K.L.S., Applicant[1] v. GRAIN AND GENERAL SERVICES UNION, Respondent Union and DAWN FOOD PRODUCTS (CANADA) LTD., Respondent Employer

LRB File No. 055-11; March 11, 2014
Chairperson, Kenneth G. Love, Q.C.; Members: Brenda Cuthbert and Duane Siemens

For the Applicant:	Mr. Chris Veeman
For the Respondent Union:	Ms. Ronni Nordal
For the Respondent Employer:	Ms. Kara Bashutski

Duty of Fair Representation – Applicant originally employed by Dover – Applicant provided accommodation by Dover – Employer acquired portion of Dover – Union filed grievance against Employer due to Employer's failure to continue to accommodate Applicant – Employer offered to settle which was agreed to in principle by Union – Applicant refused to accept settlement – Applicant filed unfair representation application under s. 25.1 after Union refused to grieve further - Board finds Union did not act in arbitrary, discriminatory, or bad faith manner – Union took extraordinary steps to ensure the best interests of the Applicant were taken into account – Termination of the Applicant's employment was not caused by the settlement – Union has authority to enter into settlements without the consent or agreement of the Applicant

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: The Grain and General Services Union, (the "Union") was certified as the bargaining agent for a unit of employees of Dawn Food Products (Canada) Ltd. (the "Employer") by the Canada Industrial Relations Board. In a previous decision of the Board[2] the Board determined that the Employer was no longer engaged in activities which would place it within the federal jurisdiction, and took jurisdiction over the

[1] The Board periodically redacts the name of applicants to protect their privacy related to facts which may be disclosed in these reasons.
[2] *K.L.S. v. Grain and General Services Union*, [2012] CanLII 23106 (SK LRB).

application filed by the Applicant under Section 25.1 of *The Trade Union Act*, R.S.S. 1978 c. T-17 (the *"Act"*).

Facts:

[2] The parties presented a large volume of documentary and oral evidence before the Board. We will not attempt to summarize all of the events that occurred over the course of the relevant times, but we will outline the key events. As much as possible we have not made reference to the terms of any settlement proposals or the final settlement arrived at nor have we made reference to matters which may tend to identify the person involved.

[3] The Applicant was employed in various capacities by the Employer from 1980 until approximately the end of November, 2009. During her employment and at all times relevant to this application she was represented by the Union.

[4] The Applicant was originally employed by Dover Industries Ltd., a business which was engaged in the production of flour and other commodities at a plant in Saskatoon, Saskatchewan. In 2007, Dover sold a portion of its business to the Employer who continued that business.

[5] Prior to the sale of the business to the Employer, the Applicant had been provided an accommodation by Dover with respect to issues she had faced in the workplace. With the sale of the business, only five (5) employees remained, some of whom had been involved in the issues related to the accommodation. The Union on behalf of the Applicant entered into discussions with the Employer with respect to continuation of the accommodation. Ultimately, a grievance was filed by the Union against the company related to its failure to accommodate the Applicant.

[6] In October of 2007, the Employer eliminated all but two (2) positions at its plant in Saskatoon, Saskatchewan. At that time, the Applicant was on disability leave from her employment, but advised that she could exercise her bumping rights under the collective agreement upon her return to work. A subsequent grievance was filed by the Union in respect of the Employer's allegations that her position had been eliminated.

[7] At that time (November, 2007), the Union also filed two applications[3] to this Board in relation to the layoffs. One application alleged that as a result of the sale of the business from Dover, the Employer became subject to provincial jurisdiction pursuant to Section 37.2 of the *Act*. The second alleged that the Employer had failed to comply with the "technological change" provisions contained within Section 43 of the *Act*.

[8] The grievances filed by the Union were processed through the steps set out in the Collective Bargaining Agreement, but could not be resolved. They were referred by the Union to arbitration. A hearing by the arbitrator was scheduled for June 3, 4, & 5 of 2008. Also, about that time, the Applicant, on her own, filed a complaint with the Human Rights Commission with respect to her workplace accommodation.

[9] Prior to commencement of the scheduled arbitrations, the Employer made an offer to settle the grievances. On review of the Employer's offer, the Union recommended to the Applicant that it be accepted. However, in the final result, the offer proved to be unacceptable and the arbitration process was put back on track.

[10] During this period, the Applicant engaged legal counsel, with the consent of the Union, to pursue negotiations with the Employer. Counsel wrote to the Employer's counsel to propose a settlement, but again, negotiations failed to achieve a settlement of the grievances.

[11] In September of 2009, the two remaining positions at the Saskatoon plant were eliminated by the employer effective November 30, 2009. The arbitration hearing for the grievances was also set for October 8 & 9 of 2009.

[12] About this time, the long term disability insurer was conducting a review of the Applicant's benefits. She was also eligible to obtain a "grow in" benefit in her pension plan. After consideration, she determined to retire.

[3] LRB File Nos. 139-07 & 140-07

[13] Again, just prior to the commencement of the arbitration, the Employer made another offer to settle the grievances. The Union again recommended settlement of the grievances to the Applicant. However, she was reluctant to accept the settlement and again contacted legal counsel on her own. Her legal counsel contacted counsel for the Union, but it appears that nothing came of that contact and that legal counsel did not continue to represent the Applicant.

[14] A settlement in principle was agreed between the Union and the Employer on October 2, 2009.

[15] The Applicant continued to refuse to accept the settlement entered into by the Union. On or about November 27, 2009 she forwarded a grievance form to the Union alleging that she had been wrongfully terminated. The Union refused to accept that grievance and proceeded to finalize the resolution of the grievances with the Employer. As a result of that settlement, the Union withdrew the grievances and the Unfair Labour Practice applications filed with the Board, on December 27, 2009.

[16] The final agreements were available on or about March 18, 2010. The Applicant resiled from the agreement. She again consulted counsel on her own behalf who wrote to the counsel for the Union requesting time to review the matter and an extension of the time limits in the agreement whereby the Applicant was to provide releases. That extension was requested by the Union and granted by the Employer.

[17] The Applicant brought this application under Section 25.1 of the *Act* on April 11, 2011.

[18] Relevant statutory provisions are as follows:

> *Deadline to report unfair labour practice*
>
> *12.1(1) Subject to subsection (2), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew, or in the opinion of the board ought to have known, of the action or circumstances giving rise to the allegation, unless the respondent has consented in writing to waive or extend the deadline.*
>
> *. . .*

> *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.*

Applicant's arguments:

[19] The Applicant argued that the Union had acted in bad faith when it entered into a settlement of the grievances which resulted in a termination of the Applicant's employment in exchange for additional severance amounts being paid to three other employees who had been terminated in October of 2007.

[20] The Applicant also argued that the Union acted in bad faith by deliberately withholding from the Applicant the fact that it had entered into a settlement of the two LRB applications, which the Applicant argued affected her employment status.

[21] The Applicant argued that the Union's decision was arbitrary by converting a duty to accommodate grievance into a termination – and providing no explanation to the Applicant for doing so.

[22] The Applicant also argued that the Union discriminated against the Applicant by:

1. resolving the grievances when she was in receipt of Long Term Disability and Canada Pension Plan insurance benefits.
2. by failing to treat her in a manner similar to other disabled employees of the Employer.

[23] The Applicant also argued that the Union was grossly negligent in its negotiation of some of the settlement terms, which it alleged would result in a majority of the settlement being clawed back from the Applicant.

[24] Finally, the Applicant argued that the Union also violated its own Constitution by denying her the right to vote on collective agreements while she was on long term disability.

[25] The Applicant also cited the following cases in support of its position. *Cara Banks v. C.U.P.E., Local 4828*[4] and *Re: Luc Gagnon.*[5]

Union's arguments:

[26] The Union argued that Section 12.1 of the *Act* which prescribes a ninety (90) day time limit for filing of unfair labour practices should be found by the Board to apply to complaints made by members pursuant to Section 25.1 or Section 36.1 of the *Act*. It argued that this complaint was made well outside the 90 day time limit and should, therefore, be dismissed. In respect of this argument the Union cited the Board's decisions in *Peterson (Re:)*[6] and *Saskatchewan (Re:).*[7]

[27] The Union argued that the onus of showing a breach of Section 25.1 or 36.1 fell upon the Applicant. It argued that this was high onus, citing the Board's decision in *Beverly Soles v. Canadian Union of Public Employees, Local 4777.*[8]

[28] The Union argued that it could settle a grievance without the input of the grievor based upon its interpretation of the Board's ruling in *Re: Gibson.*[9] The Union also cited numerous other often cited cases which have established the Board's jurisprudence with respect to its interpretation of a union's duty of fair representation.

[29] The Union argued that there was no evidence provided by the Applicant that the Union had acted in bad faith, had been arbitrary, or had discriminated against the Applicant in its representation of her. It argued that the settlement achieved was a fair and reasonable settlement and the Board should not second guess the Union's decision with respect to settlement.

[30] Finally, the Union argued that the Applicant appeared to be asking the Board to make a determination of the merits of her grievance. The Union argued that such was not the role of the Board, but rather the Board was limited to review the Union's handling of the

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[4] [2013] CanLII 55451 (Sk LRB).
[5] [1992] 88 di52 (CLRB No. 939).
[6] [2009] CanLII 13052 (SK LRB), S.L.R.B.D. No. 11.
[7] [2009] CanLII 30466 (SK LRB), S.L.R.B.D. No. 22, CLLC para 220-047, 169 C.L.R.B.R. (2d) 273.
[8] [2006} Sask. L.R.B.R. 413, LRB File No. 085-06.
[9] [2002] S.L.R.B.R. No. 55, LRB File No. 089-02.

grievances and to determine if, in so doing, the Union had acted arbitrarily, discriminatorily or in bad faith.

Employer's arguments:

[31] The Employer argued that should the Board find that the Union failed in its duty of fair representation, that it would be inappropriate to refer the grievances back to arbitration because the Employer has already been released by the Union, because the Employer had ceased to operate in Saskatchewan and because the Employer would be severally prejudiced in defending its case due to the effluxion of time which would make it difficult to provide evidence and make witnesses available.

Analysis:

Should the Board dismiss the Application for Delay pursuant to Section 12.1 of the *Act*?

[32] While this case raises an interesting question regarding whether or not the time limits prescribed by Section 12.1 of the *Act* should apply with respect to applications under Section 25.1 and Section 36.1 of the *Act*, we decline to answer this question at this time as we have, for the reasons which follow determined that the application cannot succeed in any event.

Has the Union failed in its Duty of Fair Representation?

[33] For the reasons which follow, we have determined that the application should be dismissed.

[34] The Board most recently undertook a review of its jurisprudence regarding a union's duty of fair representation in *Banks v. Canadian Union of Public Employees, Local 4828*[10]. At paragraph [65], the Board quoted from its previous jurisprudence as follows:

> [65] The Board's jurisprudence with respect to the duty of fair representation under Section 25.1 of the *Act* is well established. In *Hargraves et al. v. Canadian Union of Public Employees, Local 3833, and Prince Albert Health District*[12], the Board set out the principles applicable to an analysis of the duty of fair representation, with a particular focus on arbitrariness and the scope of the Union's duty. In that case, the Board said:

[10] *Supra* Note 4.

[27] As pointed out in many decisions of the Board, a succinct explanation of the distinctive meanings of the concepts of arbitrariness, discrimination and bad faith, as used in s. 25.1 of the Act, was made in Glynna Ward v. Saskatchewan Union of Nurses, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at 47, as follows:

> *Section 25.1of 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.*

[28] In Toronto Transit Commission, [1997] OLRD No. 3148, at paragraph 9, the Ontario Labour Relations Board cited with approval the following succinct explanation of the concepts provided by that Board in a previous unreported decision:

> *. . . a complainant must demonstrate that the union's actions were:*
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> *(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
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> *(2) "Discriminatory – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
>
> *(3) "in Bad Faith" – that is, motivated by ill-will, malice hostility or dishonesty.*
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> *The behaviour under review must fit into one of these three categories. …[M]istakes or misjudgments are not illegal; moreover, the fact that an employee fails to understand his rights under a collective agreement or disagrees with the union's interpretation of those rights does not, in itself, establish that the union was wrong – let alone "arbitrary", "discriminatory" or acting in "bad faith".*
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> *The concept of arbitrariness, which is usually more difficult to identify than discrimination or bad faith, is not equivalent to simple errors in judgment, negligence, laxity or dilatoriness. In Walter Prinesdomu v. Canadian Union of Public Employees, [1975] 2 CLRBR 310, the Ontario Labour Relations Board stated, at 315:*
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> > *It could be said that this description of the duty requires the exclusive bargaining agent to "put its mind" to the merits of a grievance and attempt to engage in a process of rational decision making*

> *that cannot be branded as implausible or capricious.*
>
> *This approach gives the word arbitrary some independent meaning beyond subjective ill will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.*

. . . .

[35] In *Hargraves*, *supra*, the Board also dealt with negligence of a Union in the performance of its representation of a member. Commencing at paragraph [34], the Board says:

> *[34] There have been many pronouncements in the case law with respect to negligent action or omission by a trade union as it relates to the concept of arbitrariness in cases of alleged violation of the duty of fair representation. While most of the cases involve a refusal to accept or to progress a grievance after it is filed, in general, the cases establish that to constitute arbitrariness, mistakes, errors in judgment and "mere negligence" will not suffice, but rather, "gross negligence" is the benchmark. Examples in the jurisprudence of the Board include Chrispen, supra, where the Board found that the union's efforts "were undertaken with integrity and competence and without serious or major negligence. . . ." In Radke v. Canadian Paperworkers Union, Local 1120, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, at 64 and 65, the Board stated:*
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> > *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake.*
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> *[35] Most recently, in Vandervort v. University of Saskatchewan Faculty Association and University of Saskatchewan, [2003] Sask. L.R.B.R. 147, LRB File Nos. 102-95 & 047-99, the Board stated, at 193:*
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> > *[215] Arbitrariness is generally equated with perfunctory treatment and gross or major negligence. This standard arose from Canadian Merchant Service Guild v. Gagnon . . . .*

And further, at 194-95, as follows:

> *[219] In Rousseau v. International Brotherhood of Locomotive Engineers et al., 95 CLLC 220-064 at 143, 558-9, the Canada Labour Relations Board described the duty not to act in an arbitrary manner as follows:*
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> > *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.*
> >
> > *Negligence is distinguishable from arbitrary, discriminatory or bad faith behaviour. The concept of negligence can range from simple negligence to gross negligence. The damage to the complainant in itself is not the test. Simple negligence may result in serious damage. Negligence in any of its variations is characterized by conduct or inaction due to inadvertence, thoughtlessness or inattention. Motivation is not a characteristic of negligence. Negligence does not require a particular subjective stage of mind as does a finding of bad faith. There comes a point, however, when mere/simple negligence becomes gross/serious negligence, and we must assess when this point, in all circumstances, is reached.*
> >
> > *When does negligence become "serious" or "gross"? Gross negligence may be viewed as so arbitrary that it reflects a complete disregard for the consequences. Although negligence is not explicitly defined in section 37 of the Code, this Board has commented on the concept of negligence in its various decisions. Whereas simple/mere negligence is not a violation of the Code, the duty of fair representation under section 37 has been expanded to include gross/serious negligence . . . The Supreme Court of Canada commented on and endorsed the Board's utilization of gross/serious negligence as a criteria in evaluating the union's duty under section 37 in Gagnon et al. [1984 CanLII 18 (SCC), [1984] 1 S.C.R. 509]. The Supreme Court of Canada reconfirmed the utilization of serious negligence as an element to be considered in Centre Hospitalier Régina Ltée v. Labour Court, 1990 CanLII 111 (SCC), [1990] 1 S.C.R. 1330.*

[36] In North York General Hospital, [1982] OLRB Rep. Aug. 1190, the Ontario Labour Relations Board addressed the relation of negligence to arbitrariness as follows, at 1194:

> *A union is not required to be correct in every step it takes on behalf of an employee. Moreover, mere negligence on the part of a union official does not ordinarily constitute a breach of section 68. See Ford Motor Company of Canada Limited, [1973] OLRB Rep. Oct. 519; Walter Princesdomu and The Canadian Union of Public Employees, Local 1000, [1975] OLRB Rep. May 444. There comes a point, however, when "mere negligence" becomes "gross negligence" and when gross negligence reflects a complete disregard for critical consequences to an employee then that action may be viewed as arbitrary for the purposes ofsection 68 of the Act. In Princesdomu, supra, the Board said at pp 464-465:*
>
> > *Accordingly at least flagrant errors in processing grievances--errors consistent with a "not caring" attitude--must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so, implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint.*

[37] In a subsequent decision, Canada Packers Inc., [1990] OLRB Rep Aug. 886, the Ontario Board confirmed this position as follows, at 891:

> *A review of the Board's jurisprudence reveals that honest mistakes, innocent misunderstandings, simple negligence, or errors in judgment will not of themselves, constitute arbitrary conduct within the meaning of section 68. Words like "implausible", "so reckless as to be unworthy of protection", "unreasonable", "capricious", "grossly negligent", and "demonstrative of a non-caring attitude" have been used to describe conduct which is arbitrary within the meaning of section 68 (see Consumers Glass Co. Ltd., [1979] OLRB Rep. Sept. 861; ITE Industries, [1980] OLRB Rep. July 1001; North York General Hospital, [1982] OLRB Rep. Aug. 1190; Seagram Corporation Ltd.. [1982] OLRB Rep. Oct. 1571; Cryovac, Division of W.R. Grace and Co. Ltd., [1983] OLRB Rep. June 886; Smith & Stone (1982) Inc., [1984] OLRB Rep. Nov. 1609; Howard J. Howes, [1987] OLRB Rep. Jan. 55; George Xerri, [1987] OLRB Rep. March 444, among others). Such strong words may be applicable to the more obvious cases but may not accurately describe the entire spectrum of conduct which might be arbitrary. As the*

> *jurisprudence also illustrates, what will constitute arbitrary conduct will depend on the circumstances.*
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> *[38] The British Columbia Labour Relations Board has taken a similar view with respect to matters of process. In Haas v. Canadian Union of Public Employees, Local 16, [1982] BCLB No. L48/82, that Board stated as follows:*
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> > *... similarly, the Board will be reluctant to find a breach of Section 7 by virtue of the manner in which particular grievances are pursued. As stated earlier, a complainant must demonstrate shortcomings in the union's representation beyond the areas of mere negligence, inadvertent errors, poor judgment, etc. The shortcomings must be so blatant as to demonstrate that the grievor's interests were pursued in an indifferent or perfunctory manner.*
> >
> > *Too often the intended purpose and limits of Section 7 are not well understood. A union is afforded wide latitude in the manner in which it deals with individual grievances; the Board will only find violations of Section 7 where a union's manner of representation of an individual grievor is found to be an obvious disregard for his rights or for the merits of the particular grievance. Broadening the scope of Section 7 beyond the areas described in earlier pages of this decision would not be in keeping with the purpose and objects of the Labour Code; it would encourage the filing of a myriad of unfounded and frivolous Section 7 applications to the Board and it could also force unions to untenable positions in grievance handling because of the weight they would have to give to possible Section 7 complaints hanging over their heads.*
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> > *. . .*
> >
> > *Each case must be decided on its own merits; suffice to say, however, that the Board may well find shortcomings in the manner in which the union dealt with a particular matter without finding that such shortcomings support a Section 7(1) complaint. The Board may well find that a union could have been more vigourous and thorough in its investigation of the facts in a particular case; it may even question the steps taken in dealing with a grievance and the ultimate decision made with respect to that grievance. However, that does not necessarily mean that a complaint under Section 7(1) will be substantiated. To substantiate a charge of arbitrariness, there must be convincing evidence that there was a blatant disregard for the rights of the union member.*

[36] Commencing at paragraph [39], the Board in *Hargraves, supra,* also took note that "critical job interests" or the seriousness of the interests of the employee were a relevant factor in the determination:

> *[39] As noted above, the Canada Labour Relations Board took a similar view in Rousseau v. International Brotherhood of Locomotive Engineers et al., supra.*

In Johnson v. Amalgamated Transit Union, Local 588 and City of Regina, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96, the Board referred to the evolution of the treatment of the issue of arbitrariness by the Canada Board. At 31-32, the Board observed as follows:

> *The Canada Labour Relations Board initially accepted the notion that, in the case of what were termed "critical job interests," the obligation of a trade union to uphold the interest of the individual employee affected would be close to absolute. What might constitute such critical job interests was not entirely clear, but loss of employment through discharge was clearly among them.*
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> *The Board continued to hold the view that the seriousness of the interest of the employee is a relevant factor. In Brenda Haley v. Canadian Airline Employees' Association, [1981] 81 C.L.L.C. 16,096, the Canada Board made this comment, at 609:*
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> > *This concept (i.e. critical job interests] is a useful instrument to distinguish circumstances where the balance between the individual and union or collective bargaining system interests will tilt in one direction or another. A higher degree of recognition of individual interests will prevail on matters of critical job interest, which may vary from industry to industry or employer to employer. Conversely on matters of minor job interest for the individual the union's conduct will not receive the same scrutiny and the Board's administrative processes will not respond with the same diligence or concern. Many of these matters may not warrant an expensive hearing. Examples of these minor job interests are the occasional use of supervisors to do bargaining unit work, or isolated pay dispute arising out of one or a few incidents and even a minor disciplinary action such as a verbal warning.*
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> *They concluded in the Brenda Haley case, however, that this factor should be evaluated along with other aspects of the decisions taken by the trade union. The decision contains this comment, at 614:*
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> > *As frustrating as duty of fair representation discharge cases may be and as traumatic as loss of employment by discharge may be, we are not persuaded mandatory discharge arbitration is the correct response. It is an easy response but its effect on the group and institutional interests is too harsh. With the same view of the integrity of union officials and the merits of the grievance procedure shared by Professor Weiler we say unions must continue to make the difficult decisions on discharge and we must continue to make the difficult decisions complaints about the unions' decisions often require.*

> *They went on to summarize the nature of the duty imposed on the trade union, also at 614:*
>
> > *It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.*

[40] Thus, there is a line of cases that suggests that where "critical job interests" are involved (e.g., discharge from employment), depending upon the circumstances of the individual case, a union dealing with a grievance may well be held to a higher standard than in cases of lesser importance to the individual in determining whether the union has acted arbitrarily (including whether it has been negligent to a degree that constitutes arbitrariness). The Board has taken a generally favourable view of this position as demonstrated in Johnson and Chrispen, supra.

[41] However, in Haley, supra, a case involving the missing of a time limit for referral to arbitration, the Canada Board also recognized that the experience of the union representative and available resources are relevant factors to be considered in assessing whether negligence is assumed to be of a seriousness that constitutes arbitrariness, stating as follows:

> *…The level of expertise of the union representative and the resources the union makes available to perform the function are also relevant factual considerations. These and other relevant facts of the case will form the foundation in each case to decide whether there was seriously negligent, arbitrary, discriminatory or bad faith, and therefore unfair, representation.*

[42] In Chrispen, supra, the Board approved of this position also, stating, at 150, as follows:

> *The reason why cases involving allegations of arbitrariness are the most vexing and difficult is because they require the Board to set*

> *standards of quality in the context of a statutory scheme which contemplates that employees will frequently be represented in grievance proceedings by part-time union representatives or even other co-workers. Even when the union representatives are full-time employees of the union, they are rarely lawyers and may have few qualifications for the responsibilities which this statutory scheme can place upon them.*
>
> *In order to make this system work, the legislature recognized that union representatives must be permitted considerable latitude. If their decisions are reversed too often, they will be hesitant to settle any grievance short of arbitration. Moreover, the employer will be hesitant to rely upon any settlement achieved with the union if labour boards are going to interfere whenever they take a view different from that of a union. The damage this would do to union credibility and the resulting uncertainty would adversely affect the entire relationship. However, at the same time, by voluntarily applying for exclusive representative status, the union must be prepared to accept a significant degree of responsibility for employees, especially if an employee's employment depends upon the grievance.*

[37] One of the aspects of this case, which the Applicant stressed in her evidence and argument was that she was, at the time the decisions concerning the grievances were being made, was under a disability and under treatment for stress. Additionally, there were critical job interests at stake in the grievances which were filed. She argued that the withdrawal of those grievances lead to her termination.

[38] The Union also lead considerable evidence to show the care that it took in the representation of the applicant. That evidence demonstrated that the Union took extraordinary steps to ensure that the best interests of the Applicant were taken into account. While the Applicant may not agree that such was the case, it is our opinion that the Union did, in fact, take extraordinary steps to protect the interests of the Applicant.

[39] An example of the nature of the care that was taken by the Union was that the Applicant was afforded direct access, not only to the General Secretary of the Union, Mr. Wagner, but also to its counsel, who dealt directly with the Applicant by email and telephone. Mr. Wagner testified that he endeavored to ensure that the Applicant’s concerns regarding any claw back from the settlement amount would be minimized.

[40] What needs to be remembered is that negotiations are not a one way street. Counsel for the Employer sought to structure any transaction to the benefit of his client while the Union and its counsel sought to ensure that the Applicant's best interests were taken into account. The result will, in most cases, not be precisely what each of the parties would have liked, but is a compromise that both could agree upon.

[41] The settlement agreement was structured, as much as possible to minimize both any potential clawback as well as to minimize the incidence of taxation on those funds. The majority of the monies were designated as a "retiring allowance", which should not be taxable or subjected to clawback and which could be paid directly into the Applicant's RRSP account. The balance was to be treated as damages for breach of the employer's duty to accommodate.

[42] In negotiations, as the song by *The Rolling Stones* says, "you can't always get what you want". No matter what precisely the Applicant may have wanted, that result may not have been achievable. As noted above, compromise is the usual result of negotiations.

[43] The Applicant was of the view that she should have been permitted to remain on long term disability until she was declared fit for return to work and should thereafter be permitted to return to work for the Employer. In taking this view, the Applicant also argued that while disabled the employer would be required to make pension contributions to her pension as was the case with other employees who had been disabled.

[44] This argument has a couple of flaws. The first is that the Applicant agreed to take an early retirement to ensure that she was eligible to receive a "grow in" benefit under the pension plan which would not have been otherwise available. Secondly, her decision to retire was prompted, in part, by the fact that the long term disability insurer was, at the time the decision was made by her, conducting a review of her continued benefits under the plan. It appears to the Board to be disingenuous of the Applicant to suggest that having made the decision to retire for these reasons, that the Union should now be held responsible for this decision.

[45] Additionally, the grievances had nothing to do with any issue regarding the Applicant's pension. They were in respect of the employer's duty to accommodate her disability and the Employer's allegation that her position had been eliminated.

[46] Also seemingly overlooked in this argument is that the Applicant's place of employment was permanently closed on November 30, 2009. It was this closure that prompted her decision to retire and obtain the "grow in" benefit. By retiring, she voluntarily gave up her employment with the Employer. While her decision to retire was made in October of 2009, it was agreed, as part of the grievance settlement discussions, that the effective date would be March 1, 2010.

[47] We can find no evidence which shows that by entering into the settlement discussions and the finalization of that settlement and the withdrawal of the grievances by the Union was arbitrary, discriminatory, or constituted bad faith on the part of the Union. Furthermore, the Union has carriage of the grievances and may enter into reasonable settlements.[11]

[48] The Applicant argues that she was terminated as a result of the settlement of the grievances by the Union. We do not agree with this suggestion. As noted above, the termination of her employment resulted not from the settlement of the grievances, but rather from her decision to retire.

[49] The Applicant also argued that the Union acted in bad faith by deliberately withholding from the Applicant, the fact that it had entered into a settlement agreement. Again, we cannot agree with this proposition. The evidence was clear that the Applicant was advised of the settlement. Furthermore, the Applicant, through her counsel was afforded an opportunity and a delay in respect of the implementation of the settlement.

[50] The Applicant also argued that the Union converted a duty to accommodate grievance into a termination. Again, this argument overlooks the fact that the Applicant voluntarily resigned her position to retire. The settlement of the duty to accommodate grievance had no impact on that decision and was, therefore, not the causation of her loss of employment.

[51] The Applicant also argued the Union discriminated against the Applicant by:

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[11] *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.

1. resolving the grievances when she was in receipt of Long Term Disability and Canada Pension Plan insurance benefits.
2. by failing to treat her in a manner similar to other disabled employees of the Employer.

[52] Again, these arguments have no merit. The grievance settlement addressed any potential claw back of Long Term Disability or Canada Pension Plan benefits by structuring the payments as much as possible to avoid any claw back by designating the monies received as a retiring allowance or as damages for breach of the duty to accommodate. Regrettably, the Applicant failed to participate in the structuring of the transaction to her best advantage.

[53] The Applicant's claim that she was discriminated insofar as she was not treated the same as other disabled employees again overlooks the fact that she agree voluntarily to resign to obtain the "top up" benefit under the pension plan.

[54] The Applicant argued that the Union was "grossly negligent" in its negotiation of some of the settlement terms. While we agree with the Applicant that gross negligence by a Union in the conduct of a grievance negotiation may constitute a breach of the duty of fair representation, we do not agree that the Union was "grossly negligent" in this case.

[55] Both the Union and the Employer were represented by experienced legal counsel who conducted the negotiations to resolve the grievances. Mr. Wagner testified that he was aware of the potential claw back of benefits and was focused on ensuring, as much as possible, that the Applicant would not face any claw back. The original settlement did not provide for the bulk of the funds to be paid as a retiring allowance, but were to have been paid as severance pay, which would likely have attracted a claw back. Through the efforts of the Union's counsel and Mr. Wagner, this payment was finally structured as a retiring allowance with provision that it could be paid directly into a Registered Retirement Savings Plan for the Applicant.

[56] In *Gibson v. Communications, Energy and Paperworkers Union of Canada, Local650 and Fantastic Cleaning Inc.,*[12] the Board dealt with a similar situation where the Union had resolved a grievance without the grievor's consent. At paragraphs 23 & 24, the Board says:

> *[23] The first issue this Board must decide is whether the Union could enter into a settlement with the Employer without the Applicant's consent. As set out in Berry, supra, the right to take a grievance to arbitration is reserved to the Union. (see also: Cheston v. Saskatchewan Retail, Wholesale and Department Store Union and Sherwood Co-operative Association Limited, [1998] Sask. L.R.B.R. 36 at p. 45, in which the Board confirms the Union's authority to settle a grievance). We find that the Union was entitled to enter into the settlement agreement with the Employer, without the Applicant's consent or agreement as to the terms of the agreement.*
>
> *[24] The Board must also determine whether the Union acted in an unreasonable or arbitrary manner, disregarding the Applicant's interests or treating them in a manner that could be considered perfunctory. There was no evidence that the Union acted in bad faith or in a discriminatory manner. Neither did the Union act in a manner that could be described as perfunctory, unreasonable or lacking in thoughtfulness. In deciding not to proceed to arbitration and to enter into a settlement agreement with the Employer, the Union conducted a thorough analysis of the many factors that were before it. With this analysis as a basis, the Union entered into a settlement agreement with the Employer, securing the Applicant's immediate reinstatement, partial compensation and status as a permanent employee.*

[57] These words are apt in this situation as well. The Union had the authority to resolve the grievances with the Employer without the consent or agreement of the Applicant as to the terms of the settlement agreement. Additionally, there was no evidence that in reaching the settlement it did that the Union acted in an unreasonable or arbitrary manner, disregarding the Applicant's interests. As noted above, the Union was careful to ensure the maximum benefit possible for the applicant in how the transaction was structured. They were not perfunctory, unreasonable or lacking in thoughtfulness. They took time to negotiate the final agreements and allowed the Applicant's counsel time to review the agreement and provide input (albeit no input was provided).

[58] In our opinion, the evidence clearly established that the Union conducted a careful and thoughtful examination of the potential of the grievance as well as the value of the compensation which might be achieved on arbitration and entered into a settlement that captured as much of that value as was possible.

[59] For these reasons, the application under Section 25.1 of the *Act* is dismissed.

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[12] *Supra* Note 11

The Section 36.1 issue

[60] The Board heard little evidence with respect to this issue. Nothing in this matter turns on whether or not the Applicant was or was not permitted to vote on collective agreements while she was on long term disability. In our view, the issue is moot and need not be decided by us in order to determine the main issue.

Decision:

[61] An order of the Board dismissing this application will accompany these reasons.

DATED at Regina, Saskatchewan, this **11th** day of **March, 2014.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

CORRIGENDUM

[62] **Kenneth G. Love Q.C., Chairperson**: Paragraphs 4, 5 and 11 of the Reasons for Decision in the within proceedings issued by the Board on March 11, 2014, contained errors. Those paragraphs should read as follows:

> **[4]** The Applicant was originally employed by Dawn Food Products (Canada) Ltd. ("Dawn"), a business which was engaged in the production of flour and other commodities at a plant in Saskatoon, Saskatchewan. In 2007, Dawn sold a portion of its business, but the Applicant continued to be employed by Dawn.

[5] Prior to the sale of the business, the Applicant had been provided an accommodation by Dawnr with respect to issues she had faced in the workplace. With the sale of the business, only five (5) employees remained, some of whom had been involved in the issues related to the accommodation. The Union on behalf of the Applicant entered into discussions with the Employer with respect to continuation of the accommodation. Ultimately, a grievance was filed by the Union against the company related to its failure to accommodate the Applicant.

[11] In September of 2009, the two remaining positions at the Saskatoon plant were eliminated by the employer effective November 30, 2009. The arbitration hearing for the grievances was also set for November 25 -27, 2009.

[63] The Counsel of record for the Employer should have been listed as **Ms. Kara Bashutski.**

DATED at Regina, Saskatchewan, this **24th** day of **March, 2014.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson