The Labour Relations Board
Saskatchewan

SANDRA GAIL McLEOD, Applicant v. CANADIAN UNION of PUBLIC EMPLOYEES, LOCAL 3766, Respondent

LRB File No. 015-07; February 3, 2010
Chairperson, Kenneth G. Love, Q.C

For the Applicant:	Mr. Mervin C. Phillips
For the Respondent Union:	Ms. Jodi L. Manastyrski
For the Employer:	Mr. Rod J. Rath

Duty of Fair Representation: Applicant requests Union file grievance against Employer. Applicant resigned from employment almost two years prior to request to file grievance. Board discusses situations where representation of employee warranted.

Practice and Procedure: Board discusses principles concerning issuance of Subpoena Duces Tecum. Reviews procedure to determine relevance of documents sought to be produced.

Practice and Procedure: Board discusses four questions tribunal must consider in determining if request to produce documents if *the demand* is oppressive and exceeds demanding parties necessities.

REASONS FOR DECISION

Background:

[1] The Applicant was employed by the Regina Public School Board. Canadian Union of Public Employees, Local 3766, the ("Union") was certified as the bargaining agent for a unit of employees of the Regina Public School Board, including the Applicant. On February 9, 2007 the Applicant filed this application with the Board alleging that the Union failed to represent her fairly within the meaning of Section 25.1 of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*").

[2] The application contained, *inter alia*, the following complaint:

> *The May 5, 2006 decision of the Workers' Compensation Board of Saskatchewan was the first time that any other party or organization had found that a psychological workplace injury had occurred while I was employed. As a result of this decision, on May 11, 2006, I sent correspondence to my union, CUPE Local 3766, (which union I was a member of while employed with the*

> *Regina Public School Division #4) requesting that they initiate a grievance against my employer through my union.*
>
> *On July 11, 2006, I received correspondence from Eden Guidroz the former National Representative for CUPE Local 3766, wherein she advised me that they would not file a grievance against my previous employer, as I was no longer employed and therefore was no longer a member of CUPE Local 3766.*
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> *I had also initiated a complaint against my employer for discrimination, based upon disability, with the Saskatchewan Human Rights Commission and was initially advised by the Saskatchewan Labour Relations Board that they could not accept a complaint, if I already had an existing complaint filed with the Saskatchewan Human Rights Commission, though I have previously been advised that this is not the case.*
>
> *I believe that the action of CUPE Local 3766 in refusing to initiate a grievance against my former employer is an example of unfair representation, which is in breach of section 25.1 of The Trade Union Act.*

Facts:

[3] The Applicant was employed as a secretary at an elementary school operated by the Employer from March, 1998 until May, 2004. In August 2000, a new Principal came to the school at which she was employed. The Applicant felt that her interactions with this new Principal amounted to harassment, causing the Applicant considerable stress. In December of 2002, the Applicant sought medical treatment for stress and on the advice of her physician, left work on December 20, 2002. In January of 2003, the Applicant filed a claim with the Saskatchewan Workers' Compensation Board, seeking stress related benefits.

[4] Evidence from both the Applicant, and Ms. Darby Wild, the then local president of Local 3766, established that the Applicant and the Union first became involved following an incident at her workplace that involved another worker at the same school who was represented by another union. The Applicant's Union attended a meeting in June of 2002 regarding this incident. The Applicant's Union had no further involvement with the Applicant until after she had left her workplace on December 20, 2002, under the advice of her physician.

[5] The Applicant did not contact the Union directly following her departure from her workplace in December of 2002. Rather, the Union was contacted by Ms. Sarah Maddia, the disability co-ordinator for the Employer, who asked that a representative of the Union accompany her on a visit to the Applicant's home. The purpose of the visit was to have Ms. Maddia provide the Applicant with information related to long term disability benefits, sick leave, and other work related matters. Ms. Darby Wild, as the local president, met Ms. Maddia at the Applicant's home

on January 31, 2003, at which time Ms. Wild became aware of the issues involving the claim of harassment.

[6] The Union assisted the Applicant with her Workers' Compensation Board claim during February of 2003. On February 26, 2003, the Applicant was advised by the Workers' Compensation Board that her claim was denied.

[7] The Applicant became convinced that the reason that the Workers' Compensation Board had denied her claim was because Ms. Maddia had provided information to the Workers' Compensation Board, obtained during the January 31, 2002 meeting at the Applicant's home. The Applicant testified that it was her view that some of the information she supplied to Ms. Maddia had become incorporated in a document dated February 20, 2003 which the Employer provided to the Workers' Compensation Board. In her testimony Ms. Maddia denied that she provided any specific information regarding the Applicant's claim to the Employer. Nothing turns on this matter, but I accept Ms. Maddia's evidence in this regard.

[8] Following the denial of her Workers' Compensation Board claim, the Applicant again met with her Union to discuss what options were available to her. The Applicant was advised that she could file a grievance under the Collective Bargaining Agreement or file a complaint under the Employer's Harassment Policy. After the options and probabilities for success were provided to the Applicant by the Union, the Applicant decided to file a harassment complaint. With the assistance of the Union, that harassment complaint was filed with the Employer on April 29, 2003.

[9] The Applicant and representatives of the Union met with the harassment investigator on June 9, 2003. The purpose for that meeting was for the investigator to interview the Applicant and advise the Applicant as to the process for the investigation. That investigation concluded on July 30, 2003 with the determination that no harassment could be found and determined that there was an interpersonal conflict.

[10] Following the completion of the harassment complaint investigation, by letter dated August 1, 2003, Ms. Guidroz, the National Representative for the Union had advised the Employer that it reserved the right to "take continued action under the Board's harassment policy and/or under the grievance procedure of the collective agreement." Under the harassment

policy, a further appeal lay to the Board of the Employer. Under the Collective Bargaining Agreement, a grievance could be filed.

[11] The Union met with the Applicant to discuss which option the Applicant and the Union should follow in response to the rejection of the complaint under the harassment policy. At that meeting, a possible strategy evolved, which was to have the February 20, 2003 document by the employer, which it was felt formed the basis for the rejection of the Workers' Compensation Board claim, extracted from the file. However, no decision was reached at that time.

[12] On August 18, 2003, the Applicant met with Ms. Madia to discuss a return to work process. The Applicant advised, in a letter dated August 27, 2003 to the Union that, "I had called Sarah in advance to request the competitions in the assistant classification." The Applicant was the successful bidder on two positions which were available in the fall of 2003. The Applicant accepted and was awarded a part time position at the Wascana Rehabilitation Hospital School. The Applicant's letter of August 27, 2003 to the Union further advised that, "*I was advised by my doctor to start back at half time. I advised Paula [Hessilink] that I would work this until I felt comfortable and then would perhaps bid on another .5 position."*

[13] In her letter, the Applicant also advised the Union as follows:

> *I have also decided that I would like to proceed with a report to the school board trustees and any further action to have the document that was sent to the Worker's [sic] Compensation Board retracted. As I am in a half time position I now have the time to follow any action through to completion and would welcome your advice as to what action would be the most effective.*

[14] The Union met with the Applicant to discuss the course of action that could be followed to achieve her desired end, which was the retraction of the February 20, 2003 document that was sent to the Workers' Compensation Board. Following those discussions it was determined that the best course of action would be to file a grievance under the collective agreement. Ms. Guidroz testified that she believed that there was little chance of success in filing the grievance, but she did so "*on a wing and a prayer*", drafting a grievance that was similar to the harassment complaint which had recently been dismissed. That grievance was filed with the Employer on October 14, 2003.

[15] The grievance was denied by the Employer at step one of the grievance procedure on October 24, 2003. A step two meeting under the grievance procedure was held on January 7. 2004. At the step two meeting, the parties discussed a possible resolution to the grievance which would be to retract the document that had been sent to the Workers' Compensation Board.

[16] On January 14, 2004, Ms. Debra Burnett, the Secretary-Treasurer of the Employer forwarded a letter to Ms Guidroz of the Union which enclosed a proposal for settlement. That letter advised that the Employer was prepared to forward a letter to the Workers' Compensation Board withdrawing the "document" to which the Applicant and the Union objected. That withdrawal was conditional upon the grievance being settled and that with the "*exception of the WCB appeal currently underway*", that the Applicant "*refrain from pursuing any other claims and/or actions against the Regina Board of Education and arising out of her employment therewith*."

[17] Ms. Burnett's proposal was forwarded to the Applicant, who provided a letter to the Union on January 25, 2004 in response to the proposal. In that letter, the Applicant advised as follows:

> *In my opinion, this retraction is only serving the Regina School Board. They are offering to retract this document for the wrong reasons. Therefore, it is totally unacceptable and I will not agree to withdraw my grievance or refrain from pursuing any other claims against the Regina Board of Education*.

[18] On January 29, 2004, Ms. Guidroz, on behalf of the Union advised Ms. Burnett that the Union was *"interested in discussing the terms you have put forward for settlement of the grievance*." She further advised that she would be arranging to meet with Ms. Hesselink, the Human Resources Director for the Employer, "*in the very near future to set up a time*" for further discussions. She also made it clear in that letter that in the event that settlement could not be reached, that the Union ". . .*hereby requests a meeting with the Board of Trustees as per Step 3 of the grievance procedure*."

[19] Further discussions were held between Ms. Hesselink and Ms. Guidroz concerning the proposed settlement of the grievance. On February 3, 2004, Ms. Hesselink provided a revised draft of the letter of settlement which indicated that *"[Y]our initials on this letter will signify your agreement to these terms of settlement*."

[20] Upon receipt of the revised proposal from Ms. Hesselink, representatives of the Union met with the Applicant on February 12, 2004 to discuss the proposed settlement. Following that discussion, the Applicant agreed to the proposed settlement, which agreement she acknowledged by initialing the letter. Ms. Guidroz returned the initialed letter to Ms. Hesselink on February 13, 2004. Upon receipt of the initialed letter, Ms. Hesselink caused a letter, now signed by Ms. Burnett, to be sent to the Workers' Compensation Board as agreed, withdrawing the contentious February 20, 2003 document. That letter was also sent on February 13, 2004.

[21] On February 20, 2004, Ms. Guidroz provided a draft "Letter of Grievance Settlement" to Ms. Hesselink. In her covering Memo, she advised that if it was acceptable to the Employer, she would ". . .*have people come in to sign and then forward it to your office for Board signatures*." The draft settlement was acceptable to the Employer.

[22] However, when the Union tried to have the Applicant attend to their offices to execute the "Letter of Grievance Settlement", the Applicant asked that the documents be forwarded to her home. That was done on March 5, 2004 by courier by Patty Brockman of the Union with the request that they be returned on March 8, 2004. The Applicant did not return the "Letter of Grievance Settlement" as requested by Ms. Brockman.

[23] The Applicant consulted Mr. Gerald Naylen, Q.C. with respect to the "Letter of Grievance Settlement." Mr. Naylen wrote to Ms. Guidroz on March 8, 2004 advising that "*Sandra McLeod will not be signing the letter of Grievance Settlement*." Upon receipt of Mr. Naylen's letter, Ms. Guidroz attempted to contact Mr. Naylen by telephone on March 10 or 11, 2004. Ms. Guidroz was unable to reach him and left a message for Mr. Naylen to call. When Mr. Naylen did not respond to Ms. Guidroz's telephone message, Ms. Guidroz wrote to Mr. Naylen on March 23, 2004 to explain what had occurred with respect to the settlement of the grievance.

[24] In Ms. Guidroz's March 23, 2004 letter, Mr. Naylen was advised that the settlement had already been concluded and that execution of the "Letter of Grievance Settlement" was in pursuance of that settlement. Ms. Guidroz again invited Mr. Naylen to contact her, or in her absence, counsel for the Union. No contact was made in response to the March 23, 2004 letter.

[25] The Union returned the "Letter of Grievance Settlement" to the Employer on April 1, 2004. The settlement letter was signed by the Union Vice-President, Ms. Nancy Lafontaine, but not by the Applicant.

[26] During this same time period, the Union was also continuing to provide assistance to the Applicant in the processing of an appeal of the Workers' Compensation Board decision. The Union, through Ms. Guidroz, sent a letter on February 3, 2004 to the Workers' Compensation Board on behalf of the applicant. This letter challenged the "employer's version of the events" which Ms. Guidroz suggested were "*untruthful for the most part*."

[27] Also, on April 5, 2004, the Applicant had major abdominal surgery which required that she be off work for at least six weeks and likely eight weeks. Because the half time position which the Applicant occupied was to expire at the end of June, 2004, she was required to bid for another position within the school system. She did so on April 22, 2004 when she bid on a half time clerical assistant position at one of the high schools in Regina. The Applicant was the successful applicant for that job.

[28] There was some uncertainty when the Applicant would be able to return from her surgery and take up this new position. Because half time positions were rare and highly sought after, the Applicant was advised by Ms. Hesselink that the Employer would hold the position at the high school open for her until she was able to return. However, before assuming the duties of the new position, the Applicant submitted her written resignation on May 13, 2004. In that resignation letter, the Applicant advised Ms. Hesselink that she had "*decided to pursue a different career choice*." The letter was not copied to the Union, who only became aware of her resignation when they were copied on a letter from the Employer dated May 18, 2004, accepting the Applicant's resignation.

[29] Notwithstanding the Applicant's resignation from her employment, the appeal to the Workers' Compensation Board continued. On May 5, 2006, the Workers' Compensation Board allowed the appeal and agreed to provide benefits to the Applicant for the period January 6, 2003 to and including August 21, 2003.

[30] On May 11, 2006, the Applicant wrote to the Union requesting that it file a further grievance on her behalf. In her letter she says:

> *In light of a recent Workers' Compensation Board appeal decision in my favour (dated May 5, 2006, copy attached) wherein "the Board believes Ms. McLeod developed secondary stresses related to the lack of action on the part of her employer and Union to deal with, or correct the situation, which caused the initial onset of stress", I am requesting that CUPE initiate a grievance against my former employer, the Regina Public School Division No. 4.*

The Applicant also enclosed with the letter, a copy of a Human Rights complaint which she had made.

[31] Upon receipt of the May 11, 2006 letter from the Applicant, Ms. Guidroz testified that she inquired of the President of Local 3766 as to the status of the Applicant and was advised that the Applicant had resigned. Ms. Guidroz testified that she also sought legal advice as whether or not the Union was required to file grievances on behalf of non-members.

[32] After making those inquiries, Ms. Guidroz wrote to the Applicant on July 11, 2006 to advise that the Union was unable to file a grievance against the Employer "*since you are no longer a member of CUPE Local 3766*". Ms. Guidroz also advised the Applicant that she was no longer assigned to work with Local 3766, but nevertheless Ms. Guidroz invited the Applicant to call Ms. Guidroz's replacement who was a National Representative assigned to Local 3766, to discuss the matter further if the Applicant wished to do so.

[33] The Applicant did not contact either Ms. Guidroz or her replacement. However, on February 9, 2007, the Applicant filed the within application.[1] On July 26, 2007, the Union made application to the Board to have the application dismissed summarily pursuant to subsections 18(p) and (q) of the *Act*. On August 1, 2009, the application for summary dismissal was considered by the Board *in camera*, which panel determined that summary dismissal of the application should be considered.

[1] The book of exhibits filed with the Board at the hearing show an application sworn by the Applicant dated November 29, 2006, but the Board's records show the application as being dated and filed on February 9, 2007. No explanation was given for this discrepancy.

[34] In accordance with Board practice, the parties were advised of the Board's determination regarding summary dismissal and the parties were asked to submit written arguments and a response to those arguments for further consideration by the Board.

[35] Those submissions were further considered *in camera* by the Board on September 7, 2007. By letter decision dated September 13, 2006, Vice-Chairperson Zborosky dismissed the Union's request for summary dismissal for the reasons given in that decision. In that decision, Vice-Chairperson Zborosky states:

> *While we note that the Applicant in her written submission, appears to set our additional grounds as bases for a violation of s. 25.1 of the Act, we have made our determination on the basis of the specific ground in the application, namely, that the Union failed to fairly represent the Applicant when it would not file a grievance against the Employer in response to the Applicant's request for it to do so, in her May 11, 2006 letter to the Union. In this regard, we cannot accept the Union's unqualified assertion (which it made as a basis for its request for summary dismissal) that a union will never owe a duty of fair representation to an individual who is a former employee/member of the bargaining unit, without any consideration of the overall circumstances, including when the situation giving rise to an alleged breach of the collective agreement occurred. It appears that the Board needs to conduct an oral hearing to address the scope of such a duty and whether there was a breach of such a duty in this case.*

[36] As a result of that decision, this matter came before me, sitting alone pursuant to subsection 4(2.2) of the *Act* on November 2, 3, & 4, 2009. The hearing of the matter was concluded on December 7, 2009 on which date the parties where granted leave to file written arguments. The Applicant was to have her argument prepared by December 21, 2009, the Union by January 4, 2010, with a rebuttal by the Applicant by January 11, 2010.

Relevant statutory provision:

[37] Relevant provisions of the *Act* are 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.*

Subpoenas Duces Tecum

[38] During the evidence of Ms. Sarah Maddia, it became known that she was no longer employed by the Employer and therefore did not have access to the file regarding her

interaction with the Applicant, which Ms. Maddia maintained while employed by the Employer. The Applicant maintained that there may be relevant documents on that file and asked that the file be produced by the Employer. During a break in the hearing, the Board requested Mr. Rath to attend the hearing to discuss the Applicant's request that the file be produced. Mr. Rath appeared at the hearing and advised the Board that he had been able to obtain the file, and would be prepared to have the Applicant's counsel review it to determine if any relevant documents existed on the file.

[39] During the break between the hearings in November and the hearing on December 7, 2009, the Applicant's counsel meet with Mr. Rath to review the file maintained by Ms. Maddia. During that time period, the Applicant's counsel determined that other files in possession of the Employer might contain relevant documents to these proceedings. As a result, the Applicant requested that the Board issue a *Subpoena Duces Tecum* to each of (a) Sarah Maddia, (b) Paula Hesselink, and (c) Debra Burnett[2]. Each of these subpoenas requested the person named in the subpoena to produce certain documents. Those documents were as follows:

> *Sarah Maddia*
>
> *Notes, documentation, file material, records and logs, including but not limited to medical and/or disability information, pertaining to Sandra Gail McLeod remaining in your possession and not left with your former employer, the Regina Public School Board.*
>
> *Paula Hesselink*
>
> *The complete Regina Public School Human Resource file pertaining to Sandra Gail McLeod, including and not limited to medical information provided in relation to medical and disability leave.*
>
> *The policies, regulations and practice of Regina Public School relating to communication, treatment, options, management and disclosure on medical leave of absences or with disabilities, including and not limited to accommodation, return to work protocols, etc.*
>
> *Debra Burnett*
>
> *Any exchange of correspondence, memorandum, file records, whether paper or electronic between the Board of Trustees and executive, and the staff of the Regina Public School Board pertaining to employment and termination of employment of Sandra Gail McLeod.*

[2] The Subpoena requested for Ms. Burnett on November 25, 2009 was subsequently replaced with an amended *Subpoena Duces Tecum* dated November 30, 2009.

[40] In accordance with the direction of the Court of Appeal in its decision *in Wal-Mart Canada Corp. v. United Food and Commercial Workers, Local 1400*[3], the Board made no inquiry as to the relevance of the documents required to be produced by the subpoena prior to its issue.[4] However, both the Union and the Employer advised the Board that they would make objection to the relevance of the documents required to be produced by the subpoena at the commencement of the hearing on December 7, 2009. Both parties did so.

[41] The Union took the position that none of the requested documentation had any relevance to the matters at issue, that is, how the Union had represented the Applicant. Their position was that nothing in the Employer's files was known to the Union and could therefore have had no impact on the manner in which it represented the Applicant.

[42] The Employer also objected to the relevance of the documents being produced. They took the position that the Applicant was on a fishing expedition for documents which were not relevant to the matters at issue. Nevertheless, the Employer agreed that, in accordance with the Court of Appeal decision in *Wal-Mart*, *supra,* it would surrender the files to the Board, for review of those files, in accordance with the procedure outlined by the Court of Appeal.[5]

[43] In accordance with that procedure, the Board examined the files produced by the Employer and found only one document, which was relevant. That was notes made by Ms. Burnett at the meeting held at the second stage of the grievance procedure. That note was provided to the parties.

[44] Although it is not necessary for the Board to make a ruling with respect to the *Subpoena Duces Tecum* which were requested as all parties were in agreement to the review process conducted by the Board. Nevertheless, it is believed that some comments for the guidance of litigants regarding the issuance of wide ranging *Subpoena Duces Tecum* to witnesses in proceedings before the Board will be helpful.

[45] Had the Board been required to rule on the relevance of the documents requested and determine whether or not the subpoenas should be quashed, the Board would have quashed the subpoenas. They were far too non-specific and vague as to the documents sought

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[3] [2004] SKCA 154 (CanLII), 247 D.L.R. (4th) 30, [2005] 11 W.W.R. 252, 22 Admin L.R. (4th) 285
[4] *Supra* at paragraph [32]

to be produced. In the Board's view, they clearly represented a "fishing expedition" by the Applicant since, as argued by the Union, the documents in the Employer's file were unknown to it and could not have been relevant in the determination of how the Union would have represented the Applicant against the Employer.

[46] In *Wal-Mart*, *supra,* the Court considered the Court of Queen's Bench decision in *Re: Dalgleish and Basu*[6]*.* In that decision, Bayda J. (as he was then) reviewed the relevant authorities and determined that the *"issue to be determined was whether the specification was so broad and indefinite that the demand is oppressive and exceeds the demanding parties necessities*".[7] He summarized the four questions which the tribunal must consider in making this determination as follows:

> *1. whether the witness is informed with sufficient particularity of the documents that are needed for the inquiry;*
>
> *2. whether the party issuing the subpoena had an opportunity to examine the documents beforehand;*
>
> *3. whether the witness is or is not a party to the proceedings so that she has some familiarity with the documents; and*
>
> *4. what the scope of the proceedings is.*

[47] The issue here is principally between the Applicant and the Union, insofar as the complaint is that the Union failed to properly represent the Applicant. While the Employer is interested in the matter, insofar as the remedy may involve a grievance being filed under the Collective Bargaining Agreement if the complaint be well founded, it is not a party to the claimed oppression suffered by the Applicant due to the assertion that the Union failed to properly represent the Applicant.

[48] Additionally, as noted above, the Applicant used a "shotgun" approach to the documents which it claimed should be produced. There was a distinct lack of both relevance to the matters in issue and a rational connection between the documents situated in the Employer's file and the conduct of the Union and the claimed lack of representation.

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[5] *Supra* at paragraphs 35 – 37.
[6] [1974] 51 D.L.R. (3rd) 309, Sask. Q.B.

[49] Admittedly, the documents could not have been seen by either the Applicant or the Union which would provide some latitude to the Applicant. However, all of the medical records sought to be produced would have come from the Applicant's own records and hence should have been known to her, or could have been produced by her from other sources (such as the Applicant's own medical practitioners). There was no need to subpoena the Employer's files to obtain medical records related to the Applicant.

Analysis and Decision:

[50] At paragraph 35 hereof, the Board reproduced a portion of the decision by former Vice-Chairperson Zborosky. It was reproduced as it set the tone for the inquiry by the Board. Regrettably, neither the Applicant nor the Union took Vice-Chairperson Zborosky's comments to heart and directed their evidence to the substantive issue identified in the decision.

[51] As noted in Vice-Chairperson Zborosky's decision, the grounds on which the application was based were very narrow, relating to the refusal of the Union to file a grievance on behalf of the Applicant after she had resigned from her employment. As had been the case with respect to the preliminary motion, the Applicant argued additional grounds other than the failure to file a grievance as requested by the Applicant in her letter of May 11, 2006. The Applicant attempted to argue that in addition to the failure to file this grievance, the Union should also have "inquired" as to the reasons for the Applicant's resignation, which she argued was "wrongfully procured." Also, the Applicant argued that the Union should have been aware that she was suffering a disability that "should have led to some inquiry on the part of the Union," which the Applicant argued was discriminatory.

[52] However, these grounds and others were not the basis for the complaint which was filed with the Board. As was the case with the earlier decision by Vice-Chairperson Zborosky, I have made my determination "*on the basis of the specific ground in the application, namely, that the Union failed to fairly represent the Applicant when it would not file a grievance against the Employer in response to the Applicant's request for it to do so, in her May 11, 2006 letter to the Union*." [8]

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[7] *Wal-Mart v. UFCW* ,*supra,* footnote 3 at paragraph [41]
[8] *Supra,* at paragraph [35]

[53] The Applicant could have, but did not, make any request to expand the grounds of her complaint. Section 19 of the *Act* authorizes the Board to allow parties to amend their applications, reply, intervention, or other process "in such manner and upon such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy in proceedings." The Board has utilized this authority on many occasions when requested by a party so as to insure that the "real questions" will be before the Board. However, in this instance, no Application to Amend the application was advanced. The Board is therefore, left to determine the matter based upon the application and on the grounds which were presented to the Board.

[54] It is common ground that the onus of proof, that the Union failed to properly represent the Applicant, is on the Applicant.[9]

[55] The case law that the Board consistently follows with respect to the duty of fair representation owed by the Union to the Applicant as set out in s. 25.1 of the *Act* was extensively reviewed in *Beatty v. Saskatchewan Government and General Employees Union*.[10] It is unnecessary to repeat that review here.

[56] As noted by former Vice-Chairperson Zborosky in her decision not to summarily dismiss this application, the Board:

> *. . .cannot accept the Union's unqualified assertion (which it made as a basis for its request for summary dismissal) that a union will never owe a duty of fair representation to an individual who is a former employee/member of the bargaining unit, without any consideration of the overall circumstances, including when the situation giving rise to an alleged breach of the collective agreement occurred.*

[57] There are certainly instances where a union would be required by the Board to continue to represent a former member of that union and to file a grievance on behalf of a former member. A dismissal or discharge of an employee may well give rise to that requirement as might some other situations. However, as noted by Vice-Chairperson Zborosky, the determination of when that obligation might arise is to be determined by the facts of every case and hence the requirement that a hearing be held, as is the case here.

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[9] *Chrispen v. International Association of Fire Fighters' Local 510 (Prince Albert Fire Fighters' Association)*, [1992] 4th Quarter Sask. Lab. Rep. 133, LRB File No. 003-92

[10] *Ron Beatty v. Saskatchewan Government and General Employees' Union and Northlands College*, [2006] Sask. L.R.B.R. 440, LRB File No. 086-04 at 464 through 473

[58] In this case, the facts do not support the Applicant's view that Union was required to represent the Applicant, subsequent to her resignation. Firstly, the Applicant's resignation was voluntary. No evidence was presented to suggest that the Applicant's resignation was anything else. The Applicant's letter of May 13, 2004 suggests nothing to the contrary. It is succinct and cordial and exhibits no sign of distress or any loss of capacity. The Applicant stated that "*I have decided to pursue a different career choice*." The Applicant then apologized for any inconvenience that her decision may cause in respect of her awarded position at Sheldon-Williams Collegiate. There was nothing in the Applicant's resignation, that had not even been communicated directly to the Union, which would suggest that the Union owed any further duty to the Applicant, subsequent to the resignation (such as might be the case where there was a cloud on the resignation or that the departure was in some way involuntary).

[59] Secondly, there was no further grievance which the Union could have pursued. The Union had previously filed a grievance on the Applicant's behalf regarding the harassment issue. That grievance had been settled by the Union, albeit without the co-operation of the Applicant, and could not be reactivated by the Union.

[60] Thirdly, the Workers' Compensation Board process was not a process that the Union would normally be required to assist an employee. The Workers' Compensation Board process is a statutory regime not governed by the Collective Bargaining Agreement and under which the Union had no status (other than as agent for the Employee and to assist them as much as practical). However, as a part of the Workers' Compensation Board process, there are specially trained "Worker's Advocates" employed by the Ministry of Advanced Education, Employment and Labour, but funded through the Workers' Compensation Board, who normally assist claimants to obtain the benefits to which they are entitled at law.

[61] Fourthly, the determination by the Workers' Compensation Board was time specific. The award of benefits covered the period when the Applicant was unable to work at the position at the elementary school where the alleged harassment occurred. Following the period for which the Applicant was awarded benefits, the Applicant applied and was again engaged by the Employer in a half time position at Wascana Rehabilitation Hospital School. The Applicant's

acceptance of that position on a half time basis was based upon advice from the Applicant's physician.[11]

[62] It is unclear if the Applicant wanted to have the Union continue to process her complaint under the Harassment Policy to the next step, which was to take that complaint to the Trustees of the Regina Public School Division #4. However, even if that was the intent of the Applicant (which intent is difficult to read in the Application made to this Board), the Harassment Policy does not form a part of the Collective Bargaining Agreement between the Union and the Employer. The uncontradicted evidence was that the rights afforded to an employee under the policy were individual rights which could be pursued by the Employee with assistance of counsel, or with the assistance of the Union.

[63] It was the Union's evidence that they felt, following the investigation by the harassment investigator, that the probability of success in pursuing the harassment complaint was limited. For that reason, with the agreement of the Applicant, the Union changed its strategy and filed the grievance complaint which was ultimately successfully concluded (and which arguably may have resulted in the change in the Workers' Compensation Board decision on appeal).

[64] Nevertheless, it would appear that, notwithstanding the prospects of success in continuation of the harassment complaint under the harassment policy, that complaint appears to remain open to be pursued by the Applicant. The Applicant can pursue that application independent of the Union. (Note: In making this statement, the Board is clearly not making any determination of the merits of the Applicant, nor is the Board suggesting that the Employer would not have any ability to defend the complaint on any basis it sees fit.)

[65] There is nothing in the evidence presented to this Board that demonstrates that the Union has in any way failed in its duty to represent the Applicant as provided in s. 25.1. As noted in *Hargrave,*[12] *supra,* at paragraph 44:

> *In cases of alleged denial of fair representation it is not the Board's role to minutely assess the reasonableness of every component of a union's conduct.*

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[11] *Supra,* paragraph [12]
[12] *Deb Hargrave et al. v. Canadian Union of Public Employees, Local 3833 and Prince Albert Health District, [2003] Sask. L.R.B.R. 511, LRB File No. 223-02*

> *Certainly a union is not generally required to ferret out potential grievors and attempt to convince them that they ought to request that a grievance be filed. Depending on the circumstances of the individual case, the union's duty may be different in cases of the nature of "critical job interests" as referred to in Haley, supra. The purported potential grievances in the present case are not of the nature of such critical job interests…*

[66] Further, there is nothing in this case which is in the nature of a "critical job interest", such as a discharge from employment. The Applicant's suggestion that the Union should have investigated the reasons for the Applicant's resignation, are unfounded. In circumstances like this, when the resignation was so obviously voluntary, there would be no purpose for such an investigation, and even if conducted, the investigation would, the Board thinks, show simply a voluntary resignation.

[67] The uncontradicted evidence is that the Union represented the Applicant fairly in respect of the original grievance that was filed. It also shows that the Union assisted in respect of the complaint under the harassment policy and the application for benefits to the Workers' Compensation Board. Arguably, they were not required to represent a member of the Union with respect to either of these latter two processes, but no fault can be found in the nature of their representation in respect of these processes either.

[68] For the Applicant to be successful, it is necessary for the Applicant to show that the Union's representation of her, and the failure to file an additional grievance following the voluntary resignation was "arbitrary, discriminatory, or in bad faith." The Applicant failed to provide any evidence to the Board that the actions of the Union were arbitrary. In fact, the evidence from the Union showed that their decision was anything but arbitrary. In fact, the Union conducted an independent investigation and received legal advice from counsel. Following their investigation, the Union determined that the Applicant was no longer a member of the Union, but nevertheless invited the Applicant to discuss the matter further with them. The Applicant did not take the opportunity to discuss the matter further with the Union, instead filing this complaint.

[69] There was no evidence presented that the decision not to pursue an additional grievance was in any way marred by the Union's discrimination against the Applicant. While the Applicant tried to draw irrelevant factors and arguments into the mix, there was nothing to point to any discrimination against the Applicant.

[70] The Applicant also did not provide evidence of bad faith by the Union. The Union took a reasoned position based upon the fact that the Applicant had resigned and therefore was no longer a member of the Union. They took legal advice regarding the issue and conducted an independent investigation of the facts surrounding the Applicant's resignation. The Board concludes that there is nothing in the Union's conduct which can be characterized as being done in bad faith.

Conclusion:

[71] This application is therefore dismissed.

DATED at Regina, Saskatchewan, this **3rd** day of **February, 2010.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson