the issue of whether the Union's conduct in its representation of the Applicant was arbitrary within the meaning of s. 25.1 of the *Act*.

[60] The Applicant complains that the Union acted unfairly toward him, although he had difficulty articulating why he felt that way except to say that he felt the Union failed to perform an adequate investigation into his grievance and did not follow the grievance procedure, such that it violated its duty of fair representation to him.

[61] In the Board's view, the evidence does not establish that the Union acted unfairly toward the Applicant in any way, let alone in a manner sufficient to amount to arbitrary conduct in violation of s. 25.1 of the *Act*, in terms of its handling of the applicant's grievance or its determination not to proceed to an arbitration hearing. The investigation conducted by the Union was thorough; the Union representatives, and Mr. Meinema in particular, expended a significant amount of time and effort into the representation of the Applicant. The Union went to great lengths to discern the facts that would be available upon arbitration of the matter, and when Mr. Meinema had some doubts about his assessment of the true reasons behind the termination, he brought in the Union's legal counsel to assist in the process. In so doing, he did not abdicate responsibility for the investigation or decision-making to legal counsel. In the Board's

view, Mr. Meinema was taking a cautious approach to the matter to ensure that he fully examined all matters of concern to the Applicant. The Union's legal counsel has been known to the Board to have practiced extensively in the area of labour relations for many years and it was reasonable for the Union to rely on his assistance with the investigation and the assessment of the chances of success for the grievance. Overall, we find that the Union did not act in a capricious or cursory manner in its investigation. The Union undertook these duties seriously and with diligence, reasonable care, and honesty.

[62] Similarly, we find that the Union did not act arbitrarily in terms of how it followed the grievance procedure. There was no evidence that the Union did not follow the grievance procedure set out in the collective agreement, as modified by the parties' practice. However, even if the Union did not follow the procedure exactly, the steps it took were highly adequate – the Union was able to discern the facts relied on by the Employer to support the dismissal and was able to engage in dialogue with the Employer about the grievance and its possible settlement, all of which occurred in a timely manner. Furthermore, even though the Applicant was permitted to address the Employer at one of the grievance meetings, there is no absolute right for a grievor to do so. In all of the circumstances, we find that the Union did not breach its duty of fair representation in relation to how it conducted the grievance procedure.

[63] The Applicant also stated that he brought this application because his termination was improper, given that there is a law that states that someone cannot be dismissed, without just cause, if they are in receipt of workers' compensation benefits. He also maintained that because the Labour Standards Branch, the police and the Worker's Advocate believed he was terminated without cause, the Union should have also taken that position.

[64] This assertion also provides no basis for a finding of a violation of s. 25.1 of the *Act*. Firstly, when determining the question of whether the Union violated s. 25.1 of the *Act*, the Board does not consider the merits of the grievor's case to determine if the Union should have proceeded to arbitration or if it had made an incorrect legal assessment concerning the grievance. The Board considered this point in *Mercer v. Communications, Energy and Paperworkers Union, Local 922 and PCS Mining Ltd.*, [2003] Sask. L.R.B.R. 458, LRB File No. 007-02 where the Board stated at 468:

> *[41] However,* ***it is clear that the Board's role is not to minutely assess the reasonableness of every component of a union's conduct*** *in such cases. [See Note 1 below] This is because* ***the Board does not decide the merits of the purported grievance itself, but merely hears evidence of the nature of the grievance and the alleged acts or omissions of the union in its handling in order to have some context in which to assess the reasonableness of the union's conduct.*** *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.*
>
> [**emphasis added**, footnote omitted]

[65] In essence, the Applicant is asking that we determine whether there was just cause for dismissal such that he should not have been dismissed while in receipt of workers' compensation benefits. However, it is the Board's position that it will not assess the merits of the actual grievance and determine whether we believe there was just cause for the dismissal. While this is ultimately the task of an arbitrator, we note that it is also an assessment a union typically makes when deciding whether to proceed to arbitration with a grievance. The Union had ample information before it, including the statements of the complainant and other witnesses, its notes from having interviewed some of those people, notes of meetings held with the Employer, the Employer's notes and documents from its file, and also, the several and conflicting statements made by the Applicant. In our view, the Union had sufficient information upon which it could base a decision as to the probabilities for success of the grievance. It is clear that the Union made such an assessment about whether there was proper cause for the dismissal, whether the Applicant was in receipt of benefits or not. It is not for us to judge whether that assessment was legally correct. We find that the Union's assessment was in no way arbitrary and was therefore not in violation of s. 25.1 of the *Act*.

[66] In making his argument that he should not have been dismissed while on workers' compensation benefits, the Applicant suggested that the Union should have accepted that there was no just cause for his termination. We disagree with his assessment that the police and the Worker's Advocate thought his dismissal was not for just cause. In our view, that is not what the Worker's Advocate was suggesting to the Workers' Compensation Board in its letter of appeal. On the limited evidence before us concerning a report made to the police in relation to the incident, we can only guess that the police were making an assessment as to whether they had evidence sufficient to prove (on a much higher, criminal standard of proof) that an assault had occurred. In addition, other evidence suggested that when the complainant contacted the police, they only suggested that the matter be handled internally and they did not, in fact, investigate the matter. In any event, the fact that other decision-making bodies might have reached a certain conclusion about the incident or "just cause" does not mean that the Union acted in violation of s. 25.1 of the *Act* – we must assess the "reasonableness" of the Union's decision, not whether it was "correct" and, as stated above, it is not for the Board to decide the merits of the grievance as a measure of whether Union acted fairly. Lastly, we note that the labour standards officer found that the Applicant did, in fact, push the quality control superior and that the lack of "just cause" related only to termination as the appropriate disciplinary response. This is much the same assessment as was made by the Union, and a point which bears further comment.

[67] In essence, the Union decided it would not proceed with the Applicant's grievance only after it received the offers of settlement from the Employer. It relayed those proposals to the Applicant and his lawyer, highly recommending that one be accepted and, at the same time, indicating it would not be proceeding to arbitration. The reason the Union made this decision was because it believed it could not achieve anything better for the Applicant if it had gone to arbitration. It concluded, as did the labour standards officer at a later date, that termination seemed like a harsh response. The Union thought it would have difficulty proving that the conduct had not occurred as alleged by the Employer. In our view, this was a reasonable conclusion for the Union to draw from the evidence. The other witnesses' statements agreed with the complainant and all that the Union had was the evidence of the Applicant, which in our view, was accurately described by the Union as a "moving target." In fact, we note that the

Applicant's evidence appeared to have continued to change throughout the course of this hearing as well.

[68] We also find that there was nothing arbitrary about the Union advising the Applicant that he should accept one of the Employer's offers or it would not be proceeding to arbitration. In *Gibson v. Communications, Energy and Paperworkers Union of Canada, Local 650 and Fantastic Cleaning Inc.*, [2002] Sask. L.R.B.R. 574, LRB File No. 089-02, the union advised the grievor to accept a settlement offer made by the employer in relation to his termination, even though the union felt that it had a good case for arbitration. The union proceeded to agree to the settlement with the employer because its terms were very good, but also because it had concerns over two post-termination incidents it had investigated that would have caused the grievor to be banned from the work premises by the owner of those premises. The union therefore reasoned that even if it were successful in getting the grievor reinstated through arbitration, the order of reinstatement would be moot. The Board found that the union did not act in an arbitrary manner by insisting that the grievor take the settlement offer (or his grievance would be withdrawn) and ultimately accepting that offer on behalf of the grievor. The Board stated at 582:

> *[26] The Board questioned counsel for the Union extensively about the "take it or leave it" aspect of the settlement into which the Union entered. The Board certainly has reservations about the appropriateness of this type of agreement. However, the Union entered into this agreement with the Employer in good faith, thinking that it had obtained a good settlement for the Applicant. The Applicant was immediately reinstated as a permanent, non-probationary employee, who would be receiving approximately half of his back pay. The "take it or leave it" settlement was negotiated with the Employer following the usual give and take that occurs in a "without prejudice" settlement meeting. It is not appropriate in these circumstances for the Board to second guess the Union's decision to enter into a settlement with the Employer on the terms which it did.*

[69] While the Union did not proceed to accept one of the offers made by the Employer to settle the Applicant's grievance, as the union had done in *Gibson*, *supra*, it did advise the Applicant that it would not be proceeding with his grievance to arbitration if he did not take one of the offers. In our view, there was nothing arbitrary about this position. The Union had reasonably assessed the chances of success at arbitration as

minimal, and although it believed it may have a chance at getting the termination overturned as being an excessive penalty, it believed it was unlikely to do better than what the Employer had offered. It is not arbitrary for the Union to decide not to expend its efforts and money proceeding to arbitration with the only reasonable hope being to get the penalty of termination mitigated to something similar to what the Employer had already put on the table. Of course, it must also be recognized that the Union might not have been successful at all with the grievance at arbitration, the risk of which we are certain the Union must have been cognizant.

[70] In summary, we find that the Union approached the Applicant's grievance honestly and diligently, taking into account relevant factors including the Applicant's significant interests in the matter. The Union took a reasonable view of the problem before it and made a thoughtful decision about how to proceed. Having been able to convince the Employer to make two proposals for settlement, the Union made a thoughtful decision to recommend settlement to the Applicant and not proceed to arbitration. For all of the reasons stated above, we are satisfied that the Union acted in a manner that was free from arbitrariness, bad faith or discrimination.

Conclusion:

[71] For the foregoing reasons, the applications for reinstatement and monetary loss, as well as the duty of fair representation application, are dismissed.

DATED at Regina, Saskatchewan, this **12th** day of **November, 2008.**

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson