The Labour Relations Board
Saskatchewan

D.M., EMPLOYEE, Applicant v CANADIAN UNION OF PUBLIC EMPLOYEES NATIONAL, CANADIAN UNION OF PUBLIC EMPLOYEES SASKATCHEWAN, AND CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975-01, Respondents and ARAMARK CANADA LTD, Interested Party

LRB File No. 110-08 & 157-08; January 15, 2009
Vice-Chairperson, Steven Schiefner

The Applicant:	Mr. D.M.
For the Respondent Union:	Ms. Nancy Rossenberg
For the Interested Party:	No one appearing

Duty of fair representation – Scope of duty – Union takes Employee's grievance to arbitration – employee alleges Union erred in failing to tender medical evidence, in failing to subpoena doctor to testify, and failing to obtain employer's phone records - Board will not sit on appeal of the decisions of Union as to how to conduct arbitration hearing, including what evidence to tender, which witnesses to call, and which arguments to advance or abandon – Employee's applications dismissed.

Duty of fair representation – Employee alleges bias, corruption and criminal conduct on part of Union officials – Employee was diagnoses with affective disorder and paranoia – Board finds no evidence of discrimination or bias or bad faith on part of Union – Board concludes Employee's disability probable cause of Employee's perception of misconduct on Union's part – Employee's applications dismissed.

Practice and procedure – Non-suit – Board satisfied that employee had tendered no evidence constituting *prima facie* case of a violation of either s.25.1 or s.36.1 of *The Trade Union Act* – Union's application for non-suit granted – Employee's applications dismissed.

The Trade Union Act, ss. 25.1 and 36.1.

REASONS FOR DECISION

Background:

[1] Steven D. Schiefner, Vice-Chairperson: The Canadian Union of Public Employees, Local 1975-01 (the "CUPE Local") represents a unit of employees employed by Aramak Canada Ltd. (the "Employer"). The Employer provides certain food services at the University of Regina. The Applicant, Mr. D.M., was at all material times, an employee of the Employer and a member of CUPE Local 1975-01 (the "CUPE Local").

[2] Mr. D.M. (the "Applicant") filed four (4) application with the Labour Relations Board (the "Board") alleging that the CUPE Local, together with the Canadian Union of Public Employees National ("CUPE National") and the Canadian Union of Public Employees Saskatchewan ("CUPE Saskatchewan") (hereinafter collectively referred to as the "Union"), engaged in violations of s. 25.1 and/or s. 36.1 of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*"). The first application was filed with the Board on May 23, 2008 and was assigned LRB File No. 110-08. The second and third applications were both filed on July 4, 2008 and were collectively assigned LRB File No. 157-08. The fourth application was filed on August 22, 2008 and no LRB File No was assigned at that time.

[3] On September 10, 2008, the Executive Officer of the Board issued an Order consolidating all applications made by the Applicant against the Union pursuant to ss. 25.1 and 36.1 of the *Act* and directing that all applications be heard together by the Board.

[4] The Employer did not participate in the proceedings before the Board but was apprised as matters proceeded.

[5] All of the applications were heard by the Board over the course of four (4) days commencing on December 16, 2008 and concluding on December 19, 2008 following the close of the Applicant's case, whereupon the Union made an application for non-suit alleging that the Applicant had tendered no evidence constituting a *prima facie* case of any violation of either ss. 25.1 or 36.1 of the *Act* on the part of the Union. The Board heard argument from both the Union and the Applicant on the Union's application for non-suit.

[6] These Reasons for Decision are in response to the Union's application for non-suit.

Preface:

[7] The Applicant testified on his own behalf and called Mr. Calvin Dunford as a witness. Mr. Dunford, now an employee of the Regina Correctional Centre, worked for sixteen (16) years with the Employer and was also a member of the CUPE Local. Mr. Dunford worked directly with the Applicant and was variously a shop steward and on the executive of the CUPE Local.

[8] During the presentation of the Applicant's case over seventy-seven (77) documents were tendered and accepted as Exhibits in the proceedings (31 by the Applicant and 46 by the Union). The Board would like to preface its review of the facts with the observation that the evidence was confusing and largely presented by the Applicant in a non-linear fashion, jumping in time from what the Applicant perceived as one failing on the part of the Union to another. The Applicant's evidence was not presented chronologically and was often overly generalized, with non-specific references to persons and events, making the evidence difficult to follow. To the extent reasonable and appropriate, the Board sought clarification from the Applicant and attempted to facilitate the Applicant's presentation of his case, granting generous latitude to the Applicant in doing so, at times over the objection of the Union.

[9] The Applicant was assisted in the presentation of his case by Mr. Keith Pederson, a friend of the Applicant. The Board found it necessary to caution Mr. Pederson on a number of occasions for inappropriate communication with the Applicant when he was testifying and for distracting conduct during the hearing.

Facts:

[10] The Applicant testified that he moved to Saskatchewan from British Columbia in 2001 and commenced employment with the Employer on or about August 30, 2001 as a dishwasher.

[11] The Applicant testified that he enjoyed his work, was good at what he did, and got alone with his co-workers. In cross-examination, the Applicant admitted that he sometimes gets "stressed out" having a disability that will be discussed later in these reasons. For a period of time, the Applicant was a shop stewart for the CUPE Local, having being elected by the membership to do so.

[12] Sometime in 2002 or early in 2003, the Applicant bumped into a higher paid position that he described as a "porter" (the title "Porter/Dishwasher" was identified in the documentary evidence). Although Mr. Dunford testified that that the Applicant was a good dishwasher, he also indicated that some of the other workers in the unit did not seem to want him as a porter.

[13] On or about September 3, 2003, on Mr. M's first day back to work after the summer break at the University, the Applicant had a confrontation with a co-worker, "Agi". As a result of this confrontation, two (2) things transpired; the Applicant was dismissed; and the Applicant filed a harassment complaint with the Employer. Both of these things took on their own life as discussed below.

[14] By letter dated September 4, 2003, the Employer removed the Applicant from the position of Porter/Dishwaster, with the Employer's stated reason being an "*incompatibility with the inter-personal skills that are required*" in his position, which the Employer indicated required a "*high tolerance for stress, the ability to multi-task*" and "*a team player, someone who can work well in a very fast paced environment with their co-workers*." The Applicant's confrontation with his co-worker was identified by the Employer as a reinforcing factor in the Employer's belief that the Applicant was not suitable for his position.

[15] Following receipt of this correspondence, which the Applicant understood to be a dismissal letter, the Applicant sought the assistance of the Union; whereupon the Applicant, together with Mr. Don Puff, the then President of the CUPE Local, met with a representative of the Employer. The stated reason for this meeting was to seek the Applicant's reinstatement.

[16] On or about October 6, 2003, the Applicant was reinstated by the Employer to his original position of Dishwasher, with the Employer paying back pay from September 3, 2003 until his reinstatement on October 7, 2003. Upon reinstatement, the Applicant was reassigned to a different location (at the Language Institute – previously having been located at the University Centre kitchen) and had a different work schedule (involving less hours). Although the Applicant acknowledged in cross-examination that the Union assisted him in being reinstated by the Employer, assisted in his receiving back pay (for the period he did not work prior to reinstatement), and assisted him in maintaining the higher rate of pay from the Porter/Dishwasher position after reverting to the Dishwasher position, the Applicant expressed disappointed with the resolution of the matter and the Union's representation of him.

[17] Sometime in the fall of 2003, the Applicant filed a harassment case with the Employer related to the September 3, 2003 incident. Although the particulars of who is alleged to have harassed whom is unclear, the Employer undertook some form of investigation of the claim of harassment advanced by the Applicant. Although no evidence was tendered as to what

the result of this investigation was, the Applicant was clearly not satisfied with the Employer's investigation and believed that his reputation had been damages by the findings contained therein. Because the Applicant believed his reputation had been tarnished by this investigation (using words such as "humiliating" and "embarrassing") presumably the findings had been critical of the Applicant's conduct.

[18] From the evidence it appears that during this period, the Employer had taken the position that the University of Regina's policy on "Harassment and Discrimination Prevention" did not apply to it as a contractor. No evidence was led as to the significant of this distinction. On or about January 7, 2004, the Union filed a grievance with the University of Regina seeking the enforcement of the "Harassment and Discrimination Prevention" policy by all contractors including the Employer. Although not entirely clear from the evidence, apparently the Employer accepted the grievance and agreed to conform to the University's policy. No evidence was led as to how the Employer's acceptance and/or adoption of the University's policy would have or could have affected the outcome of the Employer's investigation into the Applicant's claim of harassment. However, the Applicant did seemed to take the position that the Union should "grieved" the harassment investigation conducted by the Employer on the basis that the Applicant should have been granted access to the harassment investigation procedures contained within the University of Regina's policies. Other than the Applicant's belief that his reputation had been sullied by the Employer's investigation of his harassment complaint, no evidence was led as to the outcome of the impugned "harassment" investigation or what it was that the Union was expected to have grieved.

[19] The evidence disclosed that on November 11, 2003, soon after being reinstated by the Employer, the Applicant went off work on "stress leave." While on stress leave, on or about December 2, 2003, the Applicant was laid off by the Employer. The Applicant took the position that his "lay off" was contrary to law ("illegal") believing that no one could be laid off while on medical leave. The Applicant seemed to take the position that the Union was complicit in this "illegal" conduct by not grieving his lay off and/or by not being successful in convincing the Employer to reverse it decision. The Union did, however, filed a grievance on behalf of the Applicant with respect his eligibility for benefits and/or the calculation of the quantum thereunder. In addition to the Applicant's belief that the Union had been complicit in the Employer's illegal conduct, the Applicant took the position that the Union only filed a grievance

on his behalf reluctantly and, thus, demonstrated a bias toward him and/or was generally unwilling to adequately represent him.

[20] The Board cautioned the Applicant that, as all of these events transpired approximately five (5) years ago, they could not now form the basis of the Applicant's current claims against the Union on the basis of the Board's policy on unreasonable delay. Furthermore, later in the proceedings it became clear that these events that had been the subject matter of a prior application before the Board (LRB File No. 114-04) that had been withdrawn by the Applicant on June 21, 2004. Nonetheless, it was clear from the evidence that these events formed the genesis of the Applicant's belief that certain officers of the Union were either biased or prejudiced against him or complicit with the Employer in attempting to get rid of him. As a consequence and over the noted objection of the Union, the Board permitted evidence to be led on these events.

[21] In addition, the documentary evidence discloses that the Applicant was subject to a number of absences from the work place at a rate the Employer believed was in excess of other employees. For example, the Applicant returned to work on November 11, 2003 and was off on sick leave by December 3, 2003; similarly the Applicant had returned to work on January 2, 2004 and by January 4, 2004 was again off on sick leave. The documentary evidence discloses that the Applicant was cautioned and/or disciplined on multiple occasions regarding absenteeism up to and including a three (3) day suspension for his failure to notify management and provide a valid reason for a particular absence. The documentary evidence also discloses that on February 15, 2005, the Union grieved the Applicant's suspension but the grievance was denied.

[22] The documentary evidence discloses that, by May of 2004, the Union was representing the Applicant in multiple matters, including seeking additional compensation from the Employer for the Applicant, related to his absences from the work place (based on the provisions of the collective agreement then in place with the Employer). Nonetheless, the documentary evidence also discloses that by May of 2005, the Applicant had begun writing to CUPE National complaining about the conduct of Union officials, which complaints included allegations of lying, and asked that the CUPE Local be put under "*administrative supervision/suspension*" and that the Union "*get rid of Don Moran*." At this time, Mr. Moran was

a member representative for CUPE Saskatchewan and had personally represented the Applicant in numerous grievances with the Employer.

[23] The documentary evidence discloses that, by May of 2005, the Applicant was again on medical leave and again the Union was representing the Applicant in his dealings with the Employer. The Applicant tendered into evidence a May 12, 2005 letter from Mr. Don Moran, CUPE Saskatchewan, to the University of Regina. This document indicates that the Union had participated in "*ongoing*" discussions with the Employer with respect to the Applicant's "*numerous*" outstanding issues with the Employer regarding his harassment complaint, his right to short and long term benefits, his absenteeism and various disciplinary matters initiated by his employer, including his suspension(s). Nonetheless, the Applicant took the position that the Union was not adequately representing him, a belief related to the participation of Mr. Don Puff, the President of the CUPE Local, in the Union's dealings on his behalf.

[24] The Applicant's belief that the Union was not adequately representing him was reinforced when he received a letter dated June 13, 2005 from the Occupational Health and Safety Division of the Department of Labour. This Department's letter was in response to the Applicant's request for a review of the Employer's harassment policy, which review indicated that the policy did not contain a reference to sections 3(c) and 4(b) of *The Occupational Health and Safety Act, 1993* and section 36(1)(g) of *The Occupational Health and Safety Regulations, 1996*. Although the letter clearly states:

> *In all other respects the policy meets the requirements of the Act, including a reference that workers have the right to request the assistance of an occupational health officer to resolve a complaint of harassment.*

The Applicant took this letter as confirmation that the employer's "Harassment" policy was "*discriminatory*" and that the Union was a party to an "illegal" proceeding because it was based on a policy that was "contrary to law." In testimony and in the documentary evidence, the Applicant repeatedly referenced being forced to participate in a harassment complaint processes that was "*discriminatory*" and/or "*criminal*." In several documents, the Applicant described Mr. Puff as a "*criminal*." These references all appear to stem from the Union taking a different view as to the defect, if any, in the Employer's harassment policy; a view presumably more consistent with the Employer's view (and inconsistent with the Applicant's own view) of this policy. Nonetheless, it was this defect in the Employer's harassment policy that was the

foundation for the Applicant's belief that the Union, in general, and Mr. Puff, in particular, were a "*party to an 'illegal process*" and thus "*criminal*."

[25] The evidence discloses that on or about March 1, 2006, the Applicant received a $500.00 donation from the CUPE Local "*to help with [the Applicant's] expenses while awaiting Arbitration*." The documentary evidence discloses that, during the winter of 2006, when the Applicant was medically disabled (presumably unable to work again), the Applicant asked about the existence of an "emergency fund" and was told no such fund existed by Mr. Don Puff, the then president of the CUPE Local. Notwithstanding the fact that the Applicant received a donation from the CUPE Local (presumable from the "emergency fund"), the Applicant took the position that Mr. Puff was either "*inept*" and/or "*corrupt*" because he denied or was unaware of the existence of the emergency fund when initially asked by the Applicant. The fact that the Applicant did, in fact, received these funds did not mitigate his belief that the Union was "*corrupt*" and populated by officials, such as Mr. Puff and Mr. Moran, whom (in the opinion of the Applicant) should be stripped of their positions within the Union.

[26] The documentary evidence discloses that in June of 2006, the Applicant filed a complaint with the Labour Standards Branch of Saskatchewan Labour alleging that the Employer had refused to accommodate his return to work and seeking immediate intervention by the Department of Labour (as it was known then). The Applicant's claim alleged that the Employer's conduct had been "*condoned*" and "*supported*" by the CUPE Local.

[27] The documentary evidence also discloses that by July of 2006, the Applicant had begun writing to CUPE Saskatchewan and CUPE National complaining about Union officials, including allegations of "*professional ineptitude*", "*lies, corruption and professional incompetence*." Most of the Applicant's grievances with the Union seemed to be directed at Mr. Don Puff and/or Mr. Don Moran and relate to the Applicant's continuing disappointment with the terms of his reinstatement in 2003 (fewer hours and different location); his continuing perception that the employer's Harassment and Discrimination Prevention policy was "*illegal*" and his participation therein caused him "*embarrassment" and "humiliation*"; his perception that the Union had "*forced*" him to participate in the said illegal policy/procedure*;* and the Union's failure to overturn his three (3) day suspension related to absenteeism. In his documents, the Applicant alleged lies, corruption and profession incompetence on the part of Union officials, with a tone that was sarcastic, disrespectful and disparaging. These letters continued through

August and September of 2006 with a clear escalation in the Applicant's allegations, tone and disparaging comments regarding the Union (and Mr. Puff, in particular). The Applicant's testimony was that he was "*righteously indignant*" with the Union because of the delays in achieving what the Applicant believed to be the desired outcome of his various claims against the Employer. The documentary evidence indicates that the Applicant's goal at this point appeared to be a desire that Mr. Puff be stripped of any authority in the Union.

[28] At or around this time (the evidence was unclear as to when), a meeting occurred involving members of the CUPE Local, at which the Applicant, Mr. Dunford, and Mr. Puff were present. Other members were present but were not called to testify. The meeting took place in a cafeteria at the University of Regina. Mr. Dunford could not recall when this meeting took place or what the meeting was about but testified that, during this meeting, Mr. Puff was very aggressive toward the Applicant and his conduct was inappropriate for a "university" setting. In cross examination, Mr. Dunford testified that he was not aware of any provocation by the Applicant. Mr. Dunford did testify that the Applicant was trying to record the meeting and was having difficulty with his tape recorder and that, in his experience, Union meetings were not normally recorded by members. The Applicant testified that Mr. Puff used profane language in addressing him and "stormed" out of the meeting. This confrontation between Mr. Puff and the Applicant appears to have been the culminating event in the Applicant's belief that Mr. Puff was biased against him and unwilling to adequately represent him and/or was potentially desirous of, in the Applicant's words, "*getting rid of him*". Thereafter the Applicant took the position that Mr. Puff should no longer play any part in the Union's representation of his interests and took offence at Mr. Puff even being informed of the status of proceedings or being copies on correspondence. In cross examination, the Applicant was reluctant to accept that Mr. Puff, the then President of the CUPE Local and chair of CUPE Local's grievance committee, needed to be informed about the Union's dealings in representing the Applicant and was unwilling to accept that Mr. Puff had any right to be involved in the representation of the Applicant.

[29] The documentary evidence discloses that by the fall of 2006, the Union was representing the Applicant in a multiplicity of proceedings with the Employer and, at the same time, responding to escalating criticism of the Union by the Applicant on various fronts, including CUPE National and the Department of Labour. In the midst of these circumstances, a new and ultimately more significant series of events transpired affecting the Applicant's employment.

[30] The Applicant testified that on or about September 27, 2006, while he was working as a dishwasher, he was sent home by his Manager because he had a bad back. The Applicant testified that, while off work on medical leave, he re-injured his back. The Applicant testified that on October 10, 2006, prior to his scheduled return to work, he attended to the Office of Dr. M.N.Z. Adams at the Broad Street Clinic. Upon examining the Applicant, the doctor provided a cryptic note in his own (nearly indecipherable) handwriting indicating that the Applicant could return to work on October 12, 2006 (at that point, some 3 days hence).

[31] The Applicant testified that he, as required by the Employer's absenteeism policy, phoned the Employer to advice of his inability to return to work. The Applicant testified that he phoned from a pay phone at or near Shoppers Drug Mart adjacent to the Board Street Clinic immediately after receiving the note from his doctor (the morning of October 10, 2006). The Applicant testified that, in addition to this first phone call, he phoned the Employer on at least two (2) other occasions using either his own or his roommate's cell phone over the next two (2) days. The Applicant testified that on each occasion he left messages advising of his inability to return to work because of a medical condition.

[32] The Applicant testified that the next time he phoned the Employer, he was advised that he had been placed on the "casual list" because he had failed to report to work and that he should speak to his Union. The Applicant testified that he understood this to mean that he had been dismissed.

[33] The documentary evidence discloses that, at this same time, the Union was representing the Applicant in a claim from November of 2005, which was a disability claim regarding the tendons in the Applicant's arm. In addition, the documentary evidence discloses that the Union was also representing the Applicant in a claim wherein it was alleged that the Employer had denied disability benefits to the Applicant for a period of time that he was off sick from February of 2006. It was not clear from the evidence how or if these claims were related. However, it was clear that the Union was representing the Applicant in both of these claims with the Employer.

[34] The Applicant testified that, after he had been informed by the Employer that he had been "*placed on the casual list*", he contacted the Union and spoke with Mr. Moran seeking assistance and advice from the Union on how to proceed now that he had again been dismissed

by the Employer. The Applicant was asked to document what had happened and to bring a copy of his medical note to the Union, which the Applicant testified that he did.

[35] On or about October 13, 2006, the Employer prepared a document stating its position with respect to the Applicant's dismissal. The Employer's position was that the Applicant had vacated his position by being absent from work for three (3) consecutive days (October 10, 11 and 12 of 2006) without notifying the Employer in accordance with the provisions of the collective agreement. The Employer later disclosed that the relevant employees had been canvassed and the Employer's position was that it had not received any messages from the Applicant indicating that he would not be attending work during the subject period. This position was obviously inconsistent with the Applicant's position. The evidence disclosed that the Employer issued two (2) letters dated October 13, 2006. The first included a reference to the Applicant being "*reclassified as a casual on the seniority roster effective today, October 13, 2006*." The Applicant testified that he understood that Mr. Puff had received an advance copy of the first letter and asked the Employer to redraft the document on the basis that it contained an error (the above captioned reference to being "*reclassified as a casual on the seniority roster*" should not have been included). The Applicant believed that it was inappropriate for Mr. Puff to assist the Employer in this fashion and took this as evidence that Mr. Puff was meddling in the Applicant's affairs.

[36] The culmination of this multiplex of events was two (2) separate grievances being advanced by the Union; the first related to the Applicant's previous disability claim(s) and the second related to the Applicant's dismissal. With respect to the Applicant's dismissal grievance, the evidence indicates that it was filed on or about December 20, 2006 by Mr. Don Puff. The Applicant testified that he did not get a copy of the grievance until much later and that, upon receiving it, discovered it contained an error as to the date, which indicated "*December 20, **2007***." The Applicant took the position that this error was "*very suspicious*", believing that the Union may not have filed a grievance with respect to his dismissal. The Applicant maintained his belief that something was "*suspicious*" with his dismissal grievance notwithstanding the fact that the Union did, in fact, advance his grievance up to and through arbitration.

[37] The documentary evidence discloses that, since the Union had already agreed to proceed to arbitration with the disability grievance, the Union asked the Employer to use one (1) arbitrator to hear both grievances as the same time. The documentary evidence discloses

numerous correspondences during the winter of 2007 between the Employer and the Union organizing and preparing for arbitration for both grievances. Through these documents, most of which were signed by Mr. Moran, the parties agreed to the selection of Mr. Robert (Bob) Pelton as a sole arbitrator, together with various other procedural matters. Although the Employer agreed to a single arbitrator for both grievances, the Employer would not agree to hearing both grievances together. Rather, the disability grievance was scheduled to be heard first, with the dismissal grievance to be heard thereafter. As a consequence, the Union was required to prepare for two (2) separate arbitration proceedings; albeit with the same arbitrator hearing both.

[38] The Union assigned their in-house legal counsel to prosecute the Applicant's grievances, whom in the first instance was Mr. Peter Barnacle until July of 2007 and Ms. Crystal Norbeck thereafter. As early as December of 2006, the Union's legal counsel was seeking medical information from the Applicant's doctor and was coordinating the preparation of reports and information with respect to the Applicant's medical condition. At that time, the Applicant had been a patient of Dr. Jayaprakash, who recommended that the Union obtain an independent psychiatric report. The Applicant testified that he was aware that the Union had been required to contact numerous physicians before one agreed to undertake the necessary assessments and provided the desired report. All of these activities took time to complete. This delay was the source of considerable frustration for the Applicant. The Applicant testified that he understood that the Union was paying for these costs.

[39] At this same time, in June of 2007, the Applicant continued to believe that the Employer's Harassment and Discrimination Prevention policy was "*illegal*" and that the Union had actively participated in what the Applicant referred to as the "*criminal*" procedures undertaken by the Employer pursuant thereto. The documentary evidence discloses that on or about June 21, 2007, the Applicant wrote to the Executive Director of Saskatchewan Labour Standards, again asking for the "*immediate intervention*" of the Department of Labour, alleging "*proven criminal actions and criminal intent*" on the part of Mr. Don Puff and the CUPE Local. In addition, the Applicant began providing copies of his documents to third parties such as Mr. Dave Forbes (the then Minister of Labour), Mr. Lorne Calvert (the then Premier of the Province), Mr. Brad Wall (the then Leader of the Opposition), and Mr. Frank Quennell (the then Minister of Justice). No evidence was tendered as to the disposition of these complaints. In cross examination, the Applicant admitted that involving these other parties may well have been

distracting for the Union, causing them to respond to multiple requests for information related to his proceedings, but generally he felt doing so was helpful in getting action from the Union.

[40] As indicated earlier, part of the Applicant's concern with the Union was frustration with the time it took to proceed to arbitration. The other component of the Applicant's concern was his perception that the Union was not answering all of his questions. The Applicant testified that he made numerous phone calls to the Union, often after normal office hours, leaving numerous messages on the Union's answering service. In cross examination, the Applicant admitted that some of these messages were, in his words, "*righteously indignant*." In July of 2007, the Union wrote to the Applicant indicating that his messages were "*unacceptable*" and that, if he continued with this conduct, it would result in the Union "*dropping his file*." The Applicant also wrote numerous letters seeking clarification of various points and demanding specific action on the part of the Union. The documentary evidence discloses that the Union wrote numerous letters to the Applicant responding to his phone calls and letters. Letters were specifically sent by the Union to the Applicant on July 3, 2007, October 3, 2007, October 17, 2007, November 26, 2007, November 30, 2007, December 10, 2007, and December 17, 2007 updating him on the status of his grievances and his various requests for information. The documentary evidence also discloses that the Union routinely copied the Applicant on correspondences with the Employer, the Employer's counsel, and the medical professionals being consulted in preparation for his grievances. In cross examination, the Applicant admitted that he routinely received documents from the Union regarding his grievances. Nonetheless, the Applicant continued to believe that he was not being copied on "every" document that he should have been.

[41] The documentary evidence indicates that the Union took the position, based on the advice of the Applicant's doctor, that it was necessary to obtain an independent verification of the Applicant's medical condition prior to proceeding to arbitration. Obtaining an independent medical assessment took longer than anticipated and delayed proceeding to arbitration. The Applicant cooperated with the Union in obtaining the independent assessment recommended by the Applicant's doctor, although, at times, the Union had difficulty contacting the Applicant. The Applicant testified that he signed several medical releases for the purpose of obtaining the desired assessment. The Applicant also testified that he understood the Union was paying for the costs associated with obtaining this medical information.

[42] At the same time as the Union was attempting to coordinate medical information to advance the Applicant's grievance, the Applicant believed that the Union should be obtaining the Employer's phone records; presumably to prove that he had called or attempted to call the Employer on the date and time he alleged. The documentary evidence discloses that the Union repeatedly sought these records from the Employer. The Applicant understood that the Employer took the position that it did not have individualized phone records of the nature sought by the Applicant/Union, a position which the Applicant disputed. When the Employer indicated that it was unwilling to volunteer this information, the Union took the position that, if they needed this information, it could be obtained through a subpoena issued for the arbitration hearing. The Union communicated its position to the Applicant by letter dated July 3, 2007. The Applicant testified that he believed that the Union could have, and should have, obtained the Employer's phone records prior to arbitration.

[43] Throughout the summer of 2007, the Applicant continued writing numerous letters to the CUPE National complaining about Mr. Puff and continuing to allege "*criminal activities*" on the part of both Mr. Puff and the CUPE Local. These letters were disrespectful and sarcastic and were copied to numerous third parties such as Lorne Calvert, Brad Wall, Stephen Harper, Rob Nicholson, Frank Quennell, Bob Pelton and Dave Forbes.

[44] Also at the same time as the Union was preparing for the Applicant's grievances, the Applicant sought assistance from the Union in obtaining a Statement of Employment from the Employer. The Applicant believed that examining how the Employer had completed this document may well be of assistance in the Applicant's dismissal grievance. The documentary evidence discloses that, while the Union sought this information on the Applicant's behalf, for reasons that were not entirely clear from the evidence, the Applicant did not receive this document in a timely fashion. Furthermore, the Applicant testified that, when he finally did get a copy of a Statement of Employment, which was transmitted from the Employer's counsel to the Union's counsel to the Applicant, it contained an error. The documentary evidence indicates that the nature of the error was that it contained the wrong termination date. The Applicant found this error egregious in the extreme, particularly when coupled with the fact that he (and not the Union's counsel) discovered the error. More on the Applicant's response to the impugned error in the first Statement of Employment will be discuss later in these reasons. The Applicant testified that it was he who discovered this error and he who notified the Union. Upon being advised of the error in the Statement of Employment, the Union asked the Employer to

provide a corrected document, which was ultimately provided by the Employer to the Union and from the Union to the Applicant.

[45] In December of 2007, the Applicant asked the Union to consider the potential of him receiving "severance pay" (a payment pursuant to Article 12.22 of the Collective Agreement) from the Employer. He asked Ms. Norbeck, the Union's counsel, to investigate this potential, which she did. In a letter dated December 17, 2007, Ms. Norbeck wrote to the Applicant and explained her conclusions that, in her opinion, "*it is unlikely that you are entitled to severance pay pursuant to Article 12.22*." Ms. Norbeck's letter goes on to state that the Union does not intend to raise this argument on behalf of the Applicant during the dismissal grievance.

[46] The documentary evidence discloses that, in the fall of 2007, the Applicant had been attending to the University of Regina and, in the Employer's opinion, had made "*repeated displays of anger and threatening conduct*" toward other employees. By letter dated December 10, 2007 from the Employer, the Applicant was asked to "*cease and/or alter the nature of [his] communication with staff*." While in cross examination, the Applicant minimized any inappropriate conduct on his part and did indicate that he voluntarily agreed to stay away from the University thereafter. In addition, the documentary evidence also discloses that by letter dated December 17, 2007, the Applicant was cautioned again by the Union regarding the messages he was leaving and asked to stop calling and that in the future he should correspond in writing.

[47] On January 18, 2008, the Union's counsel wrote to the Applicant to provide an update on the conduct of the upcoming grievances, which letter contained the following information:

> *You have asked me to provide you with an itinerary list or agenda for the arbitration. The disability grievance will be heard initially on May 28th and 29, 2008. During that time, we will raise evidence of your disability and prove the Employer had a duty to accommodate you. Furthermore, I will attempt to prove that the Employer inappropriately denied your sick leave in 2006. To prove your case, you will be called as a witness and medical evidence will be tendered. We will likely require the expert testimony of your family doctor. The onus to prove your claim in the disability lies with the Union.*
>
> *The onus in the termination grievance lies with the Employer. The Employer must prove that your termination was appropriate under the circumstances. Again, the Union will call you as a witness to discuss your absence from work just prior to your termination. On the Employer's side I suspect that your*

> *Manager or Supervisor will be called and, potentially, someone from the Employer's human resources.*

[48] This January 19, 2008 letter from the Union also provided the Applicant with information as to his ongoing desire that the Union obtain a copy of the Employer's phone records for October 9, 10, 11, and 12 of 2006 and contained the following information:

> *Finally, you have asked if we have copies of Aramak's telephone records. The answer is no. I have not requested Aramark's phone records in some time. The termination grievance is Aramarks's case to prove and we do not need their phone records in your defence. Instead, we will rely on your personal telephone records to disprove Aramark's theory of the case.*

[49] In the midst of preparation for the arbitration hearing, the Applicant commenced upon two (2) new courses of action; firstly, the Applicant began communication directly with Mr. Pelton, alleging "*bias, conflict of interest, corruption, willful negligence, fraud and professional incompetence*" on the part of the Union's counsel, whom at that time was Ms. Crystal Norbeck. The Applicant also demanded that Mr. Pelton appoint independent legal counsel for the Applicant; and secondly, the Applicant filed a complaint with the Law Society of Saskatchewan demanding the debarment of the Union's previous counsel, Mr. Peter Barnacle.

[50] With respect to the Applicant's desire for the appointment of independent legal counsel, the documentary evidence discloses that the Applicant first wrote to Arbitrator Pelton on January 29, 2008, with subsequent letters on February 23, 24, 25 and 26, 2008, and March 5, 2008. The Applicant also began providing Mr. Pelton with copies of documents he was writing to other parties, such as the Law Society of Saskatchewan. Finally, the documentary evidence discloses that many of the documents the Applicant was writing at that time, including the letters written to Mr. Pelton, were being copies to third parties, such as Stephan Harper, Rob Nicholson, Brad Wall, Rob Norris and Don Morgan. Mr. Pelton wrote to the Applicant on February 5, 2008 and advised that he had no knowledge of any authority to appoint independent legal counsel for the Applicant. Thereafter, Mr. Pelton's response was to forward all correspondence from the Applicant (unread) to the Union's counsel, Ms. Norbeck.

[51] On or about January 16, 2008, the Applicant did file a complaint with the Law Society of Saskatchewan demanding the debarment of Mr. Peter Barnacle. On or about February 8, 2008, the Applicant filed a complaint with the Law Society of Saskatchewan

demanding the debarment of Ms. Crystal Norbeck. In support of his allegations, the Applicant wrote to the Law Society on February 21, 22, 23 and 24, 2008 alleging "*bias, conflict of interest, corruption, willful negligence, fraud and professional incompetence"* on the part of Ms. Norbeck. The Applicant's primary complaints to the Law Society with respect to Ms. Norbeck appears to have been that she refused to "acknowledge" what the Applicant believed to be criminal conduct on the part of the CUPE Local and, in particular, Mr. Puff (relating back to the Applicant's participation in the Employer's "illegal" and "criminal" harassment policy) and that he could not "instruct" Ms. Norbeck directly. Both Mr. Barnacle and Ms. Norbeck provide detailed replies to the Applicant's allegations; Mr. Barnacle writing to the Law Society on February 6, 2008 and Ms. Norbeck on March 3, 2008. Upon reviewing the information provided, Ms. Reche McKeague, the Assistant Complaints Counsel for the Law Society of Saskatchewan, decided to take "no further action" with respect to the Applicant's complaints. Not satisfied with this decision, the Applicant asked that his complaints be referred to the Law Society's Complaint's Review Committee. The documentary evidence indicates that this further review was conducted by Mr. Fisher of the Law Society, who also dismissed the Applicant's claims.

[52] Although limited evidence was tendered during the hearing, the documentary evidence also discloses that the Applicant filed a complaint with the Law Society with respect to Ms. Susan Barber, counsel for the Employer with respect to her participation in the transmittal of the erroneous Statement of Employment. In addition, there was some evidence that the Applicant also filed a complaint with the Law Society with respect to Mr. Fisher. Furthermore, the evidence indicates that by letter dated May 28, 2008, the Applicant also wrote to the Minister of Saskatchewan Justice, as well as the Minister of Justice for Canada, demanding that Mr. Fisher, Ms. McKegue and Ms. Barber be disciplined and removed from their positions with the Saskatchewan Law Society.

[53] In a letter dated March 5, 2008, Ms. Norbeck wrote to the Applicant attempting to respond to the various concerns expressed by the Applicant to the Law Society, as well as to discourage the Applicant from continuing to contact Arbitrator Pelton. The Union also wanted to arrange a meeting with Applicant to prepare for the upcoming arbitrations. The content of Ms. Norbeck's March 5, 2008 letter was as follows:

> *Further to your correspondence of January 16, 2008, I believe I have already responded to your request for a written list of issues that will be presented at the upcoming arbitrations (reference my letter to you dated January 18, 2008).*

> *In your correspondence of January 16, 2008, you outline your understanding of the issues that will be presented on your behalf at the arbitration. Your understanding is incorrect, we will* ***not*** *be raising any allegations against Mr. Puff and CUPE Local 1975-01. It is CUPE Local 1975-01 that I represent and the issues raised at arbitration will relate solely to the disability grievance of 2006 (denial of sick leave) and your termination in October 2006.*
>
> *I also note that you refer to the upcoming arbitration as <u>against</u> Aramark, the University of Regina and CUPE 1975-01. To be clear, it is CUPE Local 1975-01 that holds conduct of your grievances and it is CUPE Local 1975-01 that makes the decisions whether or not the grievances proceed to arbitration. The arbitration in respect of your grievances are being* ***pursued*** *by CUPE Local 1975-01 on your behalf and the arbitration will <u>not</u> be deciding anything against CUPE Local 1975-01 or Mr. Puff.*
>
> *I must also reiterate my request to you that you stop contacting the arbitrator, Robert Pelton, directly. He had indicated to me that you have sent five more letters recently and will not be responding to you. It is highly inappropriate for you to be contacting the arbitrator directly and, as indicated in my previous correspondence to you, it could jeopardize Mr. Pelton's ability to hear the upcoming arbitrations. If Mr. Pelton chooses to excuse himself or the employer raises an objection to his hearing the arbitration due to the suggestions of bias, we will have to start from square one and seek out a new arbitrator. This will only serve to delay matters further.*
>
> *At this time I am asking that you attend a meeting with me, Don Puff, President CUPE Local 1975-01 and Don Moran, CUPE National Representative. The meeting will take place at the CUPE Saskatchewan Regional Office, 3731E Eastgate Drive on Tuesday, March 25, 2008 at 10:00 am. The purpose of this meeting is to further discuss the parameters of the upcoming arbitration and the evidence that may be submitted on your behalf.*

[54] In cross examination, the Applicant admitted that he did not attend the March 25, 2008 meeting. The documentary evidence discloses that the Applicant phoned the morning of the meeting to advise that he would not be attending.

[55] On March 31, 2008, Ms. Norbeck wrote to the Applicant on behalf of the Union again stating the following:

> *Further to your correspondence of March 17th, 2008, I wish to clarify a number of issues. I had requested Mr. Puff to attend the meeting of March 25th, 2008, simply because he is the Local president and grievance chair. You then responded, indicating that you did not want Mr. Puff to attend and we arranged to have another member of the Local Executive present. The meeting did not proceed as you contacted my office to cancel the meeting the morning of March 25th, 2008.*
>
> *In response to your questions, I can advise as follows. Mr. Puff is not "meddling" in your file. He is the Local President and grievance chair and, as such, is obliged to assist when grievances are advanced. Mr. Puff is not in charge of requesting your Record of Employment ("ROE"). He may have made*

the request in the past, but as you have seen by my letters of January 7th, 2008, January 17th, 2008, February 4th, 2008, and February 25th, 2008 to Sue Barber (copies enclosed), I have assumed conduct of the matter and I have requested your ROE.

You continue to ask about the Aramark telephone records. As I have advised, I do not believe the Aramark telephone records are necessary in this matter. Again, Aramark has the onus to prove that your termination was appropriate. You have already provided copies of your telephone records proving that you contacted Aramark and I believe this is sufficient to prove that you did, in fact, contact Aramark during the timeframe in question. The Local and I will not be requesting Aramark's telephone records.

In respect of your questions about the time delay (referring to the request for your ROE, the Aramark phone records and the Aramark dismissal letters), I do not have an answer for you. We are still working on the ROE, I have explained my position in respect of the Aramark phone records and you have copies of the dismissal letters. I am not sure what else we can do for you in this regard.

The grievance in respect of your termination was <u>not</u> filed in December 2007. I have explained this to you on more than one occasion, including during our last meeting that took place <u>before</u> December 2007. At that meeting, we reviewed the grievance and noted that the date was incorrect. The grievance was filed on December 20th, 2006. If you look at the top of the page you will see a fax notation dated September 24th, 2007. Clearly, this document was in existence before December 2007.

Kindly refrain from any further references to Mr. Puff, your allegations of fraud, bullying, corruption and referring to Mr. Puff as the "employer's boy". Your continued allegations in this respect do nothing to assist in moving your grievances forward. In fact, I am spending an excessive amount of time answering your allegations and wish to focus more time and energy on the pertinent to your arbitrations.

I have no information in respect of your complaints against Marni Hubelit and Don Puff, nor do I believe it pertains to grievances and impending arbitrations. Furthermore, I have no information about your co-workers, their time off work and how the employer handled those matters.

I have re-scheduled the March 25th, 2008 meeting to Tuesday, April 8th, 2008 at 2:00 pm. The meeting will take place at our office, 3731 E. Eastgate Drive and should take approximately one hour. Present for the meeting will be myself, Don Moran and Brad martin, 1st Vice-President of Local 1975-01. The purpose of this meeting is to further discuss the parameters of the upcoming arbitrations and the evidence that may be submitted on your behalf. I require your cooperation to move these matters forward and ask that you make an attempt to work with me from this point forward.

[56] In cross examination, the Applicant admitted that he did not attend the April 8, 2008 meeting with the Union. Asked why he did not attend, the Applicant indicated that he had a "*weak immune system*" and that he thought he had a "*cold*"; stating that "*I get sick*."

[57] On April 9, 2008, Ms. Norbeck wrote to the Applicant on behalf of the Union, her letter stated the following:

> *Further to my correspondence of March 31st, 2008 and your subsequent telephone message of April 2nd, 2008 to Don Moran, I am writing to follow up with you about our meeting scheduled for April 8th, 2008 at 2:00 pm. Don Moran, Brad martin and I were present waiting for the meeting to proceed but it became clear by 2:40 pm that you were not attending. You cancelled the March 25th meeting but did not provide a reason for the cancellation. I rescheduled that meeting to April 8th, 2008 and you did not attend, nor did you provide any notice or a reason for your failure to attend.*
>
> *I must reiterate the importance of meeting with you. It is important that we further discuss the parameters of the upcoming arbitrations and the evidence that may be submitted on your behalf. I wish to discuss evidentiary issues with you, including the medical evidence I would like to submit at the disability/sick leave grievance. As indicated in previous correspondence, I require your cooperation to move these matters forward.*
>
> *I have again re-scheduled the meeting to Thursday, april 24th at 10:00 am. The meeting will take place at our office, 3731 E. Eastgate Drive and should take approvimately one hour. Present for the meeting will be myself, Don Moran and Brad Martin, 1st Vice-President of Local 1975-01. Melanie Medlicott, the Regional Director may be in attendance, but I have yet to confirm the same.*
>
> *If you are unwilling or unable to attend the above-noted meeting, kindly advise our office as soon as possible. I ask that you indicate a reason why you are unable or unwilling to attend the meeting.*
>
> *I must advise that your continued refusal to meet with us in respect of your grievances will jeopardize the Local's ability to take the matters to arbitration. Should you fail to respond to this letter or attend the meeting noted above, the Local may decide to withdraw the grievances as a result of your failure to cooperate with us.*
>
> *Finally, I enclose a copy of correspondence receive from counsel for Aramark in respect of our requests for your record of employment.*

[58] During preparation for arbitration, an issue arose related to the Employer's request for access to the Applicant's full medical and phone records. The documentary evidence discloses that in May of 2008, in the normal exchange of documents that takes place prior to such proceedings, the Union's counsel had provided copies of various medical notes that the Union indicated that it "*may relay upon at the upcoming arbitration*", together with portions of the Applicant's phone records. In response, the Employer's counsel sought the Applicant's full phone records, together with Dr. Adams' medical file (the doctor who issued the medical note relevant to the Applicant's dismissal grievance). The documentary evidence indicates that the Union advised the Applicant of these requests and that these requests were appropriate.

[59] With respect to the phone records, the Applicant testified that he was upset that he was required to provide more of his phone records to the Employer. The documentary evidence indicates that the Employer was seeking the remaining pages from the Applicant's telephone records for October of 2006. The Applicant indicated that he was upset at the Union, that at this point he was "*rebellious*", that he felt the Employer's request was "*intrusive*", and that, although he didn't want to give them his records, he did provide the desired document. More on the Applicant's phone records will be discussed later in these Reasons. However, the evidence indicates that the Applicant provided his phone records to both the Employer and the Union at the same time, at a pre-hearing conference.

[60] With respect to the medical records, the Applicant testified that he was willing to provide access to his medical records for the purpose of the disability grievance but was reluctant to do so for the dismissal grievance. The Applicant testified that he did not believe the dismissal grievance was a "*medical case*." Furthermore, the Applicant testified that he was contacted by Dr. Adams (after the doctor had received a subpoena to testify at the Applicant's disability grievance) and that his doctor had expressed concern about having to testify; in the Applicant's words, his doctor had "*freaked*". The Applicant stated that his doctor was new to the country and was concerned about being away from the office. The Applicant testified that he settled his disability grievance with the Employer so that his doctor would not have to testify. More on the settlement of the Applicant's disability grievance will be discussed later in these Reasons. The Applicant testified that he argued with Ms. Norbeck about his belief that the Employer should only have access to "*relevant*" documents in his medical file, that their request for full access was "*highly instrusive*" and "*unreasonable*". The Applicant testified that he did not believe that his <u>whole</u> medical file was relevant (*i.e.* Dr. Adam's medical file). The Applicant testified that he did not understand that if he did not provide access to his medical file, his medical note could not be produced during his dismissal grievance.

[61] On May 12, 2008, the Union's counsel wrote to the Applicant regarding both the issue of the phone and medical records. The document read as follows:

> *Further to my letter of May 8, 2008 and your telephone message of today's date, I am writing to confirm my request for your entire phone record. CUPE is not interested in any phone calls made or received by you, except for the calls made to Aramark. What we are interested in is obtaining the pages that show what each column represents. For example, a phone number is listed on the page*

> *you provided. I assume that the first page indicates that one column is the number of origin, another column is the number called, another column is the length of the call, et cetera. The remaining pages would assist to prove the authenticity of the document and I ask that you provide them as soon as possible. If you are uncomfortable with disclosing the phone calls, we would easily black out all irrelevant calls (i.e. any calls not made to Aramark) prior to providing the same to Aramark.*
>
> *I enclose a copy of my recent correspondence to Sue Barber, solicitor for Aramark, for your records. She contacted me by telephone on Friday, requesting the entire telephone records and has since followed up that request in a letter (copy enclosed).*
>
> *You will note that Ms. Barber is seeking clarification in respect of the benefits you received during the February – June, 2006 time period. I will confirm that you received sick benefits through EI at that timeframe, but ask that you advise if you obtained benefits from any other source. As well, please advise of the total amount received from EI during this period.*
>
> *You will also note that Ms. Barber has requested a copy of Dr. Adams' file. You may recall that I spoke to you about Dr. Adams' file during our last meeting and you refused consent for me to obtain Dr. Adams' file. I also indicated that we may need to call Dr. Adams as a witness but again, you refused. At this point it does not sound like Aramark will request to cross-examine Dr. Adams on his medical notes, but the request for his medical file is appropriate. If we refuse this access, Aramark will likely raise this with the Arbitrator and seek a production order. In my opinion, they have a good chance at being successful in seeking a production order so it would be prudent to provide the information up front. If we refuse the medical file and we later are ordered to provide the same, it could delay the hearing or possibly lead to an adjournment. Please consider providing consent for me to obtain a copy of Dr. Adams' file for the upcoming arbitration. To this end, I enclose a form of consent which I ask you complete and drop off at my office as soon as possible.*

[62] The evidence did not disclose who initially approached whom with respect to a settlement of the Applicant's disability grievance. However, the Employer made an offer of settlement to the Union that was communicated to the Applicant on May 23, 2008. This offer was accepted and formed the basis of Minutes of Settlement signed by the Employer, CUPE Local and the Applicant on or about June 28, 2008. In this settlement, the Applicant received compensation in the amount of $5,309.71 representing benefits for a 79 day period covering February 28, 2006 to June 16, 2006, a period for which the Applicant had not work but was denied benefits under the Employer's short term disability plan. The documentary evidence would indicate that this settlement was reached just weeks prior to the scheduled arbitration.

[63] As a consequence, by the end of May of 2008, only one (1) grievance was left to be resolved; that being the Applicant's dismissal grievance. Because of the Applicant's reluctance to voluntarily produce his full phone records and his medical records, the Employer

sought and obtained a subpoena for Dr. Adams, which subpoena included a directive that the doctor bring "*all medical records, documents and work materials in your possession*" related to the Applicant. The Employer also made an application to Arbitrator Pelton for an Order compelling the production of the Applicant's phone records. The documentary evidence discloses that the Union then altered its position with respect to their reliance on the medical note of October 10, 2006. In response, the Employer relieved Dr. Adams from the *subpoena duces tecum.* In cross examination, the Applicant denied directing the Union not to call his doctor as a witness.

[64] A pre-hearing conference was conducted on May 28, 2008 at which the Applicant was present. During this conference a number of things transpired; two (2) of which were relevant to these Reasons. Firstly, Arbitrator Pelton asked at the outset of the hearing if anyone had any objection to his jurisdiction to hear; and secondly Arbitrator Pelton suggested that the parties consider a monetary settlement as an alternative to the Applicant's desire for reinstatement.

[65] With respect to Arbitrator Pelton's jurisdiction, the documentary evidence indicates that, in prior correspondence to Mr. Pelton, the Applicant had raised a number of objections to Mr. Pelton hearing his grievance, including his unwilling to appoint independent counsel for the Applicant. The evidence indicates that the Applicant was present at the pre-hearing, but did not object to Mr. Pelton's jurisdiction to hear and determine the dismissal grievance. More on the Applicant's complaints regarding Arbitrator Pelton will be discussed later in these Reasons.

[66] With respect to settlement discussions, the Applicant testified that he discussed the potential for settlement of the grievance with the Union and indicated that, at that time, he would have accepted a monetary sum in the range of $60,000 (after taxes).

[67] The documentary evidence indicates that the dismissal grievance was conducted on June 4, 5 and 6, 2008 in Regina before Arbitrator Pelton. The Employer called five (5) witnesses, including the Employer's Foodservice Director, the then Assistant Foodservice Director, the previous Assistant Foodservices Director, and the Director of Human Resources for Western Canada. The Union called the Applicant, Mr. Puff and Mr. Dunford. Upon hearing

evidence and argument from the parties, Arbitrator Pelton reserved his decision and adjourned the proceedings.

[68] It appears that following the close of the grievance case, the Union renewed their recommendation that the Applicant reconsider his position on the issue of a monetary settlement, including the quantum thereof. The documentary evidence discloses that, by letter dated June 6, 2008, the Union's counsel communicated her impression that, even if the Applicant's claim is accepted, Arbitrator Pelton may not be inclined to reinstate the Applicant to his former position. Ms. Norbeck cautioned the Applicant that there was risk that the grievance could be dismissed and that the Applicant many not receive any money or his job back. Ms. Norbeck provided a formula (of 1 month per year of service plus a 15% top up for benefits) for the Applicant to consider in terms of a monetary settlement.

[69] During the dismissal grievance, the Union did not tender Dr. Adams medical note of October 10, 2006 as evidence in the dismissal grievance. Following the arbitration hearing, the Applicant contacted the Union to understand why the medical note had not been tendered as evidence and why Dr. Adams had not been called to testify. Mr. Moran replied to the Applicant by letter dated June 13, 2008 and advised the Applicant as follows:

> *Further to your telephone messages of earlier this week, you have asked me to confirm that your doctor's note of October 10th, 2006 was not used at the arbitration hearing last week. You are correct; we did not enter the doctor's note into evidence. You advised us that you did not provide the doctor's note to Mr. Rush or anyone at Aramark. With that in mind, our ability to enter it into evidence is limited. On top of that, we had intended on entering the note into evidence until you refused access to Dr. Adams' medical file. When Mr. Pelton granted a subpoena for your medical file you were extremely upset and advised that under no circumstances would your file with Dr. Adams be presented at the hearing.*
>
> *On Wednesday, May 28th, 2008 you were present while we dealt with a number of preliminary issues with Mr. Pelton. We took a break during that hearing to explain the necessity of Dr. Adams' file and you again refused access to the same. It was at that point that Ms. Norbeck advised that we could not use the doctor's note if you refused access to your file. You agreed and then we advised Mr. Pelton and Aramark that we would not be relying on the doctor's note and access to Dr. Adams' file was not necessary.*
>
> *I also note that Ms. Norbeck wrote to you recently outlining the terms of a potential settlement. I ask that you kindly confirm if you are willing to agree to the terms as stated or some other terms of settlement, otherwise we will simply await the outcome of Mr. Pelton's decision. In my opinion, it is in your best interest to consider a monetary settlement in the event that Mr. Pelton's decision is not favorable.*

We hope to hear from you soon.

[70] The Applicant testified that the second paragraph of the above captioned letter was a complete lie; that he had never "refused" access to his medical file during the break at the pre-hearing conference. After reviewing Ms. Norbeck's letter of June 13, 2008, the Applicant's response was to increase his desired quantum for a monetary settlement to $75,000 (after taxes).

[71] Arbitrator Pelton's decision in the Applicant's dismissal grievance was rendered on July 11, 2008. The crucial issue in the grievance was whether or not the Applicant had called to report his absence from work as required by the company's policy. The Employer's witnesses each denied having received a message or direct call from the Applicant stating that he would not be in during the days in question. The Applicant, on the other hand, maintained that he did. Arbitrator Pelton, noting that each of the Employer's witnesses gave their evidence in a straightforward manner, without attempting to embellish or overstate it, accepted the evidence of the Employer. Artitrator Pelton concluded that the Applicant's evidence was contradictory and that he displayed a propensity to overstate matters, citing numerous examples from the Applicant's testimony during the hearing.

[72] Simply put, Arbitrator Pelton did not find the Applicant to be a credible witness, concluding that "*his evidence was simply not consistent with the probabilities that surrounded the conditions which existed in the fall of 2006*." Arbitrator Pelton found that the Applicant was absent from work on the days in question; that (on the balance of probabilities) the Applicant had not phoned in as required; and that, as a consequence of doing so, the Applicant was deemed to have vacated his position and his employment terminated by operation of Article 10.2(f) of the Collective Agreement in place between the parties.

[73] During the dismissal grievance, Arbitrator Pelton heard evidence of the Applicant's complaints to the Law Society respecting Ms. Norbeck, Ms. Barber, Ms. McKeague and Mr. Fisher, as well as the Applicant's correspondence to the Ministers of Justice (both Saskatchewan and Canada). Furthermore, Arbitrator Pelton heard evidence of the Applicant's numerous internal and external complaints about his Union and various officials thereof, taking particular note that in his correspondence the Applicant was "*extremely dismissive*" and "*contemptuous*" of the Union, specifically referring to certain individuals as "*malignant and*

maggot-like." In his reasons, Arbitrator Pelton commented that the Applicant's credibility was undermined by his attacks on his Union, its representatives, his Employer, legal counsel for both the Union and the Employer, the lawyers connected with the Law Society and, in particular, the Applicant's characterization of their individual conduct with language such as "*incompetent*", "*fraudulent*", "*corrupt*" and "*criminal*."

[74] Finally, Arbitrator Pelton concluded that, had he found in favour of the Applicant (regarding his compliance with the collective agreement), he would not have ordered his reinstatement concluding that the employment relationship was "*totally beyond repair*" due in large part to the Applicant's own conduct.

[75] Following the receipt of Arbitrator Pelton's decision, the Applicant renewed his allegations that Mr. Pelton was not neutral and was in a "conflict of interest"; this time because both he and the Employer's counsel, Ms. Barber, were connected to the University of Regina; Mr. Pelton on the Board of Directors of the U of R Rams; and Ms. Barber on the Board of Governors of the University. The documentary evidence discloses that the Applicant wrote to CUPE National on or about July 28, 2008 and August 6, 2008 complaining about the conduct of his dismissal grievance and seeking an appeal of Arbitrator Pelton's decision. The tone of the Applicant's letters was disrespectful, was demanding and was sarcastic. The Applicant also copied his letters to numerous third parties, including "*Brad Wall, Premier; Don Morgan, Justice Minister; Rob Norris, Labour Minister; John Klebuc, Chief Justice of Saskatchewan; Stephen Harper, Prime Minister; Rob Nicholson, Justice Minister (Canada); the Leader Post; C.B.C. Radio and T.V.; Doug Moen, Q.C. Deputy Minister of Saskatchewan Justice; Daryl Rayner, Q.C., Executive Director of Sk. Public Prosecutions*" and "*Mr. Bob 'U of Regina' Pelton*."

[76] The Union sent a copy of Arbitrator Pelton's decision to CUPE National for review. This review was completed by Ms. Rosenberg, in her capacity as Acting Director, Legal Branch of CUPE National on August 25, 2008. Ms. Rosenberg, upon reviewing the decision, considering the standard of review and the applicable jurisprudence, concluded that there was "*virtually no possibility that a review court would disturb Arbitrator Pelton's decision*." In her opinion, Ms. Rosenberg specifically addressed the Applicant's allegations regarding Arbitrator Pelton's neutrality and concluded that "*it is highly unlikely that a reviewing court would question Arbitrator Pelton's neutrality simply because he is on the Board of Directors of the University [Rams] and Susan Barber is on the Board of Governors of the University*." Ms. Rosenberg's

opinion was communicated to the Applicant on or about August 27, 2008. In communicating Ms. Rosenberg's opinion, the Union advised the Applicant that the Union intended to take no further action regarding his dismissal grievance.

[77] The documentary evidence discloses that on or about September 2, 2008, the Applicant wrote to CUPE National complaining of "*professional incompetence and deficiencies*" of Ms. Norbeck, Mr. Moran, Mr. Puff, and Ms. Rossenberg. In cross examination, the Applicant admitted that the complaints and concerns addressed in his September 2, 2008 letter did not really relate to Ms. Rossenberg but that he had "*just throw her name in with the rest*" in alleging professional incompetence.

[78] The documentary evidence discloses that a special meeting of the CUPE Local was held on or about October 8, 2008 at the University so that the Applicant could attend and ask the membership to seek judicial review of Arbitrator Pelton's decision in his dismissal grievance. The Applicant testified that he attended this meeting and explained to the membership his desire for judicial review to the membership. The Applicant testified that, in his opinion, the membership was only concerned about "saving money." The Applicant's appeal to the general membership was unsuccessful, with the CUPE Local declining to take any further action on his dismissal grievance.

[79] During the hearing, the Applicant testified that he suffered a disability in the form of "adjustment disorder" and "paranoia." The footnotes from the Applicant's medical file with Dr. Adams confirmed the Applicant suffered from both disorders. In describing the symptoms associated with his adjustment disorder, the Applicant testified that "*when I get backed into a corner, I get upset; I can say things; I don't get violent; but I can say things* …". In describing the symptoms associated with his paranoia, the Applicant testified that "*I worry a lot; I get scared and nervous*." The Applicant testified that he believed that the Union was aware of his disability.

Argument of Applicant:

[80] The Applicant alleged that the Union violated ss. 25.1 and 36.1 of the *Act* by reason of the following errors on the part of the Union:

1) The Union participated in the Employer's "Harassment and Discrimination Prevention" policy and failed to file a grievance against this policy;

2) Mr. Don Puff was biased toward the Applicant and yet participated in the Union's representation of him;

3) The Union was negligent (willfully or otherwise) in the prosecution of his grievance(s);

4) The Union failed to advance the argument of "severance pay" during the hearing of his dismissal grievance;

5) The Union failed to obtain and tender the Employer's phone records for October 9, 10, 11, and 12, 2006 in the Applicant's dismissal grievance;

6) The Union failed to tender Dr. Adam's October 10, 2006 medical note as evidence in the Applicant's dismissal grievance;

7) The Union failed to call Dr. Adams to testify during his dismissal grievance;

8) The Union refused to allow the Applicant to "instruct" Union Counsel with respect to the conduct of his dismissal grievance; and

9) The Union failed to answer all of the Applicant's questions and/or failed to provide him with copies of all documents related to his file.

[81] The Applicant reminded the Board that, with respect to the conduct of his dismissal grievances, the Union should be held to a higher duty of care.

[82] With respect to the desired remedy, the Applicant initially indicated he was seeking reinstatement to his former position with the Employer. Upon being advised by the Board that it did not have jurisdiction to grant reinstatement, the Applicant indicated that he was firstly seeking a "fair hearing" and from that "severance pay." In other words, if the Board was to find a violation of either ss. 25.1 or 36.1, the Applicant was seeking monetary compensation if he could not be reinstated to his former position by the Board.

Argument for Non-Suit:

[83] Counsel on behalf of the Union argued that, having regard to all of the evidence that was tendered by the Applicant, there was no evidence constituting a *prima facie* case of any violation of either ss. 25.1 or 36.1 of the *Act* on the part of the Union. In the alternative, the Union argued that, if there was some evidence of error(s) on the part of the Union, such evidence was insufficient to constitute a violation of the *Act*. In this latter respect, the Union relied upon this Board's decision in the case of *Glynna Ward v. Saskatchewan Union of Nurses and South Saskatchewan Hospital Centre,* [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, as standing for the proposition that honest mistakes and/or errors in judgment, if reasonable made following a thoughtful review, do not amount to a violation of the Union's duty of fair representation.

[84] The Union's position was that the evidence demonstrated that it represented the Applicant in numerous proceedings and that in each and every case it did so in a reasonable and appropriate manner, without discrimination or bad faith. The Union observed that the Applicant's conduct made him extremely difficult to represent because the Union was continually being forced to respond to a growing matrix of problems, all initiated by the Applicant's own conduct, including his persistent, unfounded allegations within the Union, to the Law Society, and other agencies, such as the Department of Labour.

[85] Simply put, the Union's position was that, not only was the Applicant not discriminated against, but, because of his disability, the Applicant received preferential treatment from the Union, including the provision of in-house legal counsel to coordinate and conduct his grievances; a treatment that most members do not receive. The Union observed that the Applicant's preferential treatment came at the expense of other members in the Union because it diverted the Union's scarce resources away from other important activities.

[86] The Union's position was that only once did anyone in the Union respond inappropriately to the Applicant. On this point, the Union observed that it was an isolated incident; that notwithstanding the incident, the Applicant received full, reasonable and appropriate representation; and that the Applicant's own conduct toward others far exceeded anything that anyone in the Union may have said to him.

[87] In support of the Union's application for non-suit, Counsel filed a book of authorities, for which the Board is thankful.

Statutory Provisions:

[88] The relevant provisions of the *Act* provide 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.*
>
> . . .
>
> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
> *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*
> *(3) No employee shall unreasonably be denied membership in a trade union.*

Analysis and Decisions:

[89] Every individual has both strengths and weaknesses. In the Board's opinion, the Applicant was clearly an intelligent and passionate individual. In representing himself, the Applicant displayed an impressive capacity for research and was tenacious in the pursuit of his cause, having researched numerous cases from various levels of courts and quasi-judicial boards on topics ranging from the "principles of natural justice" to the "duty of fair representation" to the meaning of "due process."

[90] On the other hand, the Applicant's application of his research to his own case was often misguided. The Applicant read a number of quotes to the Board from various cases citing conclusions or proposition that the Applicant' believed furthered his case; but did not provide copies of these cases to the Board. Unfortunately, it appeared to the Board that many of the cases the Applicant had researched had occurred in different factual contexts or were decided in other jurisdiction utilizing different legislative regimes or were dealing with different types of proceedings.

[91] Furthermore, many of the Applicant's claims against the Union are too old to now form the basis of an alleged violation of either ss. 25.1 or 36.1 of the *Act*, including all of the Applicant's allegations with respect to the Employer's "Harassment and Discrimination Prevention" policy and the allegations that the Union participated in this policy and/or later failed to "acknowledge" that this policy was illegal or criminal or otherwise defective in the manner suggested by the Applicant. See: *Dishaw v. Canadian Office and Professional Employees Union, Local 397*, LRB File No. 164-08 (unreported).

[92] 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.*

[93] The Board has recognized that a trade union does not breach its duty of fair representation by settling a grievance without the grievor's consent, even if it does so over the objection of the grievor, unless it acts in a manner that is seriously negligent, arbitrary, capricious, discriminatory or wrongful. 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.

[94] Furthermore, the Board has held that there is no breach of the duty of fair representation where a trade union withdraws a grievance after consulting with legal counsel, if it took a reasonable view of the circumstances and if it made a "thoughtful decision" not to advance the grievance. See: *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.

[95] The Board has also confirmed that it does not "sit on appeal" of a trade union's decision not to advance a grievance and, in particular, will not decide if a union's conclusion as to the likelihood of success of a grievance was correct. See: *Cabot v. Canadian Union of Public Employees, Local 4777 and Prince Albert Parkland Health Region*, [2007] Sask. L.R.B.R. 401, LRB File No. 158-06.

[96] Having provided considerable latitude to the Applicant in calling his evidence and presenting his case and having examined all of the evidence tendered by the Applicant, both oral and over two (2) inches of documentary evidence, the Board saw no evidence of a failure on the part of the Union to fairly represent the Applicant in his numerous grievances under the Collective Agreement and certainly no evidence that the Union conducted itself in any of these proceedings in a manner that was arbitrary, discriminatory, or in bad faith toward the Applicant within the meaning of s. 25.1 of the *Act*.

[97] The Applicant's evidence disclosed that he suffered from a cognitive disability in the form of paranoia and adjustment disorder. In the Board's opinion, the Applicant's disability was the likely source of his perception of bias, criminality, corruption, negligence, bad faith and discrimination toward him on the part of the Union. Contrary to the Applicant's assertions, the documentary evidence discloses a consistent pattern of representation by the Union for a member who was as a high consumer of the Union's representative services.

[98] To the extent that the Applicant was the subject of a conspiracy to undermine his employment relationship with the Employer and/or to disadvantage him in his grievance proceedings, the Applicant alone was the architect of that conspiracy. The Applicant's conduct in attacking his Union, its representatives, his Employer, the legal counsel for both the Union and the Employer, and the lawyers connected with the Law Society's review procedures was misguided. The Applicant compounded his error by attempting to embarrass or intimidate these individuals by communicating unfounded allegations to a broad range of individuals. Presumably, the Applicant's disability was the source of his behaviour; but for his disability, this conduct would have been deplorable and may well constitute actionable libel. Not only was this

conduct unfortunate for the subjects of the Applicant's allegations but it ultimately undermined his credibility as a witness before Arbitrator Pelton.

[99] This Board has little doubt that the Applicant's credibility in his grievance arbitration was undone; not by the absence of his doctor or the doctor's note or by the absence of the Employer's phone records; but by the Applicant's own conduct. In testimony, the Applicant tended to overstate his evidence and, in cross examination, the Applicant was often evasive; was concerned the "*lawyer was just using word play";* he wandered off topic rather than have "*words put in [his] mouth*" or he simply "*couldn't remember*"; and expressed his concern about "*say something that could be used against [him*]." Presumably, the Applicant's disability was a factor in both.

[100] The Board finds no violation of the *Act* in the Union's decision to not permit the Applicant to directly instruct the Union's counsel with respect to the conduct of his grievance proceedings. Grievances are the property of the Union and not individual members, even if such members are directly and significantly affected by the outcome of that grievance. See: *Lawrence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93.

[101] With respect to the impugned conduct of Mr. Puff, the Board found no evidence that the confrontation that occurred between Mr. Puff and the Applicant in any way affected the Union's representation of him. Presumably because of his disability, the Applicant was a high consumer of the Union's representative services and in each and every case the Union responded to the Applicant's request for assistance and advanced his concerns or claims to the Employer in a reasonable and appropriate manner. The Board has little doubt that there may have been times when the Union was reluctant, or may have appeared reluctant to the Applicant, in servicing the Applicant's escalating need for representation; particularly so at times when the Applicant was overtly dismissive and unfairly critical of the very persons from whom he sought assistance. Because of his disability, the Applicant would have been a very difficult member to represent. In this regard, the Union accommodated the Applicant's disability in two (2) ways; firstly, the Union provided in-house counsel to prepare for and conduct the Applicant's grievance proceedings; and secondly, the Union did not abandon the Applicant's file when repeatedly confronted by the Applicant's own destructive and inappropriate conduct.

[102] Now with the benefit of hindsight, the Applicant believes that the Union should have tendered Dr. Adams' medical note and/or should have called him to testify and/or should have obtained the phone records of the Employer. Similarly, the Applicant believes that the issue of severance pay should have been advanced on his behalf by the Union. The Applicant may also wish he could revisit the issue of a monetary settlement as suggested by Arbitrator Pelton following the pre-hearing conference. However, all of these issues are now "water under the bridge" and appropriately not matters falling within this Board's supervisory jurisdiction pursuant to either s. 25.1 of the *Act*. The Board will not now, with the benefit of hindsight, sit "on appeal" of a trade union's decision on how it should have conduct its arbitration, including which witness should have been called and/or what evidence should have been tendered and/or what arguments to advance or abandon, as the case may be. See: *Hildebaugh 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 and *Sheldon Mercer v. Communication, Energy and Paperworkers Union, Local 922 and PSC Mining LTD*, [2003] Sask. L.R.B.R. 458, L.R.B. No. 007-02.

[103] Simply put, the Applicant appeared to take the position that the Union was negligent in representation of him in that they were unable to achieve all of the goals that the Applicant desired in his dealings with the Employer. The exclusive right to represent a unit of employees brings with it many responsibilities for a trade union, but guaranteeing the desired outcome of each individual member in his/her dealings with the employer is not one of these responsibilities. In representing a member, a trade union is required to make a matrix of difficult decisions on how best to present, defend or prosecute a particular case, including what evidence to tender, which witnesses to call (if any), and which arguments to advance (and which to abandon). Each trade union must do so taking into account both the interests and needs of the individual member(s) directly affected, as well as the collective interests of the remaining members of work unit, as well as how best to allocate the trade union's scarce resources. The Board's supervisory duty pursuant to s. 25.1 is not to ensure that any particular member achieves his/her desired result; but rather is to ensure that, in exercising its representative duty, the Union does not act arbitrarily or in a discriminatory fashion or in bad faith.

[104] Finally, with respect to the Applicant's allegations that the Union violated s. 36.1 of the *Act*, the Board's approach to such allegations was summarized in *Nadine Schreiner v.*

Canadian Union of Public Employees, Local 59 and City of Saskatoon, [2005] S.L.R.B.D. No. 35, LRB File No. 175-04, as follows:

> *Section 36.1(1) of the Act confines the Board's supervision to disputes between union members and a union relating to matters in the union's constitution and the member's membership therein or discipline thereunder. The Board's supervision of those matters is further confined to determining whether the member has been afforded the right to the application of the principles of natural justice, as opposed to considering the merits or perceived correctness of the decision by the union. In McNairn, supra, the Saskatchewan Court of Appeal held that for the Board to assume jurisdiction pursuant to either s. 36.1 or s. 25.1 of the Act, the "essential character of the dispute" must fall within the subject matter of the provision. The Court stated as follows, at 370:*
>
> > *Thus sub-section 36.1(1) imposes a duty upon a union (again correlative to the right thereby conferred upon an employee), to abide by the principles of natural justice in disputes between the union and the employee involving the constitution of the trade union and the employee's membership therein or discipline thereunder. As such, the subsection embraces what may be characterized as "internal disputes" between a union and an employee belonging to the union, but it does not embrace all manner of internal dispute. For the subsection to apply, the dispute must encompass the constitution of the union and the employee's membership therein or discipline thereunder.*

[105] The Board saw no evidence that the Applicant's right to the application of the principles of natural justice within the meaning of s. 36.1 of the *Act* was violated by the Union. In this respect, the Board agrees with the Union that the Applicant appeared to hold an incorrect assumption as to the scope of the duty imposed on the Union by s. 36.1 of the *Act*; presumably based on the Applicant's research as to the meaning of "natural justice" in other contexts. In the present case, the Board saw no evidence the Applicant was denied the application of his rights as set forth in the Constitution of the Union, or was denied membership therein or was disciplined thereunder. To the contrary, when the Union declined to seek judicial review of Arbitrator Pelton's decision, the Applicant was appropriately afforded the opportunity to speak directly to the membership and explain his desire that judicial review be sought. The fact that the membership denied his appeal is not indicative of a breach of natural justice; but rather the membership's right to decide how best to allocation of the Union's resources.

Conclusion:

[106] In conclusion, having regard to all of the evidence that was tendered by the Applicant, including both oral and documentary evidence, the Board finds that there was no

evidence constituting a *prima facie* case of any violation of either ss. 25.1 or 36.1 of the *Act* on the part of the Union.

[107] The Union's application for non-suit is granted. The Applicant's applications are dismissed.

DATED at Regina, Saskatchewan, this **15th** day of **January, 2009**.

LABOUR RELATIONS BOARD

Steven Schiefner,
Vice-Chairperson