Labour Relations Board
Saskatchewan

CRAIG MORRIS QUONG, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3967 and REGINA PIONEER VILLAGE, Respondents

LRB File No. 147-06; October 24, 2008
Vice-Chairperson, Angela Zborosky

The Applicant: Craig Morris Quong
For the Union: Crystal Norbeck
For the Employer: No one appearing

Duty of fair representation – Contract administration – Last chance agreement – Board satisfied applicant entered into agreement voluntarily instead of choosing to proceed to arbitration – Board finds no violation of duty of fair representation.

Duty of fair representation – Contract administration – Union conducted reasonably detailed investigation in relation to both terminations and made reasonably thoughtful assessment of situations – Board's role not to determine whether union did everything possible to assist applicant or whether union reached correct conclusion in law but rather to determine whether union fairly and reasonably investigated and assessed facts of situation, fairly considered the applicant's credibility and the probability of success at arbitration and the interests of the applicant and membership as whole, without arbitrariness, discrimination or bad faith – Board finds no violation of duty of fair representation.

Duty of fair representation – Scope of Duty – No duty under s. 25.1 of *The Trade Union Act* to pursue claims applicant may have under *The Labour Standards Act*, or claims against the Workers' Compensation Board or a disability insurer – Although union represented it would assist applicant in obtaining disability benefits, union had and continues to provide that assistance, and no obligation to take legal action against insurer – Board finds no violation of duty of fair representation.

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

REASONS FOR DECISION

Background:

[1] The Canadian Union of Public Employees, Local 3967 (the "Union"), is designated as the bargaining agent of a group of employees of Regina Pioneer Village (the "Employer"). The Applicant, Craig Morris Quong, was at all material times a

member of the bargaining unit until his employment was terminated by the Employer. The Applicant filed an application with the Board alleging that the Union had violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the *"Act"*) in failing to fairly represent him in relation to the handling of a grievance over the violation of the collective agreement and The Labour Standards Act, R.S.S. 1978, c. L-1.

[2] Section 25.1 of the *Act* provides as follows:

> *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.*

[3] In its reply to the application, the Union denied the allegation that it had failed to fairly represent the Applicant. The Union stated that the Applicant had been subject to progressive discipline and ultimately dismissed from his employment in August 2003 for continuous problems with absenteeism and being absent without leave ("AWOL"). The Union was able to secure the reinstatement of the Applicant, with his agreement, pursuant to a "last chance" agreement, in June 2006. Approximately 3 ½ months later, in September 2006, the Applicant's employment was again terminated, this time on the basis of an alleged violation of the last chance agreement. At the time this application was filed (five days following the Applicant's second termination), the Union had filed a grievance and was in the process of attempting to resolve the matter with the Employer.

[4] The application was initially set to be heard in March 2007 however, shortly before the hearing dates, the application was adjourned *sine die* by order of the Board's Executive Officer. In October 2007, the Applicant requested that the matter be set down for hearing and the Board proceeded to hold a hearing on January 8 and 9, 2008.

[5] It became clear at the hearing that while the Applicant was focusing his claim on the manner in which the Union responded to his first termination which occurred on August 25, 2003, he also intended to raise allegations of a violation of s. 25.1 of the *Act* in relation to the Union's handling of his grievance concerning his second termination, which occurred on September 21, 2006. While the Union denied that it

breached the duty of fair representation in relation to its handling of either of the Applicant's terminations, it was not opposed to dealing with the whole of the Applicant's complaints through this one hearing, despite the fact that some of those complaints post-date the filing of the application. We will therefore grant an amendment to the application in so far as it necessary to address the real matters at issue between the parties, that is, all matters of complaint by the Applicant in relation to the Union's conduct concerning the termination of his employment on both August 25, 2003 and September 21, 2006, and other related matters.

[6] The Applicant's application provided little detail of his claim against the Union except to suggest that the Union violated s. 25.1 of the *Act* on the basis of an alleged violation of the collective agreement and s. 44.2 of *The Labour Standards Act*. The specific nature of the Applicant's complaints became apparent throughout the course of the hearing and in light of that, we understand that the Applicant's reference to a breach of the collective agreement and *The Labour Standards Act* in his application to simply mean that it was the Employer who breached those provisions, not the Union. To be clear though, the Board does not address violations of the collective agreement – that is a matter between the union and employer and within the jurisdiction of an arbitrator under the parties' collective agreement. Further, with respect to the Applicant's reference to an alleged breach of *The Labour Standards Act* by the Employer, it is not a matter for our consideration and does not fall within the scope of a s. 25.1 complaint. Furthermore, the Board has no jurisdiction to administer *The Labour Standards Act* or rule upon alleged violations (see, for example, *Soles v. Canadian Union of Public Employees, Local 4777*, [2006] Sask. L.R.B.R. 413, LRB File No. 085-06, where an applicant made an allegation that the union violated a provision of *The Labour Standards Act*).

[7] The Applicant represented himself at the hearing. He was afforded the full opportunity to adduce evidence, to cross-examine the Union's witnesses and to present argument.

[8] The Employer did not file a reply and did not participate in the hearing.

Evidence:

[9] The Applicant testified on his own behalf. In response, the Union called two witnesses to testify - the vice-president of the local of the Union, Scott McDonald, and a staff representative employed with the national body of the Union, Andrew Huculak, who, at the time of the hearing, had recently retired from this position.

[10] The Applicant became employed with the Employer as a special care aide in 2000. During the time period September 2001 to January 2003, the Applicant was disciplined by the Employer on seven occasions relating to 14 incidents of being absent without leave ("AWOL") and/or late for his shift (during the time period July 2001 and December 2002). The discipline was progressive in nature, including a verbal warning, two written warnings, a 3-day suspension, two 4-day suspensions, and a 10-day suspension. None of these incidents were grieved by the Applicant or the Union and indeed, the Applicant agreed there was no basis upon which to grieve - that he engaged in the conduct for which he had been disciplined.

[11] On August 25, 2003, the Employer terminated the Applicant because he was allegedly AWOL on May 21 and August 1, 2003. In relation to the May 21, 2003 incident, the Applicant had not shown up for his shift but later phoned his supervisor advising that he was having knee pain due to an injury he suffered at work some five days before. In relation to the August 1, 2003 shift, the Applicant had called in the evening before to advise that he would not be present for his shift the next day because he had to take his son to the doctor. The Employer claimed to have discovered, through the child's mother, that the child was not ill and the Applicant did not require time off work to take the child to the doctor.

[12] There were reasons why the Applicant was not terminated immediately following the August 1, 2003 incident. The Applicant had been injured at work on approximately May 18, 2003.[1] A the time, he thought the injury was limited to his back and filled out an incident report to that effect. By May 21, 2003, the Applicant began to feel pain in his knee and subsequently saw a doctor and filed a claim for workers'

[1] There were discrepancies in the evidence about the exact date of the injury but those discrepancies do not affect this decision.

compensation benefits. He then attended for physical therapy. On June 25, 2003, the physiotherapist recommended he return to work on a gradual basis commencing July 4, 2003. On July 24, 2003, after the Applicant had returned to work at less than full hours, the Employer filed an appeal concerning the Applicant's workers' compensation benefits, on the grounds that he had a pre-existing knee injury and that he worked after the date of the purported injury without making a complaint about his knee. The Employer also told the Workers' Compensation Board ("WCB") that the Applicant was on workers' compensation benefits to avoid being disciplined for being AWOL at the time he went off work[2] and that he had attendance problems while on the gradual return to work program. When the Employer contacted the Applicant on August 1, 2003 after learning that his son did not need to attend a doctor that day, the Employer also advised him that it was discontinuing his return to work program and that it had told the WCB about his attendance problems. As the Applicant was now facing a challenge to his workers' compensation benefits, he obtained a note from his doctor that he was fit to return to work and did so on August 21, 2003, despite that he did not feel he had yet recovered from his knee injury. As stated, the Applicant was terminated by the Employer on August 25, 2003.

[13] On September 4, 2003, the Union filed a grievance on behalf of the Applicant in relation to his termination. While the Union began to process the grievance and continued to have some discussions with the Applicant, very little happened until June 1, 2005 when the Applicant was successful with his appeals to the WCB over the denial of benefits in relation to his May 18, 2003 injury with the result that his benefits were reinstated and he received previous benefits to which he was entitled. This event triggered further discussion over the settlement of his grievance concerning his August 2003 termination. On August 12, 2005 the Union wrote to the Employer requesting the Applicant's reinstatement with payment of full wage loss, seniority and benefits. The parties met on November 28, 2005 to discuss the incidents for which the Applicant had been terminated. Shortly after this meeting, the Union provided two statements it had obtained from the Applicant – one from the mother of the Applicant's child and the other from their babysitter, the effect of which was to establish that the request for time off on

[2] In its letter to the Workers' Compensation Board, the Employer references June 21, 2003 as the date of injury although it appears not to be in dispute that the injury occurred some time around May 18, 2003.

August 1, 2003 may have been legitimate. The Employer seemed to accept the Union's position in relation to that incident but that still left the May 21, 2003 incident in question.

[14] At the urging of the Applicant, the Union took the position with the Employer that the Applicant's termination for his being AWOL on May 21, 2003 was invalid because, as had been established by his successful appeal to the WCB, he was suffering a workplace injury on the day in question, an injury for which he eventually received workers' compensation benefits. The Union representatives and the Applicant took the position that the provisions of the collective agreement and *The Labour Standards Act* provide that an employee cannot be disciplined or dismissed while in receipt of disability or workers' compensation benefits. The Union representatives met with the Employer on a number of occasions to explain their position but the Employer did not accept this legal position put forward by the Union and advised the Union that it would not reinstate the Applicant – that the Union would have to proceed to arbitration.

[15] As an aside, we note that the Union also took issue with the Employer's characterization of the Applicant's conduct as being "AWOL;" the Union taking the position that an employee is not "AWOL" when he or she contacts the Employer after his or her shift has started indicating he or she will be absent that day, while the Employer takes the position that that conduct is considered "AWOL" because if the employee had called in before the start of the shift, the employee could have been replaced. Mr. McDonald explained the Employer's definition to the Applicant on many occasions, as did Mr. Huculak. However, nothing really turns on this disagreement, given that the collective agreement requires an employee to call in prior to the start of the shift and the parties seemed to acknowledge that the incidents, if proven, would constitute a basis for some discipline.

[16] There was a significant amount of evidence led about the discussions between the Applicant and the Union at the point where the Employer refused to accept the Union's position about the May 21, 2003 incident. It was also at this time, in early 2006, that the Employer and the Union had begun discussions concerning a settlement that involved the Applicant's return to work, as an alternative to proceeding to arbitration.

[17] On May 16, 2006, the Employer made an offer to settle the matter. Both Mr. McDonald and Mr. Huculak testified that they spoke to the Applicant about the Employer's offer, going through each item, point by point. Based on concerns that the Applicant had over his pension and the unit in which he would be placed, the Union made a counter offer, which offer was accepted by the Employer. Although the Applicant was seeking full financial redress from the Employer since the date of his termination,[3] the Union was not able to get the Employer to agree to pay the same. The agreement that the Union was able to secure with the Employer included the following: the purging of his personnel file as it related to the incidents for which he was terminated; reinstatement of his seniority, vacation credits and sick leave credits from the date of termination; the Employer's contributions to the pension plan provided the Applicant purchased his prior service; the top-up of his workers' compensation benefits; and the wage adjustment obtained as a result of the joint job evaluation in the workplace. With respect to the issue of benefit plans, the agreement states that qualifying periods and benefits are governed by the rules and regulations of those plans as administered by the Saskatchewan Association of Health Organizations ("SAHO") and the WCB. The agreement further provided that the Applicant must provide proof of fitness to return to work before he could do so. Lastly, the Union and Employer agreed that the Applicant would return to a permanent part-time roster in the unit he was in prior to his termination. In return for these terms and benefits, the Applicant was required to sign a "Mutual Agreement" that required him to follow certain conditions of employment for one year following the date of the signing of the agreement, failing which, he would be terminated without having recourse to the grievance procedure. Those conditions included: that he would not be AWOL; that he would not take more than 1 ¼ days sick leave per month unless the need for more was substantiated by a doctor; that he provide prior notice if he is unable to make a shift; that if requested by the Employer, he would participate in the Employee and Family Assistance Program; and that he would obey all work rules and policies and keep himself informed of same.

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[3] Although it appears that the Applicant received some workers' compensation benefits between the dates of his termination and his reinstatement, including a top-up of those benefits from the Employer pursuant to the last chance agreement, his evidence appeared to indicate he did suffer some wage loss during that time. He also indicated in his evidence that he had a serious illness during that time period which necessitated surgery in February 2004 and April 2005, and as such, he believes he would have been on disability benefits for approximately 1 ½ years.

[18] The Applicant acknowledged that he and Union representatives had discussions about the terms of the agreements before they were presented to him for signing. Mr. Huculak stated his belief that the Applicant fully understood his obligations under the last chance agreement and stated that he advised the Applicant that in terms of a last chance agreement this was a reasonable one given that its duration was only one year and it did not require him to do anything more than was expected of a regular employee. Mr. Huculak testified that he advised the Applicant that any divergence from the terms of agreement would result in his termination and that it would be near impossible to get him reinstated.

[19] Mr. Huculak and Mr. McDonald also testified that they and the Applicant discussed the options that he had – whether to accept the "last chance agreement" or proceed to arbitration. Mr. McDonald claims he made no recommendation one way or the other. The Applicant testified that the Union advised him that it would take two years to get to an arbitration hearing and that if he wanted to return to work right away, he would have to sign the last chance agreement. Mr. McDonald disagreed with this evidence stating that he told the Applicant he could wait a year for it to be resolved by arbitration or that he could return to work immediately and earn an income. Mr. McDonald and Mr. Huculak stated that they also each discussed with the Applicant the risks of proceeding to arbitration and that winning at arbitration was not a "sure thing." Mr. Huculak also stated that he expressed his concerns about the risks of proceeding to arbitration and questioned whether they would be successful in proving there was no culminating incident, on which the Employer could base his termination. Mr. McDonald further stated that at no time did he tell the Applicant that the Union would not proceed to arbitration with his grievance.

[20] The Applicant said that he made the decision to agree to the last chance agreement because of the difficult financial situation he found himself in. He testified that he told Mr. Huculak that he was signing under duress but that when he started to write that word on the agreement, Mr. Huculak advised him that if he says he is signing under duress, the Employer will not accept the agreement. Mr. McDonald stated that at no time did the Applicant express any uncertainty about his ability to meet the conditions of his reinstatement because of any medical conditions he suffered. The only medical concern for the Applicant was when he would be fit to return to work. Mr. Huculak

testified that the Union was always concerned about the Applicant's illness and injury but there were no specific concerns about his ability to meet the terms of the agreement because he had obtained clearance from his doctor to return to work. The agreement was signed by all parties, including the Applicant, on June 2, 2006. The Applicant was cleared by his doctor to return to work on June 6, 2006 and he did so on June 8, 2006.

[21] In his evidence, the Applicant indicated that, when he discussed the back to work agreement with the Union, he understood the Union to have promised to obtain disability benefits for him from SAHO in relation to the serious illness he had suffered during the time period between his termination and reinstatement. He testified that he was told he could apply for disability benefits once he returned to work and he understood this to mean he would receive those disability benefits. The Union's witnesses deny making such a promise and indicated that the clause in the last chance agreement dealing with this issue was clearly explained to the Applicant. That clause reads as follows: "Mr. Qoung's enrollment and qualifying periods in all benefit plans will depend entirely on the rules and regulations of the benefit plans, which are governed through SAHO and WCB." Mr. Huculak stated that he told the Applicant at the time they were discussing the terms of the last chance agreement that his ability to qualify for disability benefits would be up to the SAHO plan administrator but that the Union would attempt to assist him in obtaining these benefits.

[22] The Applicant testified that, upon his return to work on June 8, 2006, he applied for disability benefits through SAHO for the period February 2004 to June 2006 but was denied those benefits by SAHO in approximately September 2006 because he was not working at the time of the disability. The Applicant claims that the Union then advised him that they would try to do something about the denial of benefits.

[23] On September 21, 2006, the Employer terminated the Applicant's employment for a second time on the basis that he was AWOL on that day, in breach of the conditions of his last chance agreement. The Employer had asserted that the Applicant called in on that day 47 minutes after the start of his shift and only after the Employer had attempted to contact him by phone. The Applicant claims that in this telephone call he told the Employer that he had been seeing his doctor about insomnia. A termination meeting was held that day between Employer and Union representatives

and the Applicant. There is some dispute over what was said at that meeting. The Union's witness stated that they were informed by the union representative attending the termination meeting that the Applicant had explained at that meeting that he had overslept due to having started a new prescription sleeping pill, Trazadone, and that as soon as he woke up, he phoned the Employer. The Applicant's evidence at the hearing differed. He stated that he did not indicate at that meeting that he had taken Trazadone the evening before (i.e. on September 20, 2006) but rather, that he was going to be prescribed that medication because of insomnia. He stated that he knew this because he had been seeing his doctor for insomnia and they had discussed the Trazadone before and that the doctor wanted to prescribe it to him. He stated that he told the Union and Employer representatives at that meeting that he had taken Tylenol #3 the evening before, apparently for stomach pain related to the serious illness he had suffered before his reinstatement in June 2006, and that it had "knocked him out."

[24] On September 25, 2006, the Union filed a grievance on behalf of the Applicant in relation to the September 21, 2006 termination.

[25] The Applicant testified that Mr. Huculak advised him that the Employer had a duty to accommodate his illness. He understood that the Employer was required to look at why he was late for work that day. Mr. Huculak told the Applicant that it would be difficult to overturn the termination unless there was a medical problem which could supersede the last chance agreement.

[26] During the course of the grievance procedure, Mr. Huculak had conversations with the Employer, saying that it was inappropriate to terminate the Applicant because he had been on a new sleeping medication. On April 24, 2007, the Union received the Employer's response to the grievance. In that letter, the Employer outlined the facts of the Applicant's AWOL on September 21, 2006 and stated that when the Applicant returned the Employer's phone call that morning, "Mr. Quong's excuse was that he had taken a new sleeping pill and had failed to wake up on time." Also in that letter, the Employer stated that accommodations had been given to the Applicant not for drugs or sleep difficulties and that the Applicant had breached the last chance agreement by his failures to: (i) report to work; (ii) call the Employer prior to the start of the shift; and (iii) advise the Employer of new medication which may prevent him from

attending work on time. The Employer indicated that it was not prepared to offer any further accommodations and that it was prepared to proceed to arbitration on the issue.

[27] The Union continued to investigate the Applicant's grievance. An arbitration hearing had initially been set for July 9 and 10, 2007, which was later changed to dates in October 2007. The Union's investigation into the merits of the Applicant's grievance focused on two aspects: the Applicant's assertion that he worked overtime on September 20, 2006 until 11:00 p.m. when he was required to work an early morning day shift on September 21, 2006 and that the Applicant appeared to have a medical condition which necessitated taking a sleeping pill and that that might give rise to a need for the Employer to accommodate him.

[28] At the hearing, a significant amount of evidence was led concerning the Union's investigation into the Applicant's assertion concerning the shift the Applicant worked the day before he slept in and was terminated. The Applicant says he told the Union that he had worked an evening shift on September 20, 2006, working until 11:00 p.m. and then he was required to work an early morning day shift on September 21, 2006. He stated that the Union did not properly investigate that fact. The evidence of Mr. Huculak was that the Applicant told him that he worked overtime the evening before but that when he investigated that assertion (by obtaining the "confirmed schedule" from the Employer and the Applicant's pay stub), he determined that the Applicant had not worked overtime the evening of September 20, 2006, but rather, had worked a day shift. The Applicant asserted at the hearing that Mr. Huculak should have obtained a time sheet which confirmed the actual hours worked and that if he had done so, that time sheet would have indicated he worked an evening shift on September 20, 2006 until 11:00 p.m.. Mr. Huculak stated that he was uncertain of the relevance of the hours of the shift worked on September 20, 2006 but that he did investigate it just the same.

[29] On May 31, 2007 the Union requested medical information from the Applicant's doctor to determine whether there was any medical conditions that required accommodation by the Employer (rather than permitting termination) as that would, in the Union's view, supersede the last chance agreement. In that letter to the doctor, the Union asked for information specifically concerning how his medical conditions have affected his absenteeism, whether there was any connection between the two

(particularly concerning the September 21, 2006 date he was AWOL), any treatment he could take to reduce his absenteeism, any opinion the doctor might have about an accommodation that could be made by the Employer to facilitate his condition and attendance, and whether the Applicant had the ability to attend work regularly in the future. The doctor replied on June 6, 2006 indicating she had not seen the Applicant since February 2004 and that his regular doctor had passed away in March 2007. She also stated that the Applicant's file indicates that the Applicant saw his regular doctor on September 21, 2006, although the clinical notes do not indicate whether the Applicant was granted time off work for that day.

[30] Upon receiving this letter, Mr. Huculak had concerns because it said the Applicant only met with his doctor on September 21, 2006. By this time, Mr. Huculak was aware of the Employer's position and the evidence it had, as outlined in its April 24, 2007 grievance response to the Union. Mr. Huculak obtained the notes of the Employer's representative present at the termination meeting on September 21, 2006 which notes indicate that the Applicant advised at that meeting that he "started on Trazadone – a sleeping pill" and that as soon as he woke up, he phoned in. Mr. Huculak confirmed with the union representative present at the termination meeting that this was indeed what the Applicant had stated. Mr. Huculak also spoke with the nurse of the Applicant's doctor on September 6, 2006 at which time he was advised that on September 21, 2006, the Applicant was first prescribed Trazadone at which time he was given 20 pills to take as needed. Mr. Huculak met with the Applicant confronting him with the fact that he said he was on Trazadone and that was the reason he slept in on September 21, 2006 yet the investigation revealed he was not prescribed that medication until the day he was terminated. Mr. Huculak stated that the Applicant then advised him that he was taking Tylenol #3 the previous evening, but he had no explanation why he had told the Employer that he had taken Trazadone. Mr. Huculak also asked the Applicant for proof that he had been prescribed Tylenol #3 and the Applicant indicated he had not been prescribed them but was taking those that belonged to his spouse. At this point (September 6, 2006) Mr. Huculak thought it advisable to get a legal opinion from the Union's counsel about the probability of success of the grievance.

[31] Mr. Huculak testified that he drew the conclusion from his investigation that there were problems with the Applicant's credibility as a witness (because of inconsistent facts about his claim that he worked overtime the evening before he slept in and the inconsistencies in his claim of having slept in because of taking Trazadone) but primarily, he identified a problem with the evidence not supporting a claim by the Union that the Applicant had a medical problem that required accommodation for that condition (that he had insomnia for which he had been prescribed Trazadone and which was the cause of his having slept in on the day in question). Mr. Huculak stated the Applicant's credibility was compromised by the fact that, right from the date of his termination, this evidence had already been shared with the Employer. Mr. Huculak passed all of these concerns onto the Local, along with the legal opinion obtained from the Union's legal counsel.

[32] On September 26, 2007, Mr. McDonald wrote to the Applicant advising that it was the Union's position that they would not be successful with his grievance and would not be proceeding to arbitration with his grievance. Mr. McDonald stated that the local Union had based this decision on all of the information obtained in the investigation and with input from Mr. Huculak and a legal opinion from the Union's legal counsel. He also advised the Applicant of his right to appeal the local Union's decision to the Table Officers of the Union. The reasons the Union gave for not believing it could be successful with his grievance were that the Applicant had stated at the termination meeting on September 21, 2006 that he had taken a new prescription drug medication which had been prescribed to him for insomnia and that the effect of this medication was that he slept in on the morning of September 21, 2006 (statements which were confirmed by another union representative who attended the meeting, and also by the Employer), but that the Union's investigation revealed that he had not been prescribed the sleeping medication until September 21, 2006, *after the alleged breach* of the last chance agreement.

[33] Mr. Huculak also advised the Applicant by phone that the local Union had decided not to proceed to arbitration with his grievance. The Applicant testified that at the time he was advised by Mr. Huculak that the Union would not be proceeding to arbitration, Mr. Huculak also advised that the Union would continue to help him with his disability claim against SAHO. The Applicant claimed that the Union never phoned him

back about this issue. On the contrary, Mr. Huculak stated that early on he had spoken to a number of people at SAHO about various issues including the disability benefits and that he communicated that to the Applicant. He continued to work on the issue into the fall of 2007 and he communicated to the Applicant that the Union might be able to assist him in accessing his sick leave credits (he had 300 hours in his sick leave bank). Mr. Huculak stated that he contacted the Employer about the Applicant's sick leave credits and the Employer stated that it would consider the issue, but that the Employer did not get back to him before he retired from the Union late in 2007. Mr. Huculak stated that he passed this issue back to the local Union upon his retirement and he believes it is still a "live issue."

[34] Following receipt of the Union's letter of September 26, 2007, the Applicant indicated his intention to appeal the local's decision. The Union kept the Applicant's grievance file in abeyance until his appeal to the table officers could be dealt with.

[35] On December 10, 2007, the appeal hearing was held. The Applicant testified that he was provided with an opportunity to explain his position and to try to convince the Union to proceed to arbitration with his grievance. The Union entered into evidence a document prepared by Mr. McDonald that was presented at the December 10, 2007 appeal hearing. In that document, the Union described the background and circumstances that led to the Applicant's second termination. Mr. McDonald also described the local Union's reasons for not proceeding to arbitration, as explained above, noting that both the Union and the Employer were aware that the Applicant was not prescribed sleeping medication until later in the day on which it is alleged that he breached the last chance agreement. Mr. McDonald also indicated in that document that "[i]f we are to forward a grievance to Arbitration the griever (sic) must tell the union representing him all the fact, and be truthful when doing so." Mr. McDonald also noted that the national staff representative (Mr. Huculak) and the Union's legal counsel were of the opinion the matter would not be successful at arbitration and that the local grievance committee was in agreement that the Union should withdraw the grievance.

[36] As of the date of the hearing before the Board, the table officers of the Union had not yet rendered a decision concerning the Applicant's appeal, although Mr.

McDonald indicated that a decision would be made very soon. Mr. Huculak stated that the grievance is being held in abeyance pending the outcome of the appeal and that he believed there may still be a possible resolution to the matter. He recalled that at some point the Employer made an offer to settle this grievance by way of payment of a lump sum to the Applicant but that the Applicant refused the offer.

[37] At the hearing, an issue arose over medical information that had been requested from the Applicant's doctor around the time of the December 10, 2007 appeal by the Applicant. The evidence indicated that an earlier letter had been sent by the doctor outlining the dates that the Applicant had been in for appointments and the medication he was taking, but the Applicant said there were errors in the letter with respect to the dates and so he crossed out those dates and made handwritten changes. Mr. McDonald stated that he advised the Applicant that they could not use the medical letter because the Applicant had made these handwritten changes and therefore a further request for medical information was made. Mr. McDonald stated that the Union had been trying to determine what medications the Applicant was on and for what time period because of the inconsistencies about the medication he was taking on the day he was terminated and whether there was any possibility of a defence to the termination because of a change to his medical condition and a duty to accommodate him. The evidence also indicated that the table officers of the Union to whom the Applicant had made an appeal on December 10, 2007, were holding their decision in abeyance to provide the Applicant a further opportunity to obtain a new medical letter (their next meeting was to be held later in the week following the hearing before the Board). The Applicant testified that he was aware that the doctor had now prepared this letter but he had not gone to the doctor's office to get it. The letter in question, dated December 10, 2007, was faxed to the Board's offices during the course of the hearing. This letter, which was entered into evidence at the hearing, had not been viewed by the Union prior to the hearing but it did confirm the understanding the Union had about the Applicant's medical situation. The letter stated that the Applicant had suffered a serious illness (while off work after his first termination) and that he had been taking Tylenol #3 for pain in relation to that illness from February 2005 to February 22, 2007. The doctor stated that the Applicant had reported that the medication made him drowsy and "knocked him out many times" and so he discontinued taking it. The doctor also indicated that the

Applicant was started on the sleep medication, Trazadone, at his appointment on September 21, 2006.

[38] At the hearing, the Applicant also took issue with the fact that the Union did not assist him with his workers' compensation claim. Mr. McDonald and Mr. Huculak testified that he advised the Applicant that the Union only deals with violations of the collective agreement and does not get involved with WCB claims, except to the extent that it might help with some of the paperwork or advise of the procedures, if requested.

Arguments:

[39] The Applicant's argument was brief. He believed that he had shown at the hearing that the Employer had no grounds to terminate him on August 25, 2003 because he was medically unfit to work at that time and, even though he had been cut off workers' compensation benefits in relation to the May 18, 2003 injury, ultimately he established his entitlement to those benefits from May 21, 2003, the day of the incidence of AWOL for which he was terminated. He stated that the termination occurred while he was injured and in receipt of workers' compensation benefits, and was therefore invalid. The Applicant stated that he had proved there were no culminating incidents for his termination but despite this, the Union would not take his first grievance to arbitration. He stated that he had no other choice than to sign the last chance agreement, given his financial difficulties and the length of time it would take to get to arbitration. He asserted that the Union acted arbitrarily and in bad faith by not taking his grievance to arbitration in circumstances where he had established that there was nothing more for him to be disciplined for (as he had already been disciplined for previous incidents of being AWOL) and because the Employer had also violated *The Labour Standards Act* by terminating him on the basis of the May 21, 2003 incident. The Applicant took the position that he would not have been terminated the second time, on September 21, 2006, had he not been forced to sign the last chance agreement.

[40] Through the course of the hearing, it also became apparent that the Applicant believed the Union breached the duty of fair representation to him by not getting his disability benefits through SAHO upon his reinstatement in 2006, for not assisting him with this WCB appeal, and for not taking the grievance concerning his second termination to arbitration.

[41] Ms. Norbeck, counsel for the Union, argued that the Union had fulfilled its duty of fair representation. There was no evidence that the Union acted arbitrarily, with discrimination or bad faith. In relation to the Applicant's first termination, the Union was able to negotiate a last chance agreement for him which he agreed to instead of proceeding to arbitration. His medical issues were being dealt with and he received medical clearance to return to work but shortly after his return, he was terminated, again for being AWOL. The Applicant offered one reason for his being AWOL on this occasion, that he had taken a new sleeping medication and had slept in. The Union conducted a thorough investigation by contacting the Applicant's doctor, meeting with the Employer, meeting with the national representative of the Union and meeting with the Applicant. As a result, the Union identified a number of inconsistencies with regard to his evidence about the medication and that of the doctor's. Based on this information and a legal opinion, the Union decided not to proceed to arbitration. When the Applicant appealed the Union's decision, further clarification of the medical issues was sought, but the Union did not receive that clarification until the date of the hearing before the Board. As it turned out, the medical letter faxed to the Board's office during the hearing confirmed that the Applicant was not in fact prescribed the sleeping medication until later in the day that he was AWOL. The Union argued that it had determined that proceeding to arbitration with the Applicant's grievance was not in the best interests of the membership and based its decision on the medical information obtained, documentation from the Employer and information obtained from the Applicant. The Union submitted that in so doing, the Union showed no personal animosity toward the Applicant, did not treat him in a discriminatory fashion and did not act in a cursory or capricious manner.

[42] While the Union maintains that the Applicant gave full consent to the terms of the last chance agreement, the Union further argued that if the Board believes that the Applicant did not consent or that consent was ill-informed, there is Board authority for the proposition that the Union has the authority to settle grievances without the grievor's consent (see *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).

[43] The Union also referred to the Board's decision in *E.A. v. Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and Hotel Saskatchewan*, [2006] Sask. L.R.B.R. 369, LRB File No. 076-04, as authority for the proposition that where the union conducts a proper investigation into the merits of a grievance, the Board does not "second-guess" the union's actions or determine whether the union did everything correctly or everything possible to assist the grievor. In further support of her arguments, counsel also referred to the following decisions of the Board: *Lawrence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93; *Griffiths v. Construction and General Workers' Union, Local 890*, [2002] Sask. L.R.B.R. 98, LRB File No. 044-01; *Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000 and Kelowna Daily Courier, a Division of Thomson Canada Limited/Thomson Canada Limitée,* [2003] B.C.L.R.B.D. No. 63, BCLRB Letter Decision No. B63/2003 (QL); *Hinks v. Construction and General Workers' Union, Local 180 and Jacobs Catalytic Ltd.*, [2007] Sask. L.R.B.R. 1, LRB File No. 067-05; and *Leblanc v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555 and Lloydminster Maintenance Ltd.*, [2007] Sask. L.R.B.R. 648, LRB File No. 028-07.

Analysis and Decision:

[44] 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.*

[45] At and throughout the course of the hearing, the Applicant framed his specific complaints as follows: that he was, in essence, forced to enter into the last chance agreement in June 2006 when the Union should have proceeded to arbitration with his first grievance, given that he could prove there was no basis for discipline for the two culminating incidents of AWOL; that the Union did not obtain disability benefits for him through SAHO (for the period of time he was off work after his first termination) as it had promised to do when he agreed to enter into the last chance agreement in June 2006; the Union did not assist him in obtaining workers' compensation benefits after his claim was not accepted in 2003; the Union did not perform an adequate investigation into the circumstances of his second termination in September 2006 and wrongly decided not to proceed to arbitration with the grievance over that termination; and that the Union did not adequately communicate with him.

[46] It is our opinion that, on the whole of the evidence, the Union did not violate s. 25.1 of the *Act*. Its representatives fairly investigated the facts and circumstances of both the August 2003 termination and the September 2006 termination and otherwise fairly represented the Applicant in its handling of his grievances over those terminations.

[47] In relation to the grievance over the Applicant's first termination in August 2003, the Union gathered evidence, made a reasonable assessment of the matter, and even appears to have convinced the Employer that the incident of August 1, 2003 did

not warrant discipline. Further, it strenuously argued with the Employer about the validity of the termination based on the May 21, 2003 incident by adopting the Applicant's argument that because WCB ultimately accepted his claim for benefits, he was in fact disabled and in receipt of benefits on May 21, 2003 and his termination was therefore invalid. Unfortunately, the Employer simply would not accept the Union's legal argument on this point. There was nothing further the Union could do to assert that position, short of proceeding to arbitration.

[48] As stated, the Applicant had a choice to make – whether to agree to the terms of reinstatement that had been proposed or to have the Union proceed to arbitration with his grievance. The evidence clearly indicates that, while the Applicant was unhappy with the proposal for settlement, given that he did not receive all of his wage loss and because the agreement made him sound "guilty," he felt he had to accept the agreement because he was having financial difficulties and needed an income. On the whole of the evidence and after considering the content of the testimony and the demeanor of the witnesses, we are satisfied that the Union clearly advised the Applicant that they could proceed to arbitration with his termination grievance (but could not challenge the previous discipline he had received and not grieved, even though he had been going through a difficult time in his personal life), or they could enter into the back to work agreement or "last chance agreement" whereby the Applicant would be reinstated but on certain conditions.

[49] We are also satisfied that the Applicant voluntarily chose to sign the last chance agreement rather than proceed to arbitration and there is no basis for a finding of a violation of s. 25.1 of the *Act* for the Union's failure to proceed to arbitration with the grievance involving his first termination. The agreement was explained to him in considerable detail and in fact, he had input into its terms. The Union did not pressure him to sign the agreement and at no time did the Union suggest that it would not proceed to arbitration on his behalf. Furthermore, the Applicant did not raise any issue or question about his having a medical condition that would affect his ability to return to work and abide by the conditions to which he had agreed.

[50] With respect to the grievance concerning his second termination, we find that the Union made considerable efforts to gather the necessary information. It held a

number of meetings with the Applicant, made repeated requests for medical information from the Applicant's doctor, sought documentation from the Employer about what was said at the termination meeting, and held discussions with the union representative who attended the termination meeting. The Union had formulated an opinion early on that it could possibly challenge the breach of the last chance agreement on the basis of the Employer's duty to accommodate a disability suffered by the Applicant. This argument was based on the position that the Applicant took with the Employer from the outset – that he had slept in due to a new sleeping medication that he had taken the evening before. However, the Union's investigation into that excuse revealed that the Applicant could not have taken the sleeping medication because he had not attended upon his doctor until later in the day after he was terminated. It was only at that later doctor's appointment that the Applicant was prescribed the sleeping medication. Based on the evidence before us, we find as a fact, that the Applicant did tell the Union and Employer at the termination meeting on September 21, 2007 that he had taken a new sleeping medication and that was the reason for sleeping in and missing the beginning of his shift. However, even if we had not so found, it is sufficient that the Union reasonably believed that was the position taken by the Applicant through its thorough investigation of the issue. We find that the Union did form such a reasonable belief after speaking to the Union's representative at the termination meeting and receiving the Employer representative's notes for that meeting. We also note that even though the Union made its decision not to proceed to arbitration on the basis of the evidence before it as of September 7, 2007, the information in the additional letter from the doctor dated December 10, 2007, produced for the first time at the hearing, confirmed the facts as found by the Union – that the Applicant was not prescribed the sleeping medication until after he slept in.

[51] The Applicant had also asserted that the Union failed to properly investigate his assertion that he had worked the evening before the incident in question, that is, September 20, 2006, until 11:00 p.m. There seemed to be some confusion about this because Mr. Huculak testified that he was investigating what he believed the Applicant told him, that is, that he had worked over time hours on September 20, 2006 until 11:00 p.m. In the circumstances, it is not necessary for us to decide whether the Applicant told Mr. Huculak that he worked over time or the evening before. While it is difficult to understand the importance or relevance of the Applicant's assertion in this

regard, except perhaps as an additional reason why he slept in (he worked late and was tired), in the whole of the circumstances, this had little, if any, impact on the Union's decision not to proceed to arbitration with the Applicant's grievance. The approach the Union was taking to attempt to avoid the consequences of the last chance agreement was that the Applicant had a medical condition which required accommodation on the part of the Employer, an accommodation which presumably included the tolerance of some occasions of lateness (or AWOL) and in particular, on September 21, 2006. In taking that approach, the hours the Applicant worked the day before had little or no relevance to the Union. It was primarily the Union's discovery that the Applicant had not taken the sleeping medication that caused it to consider that the Applicant would have difficulties with credibility as a witness at an arbitration hearing (given that he told this to the Employer both at the time of the phone call the morning of September 21, 2006 and later that day at the termination meeting) and that it would have a very difficult time making an argument for accommodation as it was not clear that he had a medical condition that required an accommodation the morning of September 21, 2006 when he slept in, nor had he previously advised the Employer of such a condition.

[52] In essence, the Union determined that the alleged breach of the last chance agreement was well-founded and it had no reasonable defence or excuse to alter the result of termination. It is not for us to decide if that legal conclusion was correct. The Union's representatives made a reasonably thoughtful assessment of the situation, based on all of the information they could obtain. The Union concluded, with the assistance of a legal opinion from Union counsel, that the Union could not succeed at an arbitration of the Applicant's dismissal. It thought that it had difficulties with the Applicant's credibility, primarily as it related to his statements concerning the reason he slept in on September 21, 2006, and that it would have a difficult time proving the Employer should have accommodate the Applicant's disability. The Union's conclusion cannot be considered to have been arrived at unreasonably, without care or in a capricious manner. We believe that the reasoning and conclusions in *E.A. v. Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and Hotel Saskatchewan, supra*, equally apply to the manner in which the Union handled the Applicant's grievance in this case. In *E.A.* the Board stated at 374:

> *As has been stated in numerous decisions of the Board, for example, in Hidlebaugh v. Saskatchewan Government and General Employees' Union and Saskatchewan Institute of Applied Science and Technology, [2003] Sask. L.R.B.R. 272, LRB File No. 097-02, it is not for the Board to minutely assess and second guess the actions of a union in its conduct of the grievance procedure. Nor is it the function of the Board in this hearing to determine whether the statements made by the Applicant's co-workers in the investigation into the complaints of harassment were fair, reasonable or true.*
>
> *Accordingly, it is not for the Board to determine whether the Union did everything possible, or indeed properly, to assist the Applicant or whether it reached a correct conclusion in law about the effect of the "last chance" agreement, but rather to determine whether the Union put its mind fairly and reasonably to an investigation and assessment of the facts of the situation, the interests at stake and the effect upon the Applicant and its membership as a whole, without arbitrariness, discrimination or bad faith. We find that the Union did so and did not breach its duty of fair representation under s. 25.1 of the Act.*

[53] Therefore, it is not up to the Board to determine whether the Union reached a correct conclusion in law concerning its chances of success with an accommodation argument, whether the Union made an entirely accurate assessment of the facts, or whether it rightly or wrongly decided that the Applicant would have little credibility at an arbitration hearing. The fact is, the Union considered all of the facts, the interests of the Applicant and the membership, and the evidentiary difficulties it perceived it would have, and arrived at a thoughtful and reasoned conclusion in a manner free from arbitrariness, discrimination and bad faith.

[54] Furthermore, we find no evidence that the Union failed to adequately communicate with the Applicant such that it amounted to a violation of s. 25.1 of the *Act*. The Union communicated with the Applicant concerning any developments in his grievances, as they occurred, and fully explained the offer from the Employer to settle his first grievance. It used information from the Applicant to improve upon the settlement it obtained to his first grievance The only period of time when there was little communication between the Union and the Applicant was the period of time following the filing of his grievance and his successful WCB appeal, however, there is no evidence that the Applicant was seeking the assistance of the Union at that time and it appeared to be a shared understanding that it was best to wait and see what happened with his

WCB appeal before proceeding with the grievance. Indeed, it was his success with the WCB appeal that laid the foundation for further grievance discussions and ultimately a settlement. In addition, we note that during that time period, the Applicant was suffering with a serious medical condition and it does not appear he would have been able to return to work at that time in any event.

[55] We also decline to find that the Union breached its duty of fair representation in relation to the Applicant's assertions that the Union should have proceeded with a claim against the Employer for a breach of s. 44.2 of *The Labour Standards Act*, pursue his WCB benefits through appeals of their decisions to deny him benefits, and pursue SAHO for his disability benefits. The Board dealt directly with the issue of the scope of the duty of representation owed by a Union in relation to third parties in *Marilynne McEwan v. Canadian Union of Public Employees, Local 1975 and University of Saskatchewan*, [2007] Sask. L.R.B.R. 378, LRB File No. 001-06. In that case, the issue before the Board was " . . . *whether the Union breached the duty of fair representation as a result of its failure to assist the Applicant in her claim against the Insurer, including the retaining and instructing of legal counsel to pursue the Insurer*." There the applicant argued that the union had such an obligation because the collective agreement provided for a long term disability plan. At 390, the Board stated:

> *[44] The issues before us necessarily require the Board to determine the scope of a union's duty of fair representation under s. 25.1 of the Act. Section 25.1 reads as follows:*
>
> > *25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*
>
> *[45] The wording of s. 25.1 makes it clear that, in a unionized workplace, an employee's statutory right to be fairly represented by his or her union relates only to "grievance or rights arbitration proceedings under a collective bargaining agreement." While "grievance arbitration proceeding" and "rights arbitration proceeding" are not defined in the Act, a "collective bargaining agreement" is. Section 2(d) provides as follows:*
>
> > *2 In this Act:*

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

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

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

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

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

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

[56] The reasoning in *McEwan, supra,* is directly applicable to the case before us. While the Union may have been able to use the provisions of *The Labour Standards Act*, such as s. 44.2, in advancing the Applicant's termination grievance under the collective agreement, we find that there was no independent obligation to take up such a claim on behalf of the Applicant through the processes in that *Act* (although we note that the Applicant did not make this particular assertion at the hearing). With regard to the appeals to the WCB, there is likewise no obligation on the Union to assist the Applicant with such a claim as it involves a third party and is outside the grievance procedure under the collective agreement. Certainly it was not the Union's practice to assist members with such claims so there is no ability to assert some kind of discrimination argument against the Union.

[57] With regard to the Applicant's assertion that the Union has failed to obtain his disability benefits under the plan administered by SAHO, we agree with the reasoning in *McEwan, supra*, that the Union's duty of fair representation does not extend to pursuing third parties outside the employer/employee relationship and therefore, a decision not to assist a member in obtaining such benefits would not be considered an arbitrary, discriminatory or bad faith action on the part of the Union. We do not accept the Applicant's assertion that he only entered into the last chance agreement on the basis that the Union would obtain these disability benefits for him. The last chance agreement, which we find was explained in great detail to the Applicant by the Union's representatives, is very clear that the qualification for and entitlement to benefits is to be determined by SAHO and not the Employer. While the Union told the Applicant it would assist him in his efforts to obtain those benefits, it certainly did not promise to actually obtain those benefits – it is simply not reasonable to conclude otherwise as the Union has little or no ability to influence that entitlement.

[58] To the extent that the duty of fair representation might be imposed on the Union in the circumstances of this case because the Union agreed to assist the Applicant in obtaining those benefits, we find that the duty has not been breached. Mr. Huculak had made efforts to obtain such benefits by having discussions with SAHO and, at the time of the hearing, the Employer was considering his request to allow the Applicant to access his sick leave bank. It appears that this issue was still outstanding as of the date of the hearing but there was no indication that the Local of the Union has dropped the issue. We wish to note, however, that given the scope of the Union's duty to pursue the insurer (as stated above), we do not believe it extends to pursuing legal action against SAHO.

[59] On a final note, we were made aware that a decision is still pending from the table officers of the Union concerning the Applicant's appeal which was heard on December 10, 2007. As there were no allegations before the Board that the Union violated the duty of fair representation in relation to that appeal, we were focused on the decisions made by the Local Union not to proceed to arbitration with either of his grievances, even though the Applicant's primary complaints related to the Union's handling of the grievance in relation to his first termination. Having said this, there was nothing in the evidence that would suggest any violation of the *Act* in relation to how the

appeal has been conducted. Furthermore, the only "new" evidence that came out at the hearing that the Applicant appeared to have intended to use for his appeal, was the doctor's December 10, 2007 letter, however, as noted earlier, the contents of that letter merely confirm the opinion reached by the Union following its investigation of the matter.

[60] For the foregoing reasons, the application is dismissed.

DATED at Regina, Saskatchewan, this **24th** day of **October, 2008.**

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson