NATALIE OWL, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent Union and THE GOVERNMENT OF SASKATCHEWAN, Respondent Employer

LRB File No. 345-13; July 29, 2014
Chairperson, Kenneth G. Love, Q.C., sitting alone pursuant to Section 4(2.2) of *The Trade Union Act*

For the Applicant:	Self Represented
For the Respondent Union:	Jana N. Stettner
For the Respondent Employer:	Curtis W. Talbot

Duty of Fair Representation – Applicant alleges that Union failed to properly represent her with respect to a discharge grievance – Union took grievance through to an unsuccessful arbitration – Union declined to take matter for judicial review.

Onus of Proof – Applicant in Duty of Fair Representation proceedings bears the onus of proof that Union failed in its duty of fair representation – Applicant did not satisfy the onus to show that Union failed to properly represent her.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: The Saskatchewan Government and General Employees' Union, (the "Union") is certified as the bargaining agent for a unit of employees of the Government of Saskatchewan (the "Employer"). Natalie Owl (the "Applicant") was an employee employed in the Ministry of Corrections and Policing who was terminated from her position. The Union filed a grievance which it prosecuted through a decision by an arbitrator appointed under the Collective Bargaining Agreement ("CBA") between the Union and the Employer.

[2] Following the arbitrator's decision, the Union determined not to take the matter further to judicial review. The Applicant filed an application with the Board in which she alleged the Union had failed to properly represent her in the grievance and arbitration proceedings pursuant to s. 25.1 of *The Trade Union Act*, R.S.S. 1978 c. T-17(the "*Act*").

[3] This application was heard by Kenneth G. Love, Q.C., Chairperson of the Board sitting alone pursuant to Section 4(2.2) of the *Act* on May 13, May 27 & July 10, 2014 in Regina, Saskatchewan.

[4] For the reasons that follow, the application is denied.

Facts:

[5] The Applicant was, prior to her termination by letter dated October 8, 2009, employed by the Ministry of Corrections and Policing as the Acting Manager, Offender Employment Programs. She was terminated from her employment due to her having engaged in an unreported relationship with an offender or ex-offender contrary to the Employer's *Relationships Between Corrections Employees and Offenders/Ex-Offenders* policy.

[6] The Union filed a grievance under the CBA between the Union and the Employer requesting "reinstatement of grievor with full redress and to make grievor whole in all respects". This grievance was pursued by the Union through the steps set forth in the CBA, but the grievance was denied at all appeal levels. The Union then moved the grievance to arbitration under the terms of the CBA.

[7] The arbitration hearing was held on June 17 & 18, 2013 before arbitrator Vincent L. Ready. By his decision dated September 3, 2013,[1] the grievance was denied and the termination of the Applicant upheld. At the hearing before arbitrator Ready, the Applicant was represented by an experienced Labour Relations Officer employed by the Union, Larry Buchinski. The Applicant testified on her own behalf at the hearing.

[8] Following review of the arbitration decision, the Union determined that it would not seek to have the arbitral award judicially reviewed and advised the Applicant of that decision.[2]

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[1] Grievance No. 2009-073-141R
[2] See email dated September 13, 2013 from Larry Buchinski to Natalie Owl

The Applicant then made this application to the Board, alleging that the Union had acted arbitrarily, discriminatorily or in bad faith in its representation of her.

Relevant statutory provision:

[9] Relevent statutory provisions 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.*

Applicant's arguments:

[10] The Applicant filed an extensive and detailed application with the Board. Her application outlined her allegations that the Union had failed to represent her without discrimination, arbitrariness or good faith. The application was a mixture of factual allegations and argument. Her allegations regarding the Union's actions were as follows:

> *<u>Discrimination:</u>*
> *The Applicant alleged that her Union representative, Larry Buchinski discriminated against her based upon a comment that he allegedly made that "he could not understand how she could associate with him", in reference to the offender or ex-offender with whom she had allegedly breached the Relationships Policy with.*
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> *She further alleged that she was discriminated against because the Saskatchewan Public Service Commission's Human Resource Manual's Corrective Discipline Policy were not followed when she was terminated rather than having a lesser penalty imposed upon her. She alleged that the failure by the Union to include a letter which she had received from the other person in the relationship evidenced the Union's discriminatory treatment of her.*
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> *The Applicant also alleged that the Union failed to include in their submission to the arbitrator, other evidence regarding the other person's involvement in the Regina Anti-Gang strategy and her assisting with probation for that person. She also alleged that the Union discriminated against her by failing to include other evidence regarding her relationship with the offender or ex-offender.*
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> *The Applicant also alleged that the Union discriminated against her based upon her race. She is a First Nations woman. She alleged that one aspect of her case was to be based upon a similar case being taken to arbitration by the Union regarding the discriminatory application of the Relationships Policy on First Nation's women. That case involved a grievance filed by a Leigh Longman regarding the Relationship Policy. It was decided by arbitrator Anne M. Wallace, Q.C. on February 11, 2013.*

Discrimination (continued):
The Applicant also alleged that the Union failed to introduce testimony from a witness, Cal Carey, in her arbitration. That evidence was to support her spiritual and cultural beliefs and practices. She alleged that insufficient attention was drawn to this aspect of her personal beliefs.

Arbitrariness:
Again, the Applicant alleged that the Union did not utilize the mitigating factors spelled out in the Human Resource Manual. She noted that some factors had been included in the Union's submission, but they did not include all of the factors.

The Applicant also alleged that the Union failed to bring in evidence concerning her exemplary work record nor her training, experience and increasing responsibility while employed.

The Applicant alleged that the Union did not conduct a proper investigation of the events that gave rise to the grievance. She alleged that the investigation related solely to the events in 2009 and did not include prior events.

The Applicant also alleged that the Union failed to provide information regarding her family situation which she alleged would have shown her to be a good mother, who provides a safe, supportive and loving home for her children She again cited the Longman case alleging that the Union should have raised the same issue in her case as in the Longman case.

The Applicant pointed to what she alleged were numerous errors (15) in the arbitrator's decision or in the materials provided by the Union to the arbitrator.

Bad Faith:
The Applicant alleged that the Union acted in bad faith as a result of her work while as shop steward for the Union, during which she advocated on behalf of Leigh Longman and Laurie Pelletier, both aboriginal females and co-workers. She alleged that both women were the subject of discrimination by the Employer. She alleged that there were statements by these women and Tara McCallum, another aboriginal woman, that supported that the environment at the Union was hostile towards aboriginal female members that made formal complaints.

The Applicant alleged that the Union tried to stifle her advocacy for Laurie Pelletier.

The Applicant also alleged that there was a long standing personal relationship between Fred Burch, the Employer's representative and his spouse, Lois Burch with Corey Hendricks a labour relations officer assisting with her file, which she alleged was a conflict of interest.

The Applicant alleged that the Union admitted in its submission to the arbitrator that there was evidence at the arbitral hearing that she had breached the relationship policy

The Applicant alleged that the Union demonstrated malice and ill will by refusing to provide her with copies of the notes made by Larry Buchinski and Corey Hendriks at the arbitration hearing.

[11] The Applicant also filed written replies to the written arguments filed by the Union and the Employer. In her reply to the Union's written argument she makes the following points:[3]

1. *That the arbitrator made errors of fact and law in his determination of the grievance and that there was a reasonable basis for review of the arbitrator's decision.*

2. *Citing Lucyshyn v. Amalgamated Transit Union, Local 615*[4] *and Johnson v. Amalgamated Transit Union, Local 588 and City of Regina*[5] *the Applicant argued that "critical job interests", i.e.: the loss of her employment, was a factor that should be considered in our consideration of the aspect of arbitrary conduct of the Union.*

3. *Citing Brenda Haley v. Canadian Airline Employees' Association*[6] *the Applicant argued that "[U]nion 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.*

4. *Citing Patti Ann Peacock v. Union of Canadian Correctional Officers,*[7] *the Applicant argued that the Union failed to take the steps necessary to ensure that the grievance was presented at each level of the grievance process, so that the position of the complainant was protected.*

5. *The Applicant argued that the Union had not made a proper investigation, by failing to interview other impacted employees or to call relevant evidence from those employees.*

6. *The Applicant argued that neither Larry Buchinski nor Corey Hendriks addressed their minds to the merits of the matter and were negligent in so doing. She also argued that they were indifferent, flagrant, capricious and non-caring in their attitude towards her in their failure to obtain full disclosure from the Employer.*

7. *The Applicant argued that the Union failed to accurately articulate the true nature of the relationship between herself and the offender or ex-offender.*

8. *The Applicant argued that Larry Buchinski acknowledged little to no knowledge of or experience working with aboriginal clients and, as a result, he failed to appreciate the Applicant's testimony concerning her spiritual beliefs and cultural practices. By presenting her grievance to the arbitrator in this fashion, she argued, showed that he was acting in a non-caring and perfunctory manner.*

9. *The Applicant cited the Longman decision in support of her contention that the discriminatory aspects of the Relationships Policy should have been pursued in her case. In her submission, the decision supported that the policy was discriminatory.*

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[3] I have not included points which are similar to those raised in her initial application
[4] [2010] CanLII 15756 (SKLRB), LRB File No. 035-09
[5] [1997] Sask. L.R.B.R. 19, LRB File No. 091-96
[6] [1981] 81 C.L.L.C. 16,096
[7] [2005] PSSRB 09, File No. 171-02-1266

10. The Applicant argued that the Union failed to properly mitigate the Applicant's circumstances in accordance with the Corrective Discipline Policy of the Employer.

11. The Applicant argued that the Union should have, at least, consulted with counsel concerning the possibility for judicial review, rather than providing a perfunctory response to her request that judicial review be undertaken. In his email response, Mr. Buchinski responded simply, "No".

12. The Applicant argued that the Union failed to consider her circumstances as a single parent and argued that the arbitrator's determination of her judgment should not stand as it related to events after her termination.

13. The Applicant argued that the remedies sought were not outside the parameters of The Trade Union Act.

[12] In response to the written argument of the Employer, the Applicant essentially took the position that the decision by Arbitrator Ready was an incorrect result.

Union's Arguments:

[13] The Union argued that they had properly represented the Applicant during the grievance procedure and the arbitration. They argued that they had spent considerable time and effort in preparation for the hearing and had kept the Applicant informed and involved.

[14] The Union argued that they had originally placed the grievance "on hold" awaiting the outcome of the grievance procedure then underway for Leigh Longman. Once that decision had been rendered, the Union argued that it met with the Applicant and asked her to provide evidence of discrimination since the Longman case had been decided on other grounds. They noted that the Applicant failed to provide any evidence to them.

[15] The Union argued that the Applicant had full opportunity during the arbitration process to both have input into the case as well as to testify on her own behalf. The Union argued that while they did not challenge the Relationships Policy on the grounds of it being discriminatory, they did challenge it on the basis that it was not sufficiently clear and did not meet the requirements set out in *KVP v. Lumber and Sawmill Workers' Union, Local 2537.*[8]

[16] The Union argued that their goal in representing the Applicant was to have her returned to her employment.

[8] [1965] 16 LAC 73

[17] The Union argued that the provisions of *The Trade Union Act* should govern these proceedings.

[18] The Union further argued that the Board should not sit in appeal of the arbitration decision nor should it inquire into how the arbitration was conducted. It cited *Taylor v. SGEU,*[9] *Samperi v. Canadian Air Line Flight Attendants' Association and Ms Catherin Bruce,*[10] and *MacNeill v. RWDSU.*[11] The Union also argued that there was no evidence that this case was an extreme case where a union, in bad faith, puts on a charade with employer collusion or in which union counsel is inebriated.

[19] Citing *D.M. v. Canadian Union of Public Employees,*[12] the Union argued that grievances were the property of the Union and the conduct of the grievance was also the property of the Union. It argued that the Union was therefore required to make the difficult decisions on how to best present, defend, or prosecute a particular case.

[20] Citing *Craib v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees*[13], the Union argued that it had latitude with respect to how it handled an arbitration, and that the Board had no mandate to probe the merits of the grievance itself.

[21] Citing *Peter Elcombe,*[14] the Union argued that absent "extraordinary circumstances", the Board should not interfere with the arbitration process and that there is no requirement for a Union to hire legal counsel to conduct its arbitrations.

[22] The Union argued that the Applicant was seeking to have the Board sit on appeal of the arbitrator and conduct a microscopic analysis of the strategy utilized by the Union.

[23] The Union argued it has not discriminated against the Applicant and relied upon the Board's decision in *Glynna Ward v. Saskatchewan Union of Nurses.*[15] The Union also

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[9] [2011] CanIII 27606 SKLRB
[10] [1982] 2 Can LRBR 207 @ p. 12
[11] [2005] CanLII 63107 SKLRB
[12] [2009] CanLII 47056 SKLRB
[13] [1984] 85 CLLC 17,006
[14] [1992] 17 CLRBR (2d) 294 @ pp 7-8

denied that it discriminated against the Applicant based upon her association with the offender or ex-offender.

[24] The Union denied that it was not entitled to determine its strategy for the presentation of the case to the arbitrator, and was not required to highlight the Applicant's cultural and spiritual commitment to the offender or ex-offender. It furthermore argued that this choice was a strategic choice and was not evidence of discrimination. However, it also argued that the arbitrator was well aware of the Applicant's cultural and spiritual commitment to the offender or ex-offender as she gave *viva voce* evidence on this point and also submitted a letter from that person into evidence at the hearing. The arbitral decision also makes this clear, the Union argued.

[25] The Union rebutted the Applicant's argument that it did not support her in her submission that she had previously disclosed her relationship with the offender or ex-offender in 2006. They argued that the arbitral decision also makes this clear.

[26] The Union argued that they provided all relevant mitigating factors to the arbitrator notwithstanding it did not reference the Saskatchewan Public Service Commission's Human Resource Manual's Corrective Discipline Policy. Furthermore, they argued that this was not an assertion of discrimination, but rather of an argument that the Union should have argued the case differently. In any event, the Union argued the Applicant failed to show that it was unreasonable or grossly negligent for the Union not to have referenced those factors. The Union further argued that it made reasonable reference to mitigating factors and that the Applicant has failed to show how reference to other factors would have helped her case.

[27] The Union denies that it discriminated against the Applicant and argued that the Applicant did not make out her case on this point.

[28] The Union argued that it was pointed out to the Applicant that it would not be arguing that the Relationships Policy was discriminatory in her case, but rather would be arguing that it was in violation of the principles set forth in *KVP (supra)*.

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[15] LRB File No. 031-88

[29] The Union argued that it made references to her work history and record in its submissions to the arbitrator. This, it argues, was shown in the recitation of facts by the arbitrator. It also noted that the Employer's submission to the arbitrator made reference to her being "above average in her approach to seek out and follow policy and legislation". Furthermore, the Union argued that the arbitrator was well aware of the Applicant's achievements and promotions.

[30] The Union also argued that the Longman decision does not assist the Applicant as it is distinguishable on its facts and was determined on a fact other than the Relationships Policy being discriminatory.

[31] The Union argued that it was not required to seek judicial review. It noted that the evidence of Ms. Hendriks was that judicial review of arbitral decisions was rare and had only occurred once to her knowledge in the time she was employed by the Union.

[32] The Union argued that it had acted honestly and in good faith towards the Applicant in accordance with the principles in *Hargrave v. Canadian Union of Public Employees, Local 3833 and Prince Albert Health District.*[16]

[33] Finally, the Union argued that the Board is without jurisdiction to grant the remedies sought by the Applicant. It cited *Gendron v. Municipalite de la Baie-James.*[17]

Respondent Employer's arguments:

[34] The Employer argued that the Applicant had failed to satisfy the onus of proof that the Union had discriminated, acted arbitrarily, or in bad faith in its representation of her. It noted that the Board did not sit in general appeal of each and every decision made by a trade union in the representation of its members.

[35] The Employer argued that the requested remedies are not within the Board's jurisdiction to grant citing *Gendron (supra).*

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[16] [2003] Sask. L.R.B>R. 511, LRB File No. 223-02
[17] [1986] 1 S.C.R. 401 @ p. 415, para. F

Analysis and Decision:

[36] All of the parties to this appeal filed extensive Briefs of Law which I have reviewed and found helpful.

Applicable Law:

[37] Only the Union took a position as to whether this application should be governed by *The Trade Union Act or The Saskatchewan Employment Act.*[18] *The Saskatchewan Employment Act* (the "*SEA")* was proclaimed in force on April 29, 2014. The SEA repealed *The Trade Union Act.*

[38] The Applicant filed her application on December 13, 2013. The Union filed its response to the application on December 20, 2013. The Employer filed its Reply that same date. There were no preliminary proceedings and the matter came on for hearing for the first time on May 13, 2013.

[39] While there may be no significant differences between the provisions of *The Trade Union Act* and the *SEA,* the Applicant's rights with respect to this matter arose under, and were pursued by her, under *The Trade Union Act*. Accordingly, we believe it to be appropriate that the matter continue to be dealt with in accordance with that *Act*, notwithstanding its repeal on April 29, 2014.

[40] The Saskatchewan Court of Appeal dealt with the impact of amendments to *The Trade Union Act* made in 2008 in its decision in *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp..*[19] The court dealt with the issue of rights which had accrued prior to the date a change in the law occurred. It held that a change in legislation cannot impact on rights which had accrued prior to the amendment taking effect.

[41] The right accruing to the Applicant was not merely procedural at the date of the hearing. Any right to proper representation was due to her under *The Trade Union Act* and she was required to protect that right by timely filing of an application under Section 25.1 of that *Act*, which she did on December 13, 2013.

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[18] S.S. 2013 c. 15.1
[19] [2010] SKCA 123 (CanLII)

[42] Additionally, Section 34(1)(c) of *The Interpretation Act*[20] also provides that: "[T]he repeal of an enactment does not…affect a right or obligation acquired, accrued, accruing, or incurred pursuant to the repealed enactment".

Arbitrary, Discriminatory or in Bad Faith:

[43] The Board's jurisprudence with respect to the meaning of s. 25.1 of *The Trade Union Act* (the *"Act")* is well settled. The Board 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.*[21] 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 Hargrave, et al. v. Canadian Union of Public Employees, Local 3833, and Prince Albert Health District*[22]*, 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:*
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> . . .
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> *[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:*
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> *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.*
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> *[28] In Toronto Transit Commission, [1997] OLRD No. 3148, at paragraph 9, the Ontario Labour Relations Board cited with*

[20] S.S. 1995 C. I-11.2
[21] [2013] CanLII 55451 (SKLRB)
[22] [2003] Sask. L.R.B.R. 511, LRB File No. 223-02

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:

(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;

(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.

The behavior 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".

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:

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.

. . . .

[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:

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.

[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:

[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 behavior. 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.*
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> *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] 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] 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 of section 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.

[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:

... 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.

. . .

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 vigorous 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.

[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.

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:

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.

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:

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.*

[44] It is also well established that the Applicant bears the onus of proof of the allegations that he/she was not properly represented.

Discrimination:

[45] The definition utilized by the Board in respect to discrimination is the definition adopted from the Ontario Labour Relations Board in *Toronto Transit Commission*, [1997] OLRD No. 3148, at paragraph 9, "that is, based on invidious distinctions without reasonable justification or labour relations rationale".

[46] The Applicant raises numerous issues of alleged discrimination. These include insensitivity on the part of Mr. Buchinski, failure to include relevant evidence concerning the Applicant's relationship with the offender or ex-offender, and racial discrimination by virtue of not pursuing a claim that the Relationships Policy was applied in a discriminatory fashion.

[47] On the issue of insensitivity, the Applicant complained of Mr. Buchinski's comment that he could not understand how she could associate with "him" in reference to the offender or ex-offender. In his testimony, Mr. Buchinski denied having made any such comment. Whether said or not, such comment, while it could be considered insensitive, is not sufficient to satisfy the definition adopted by the Board for discrimination. Discrimination in this context means different treatment for different people based upon some factually determined event or fact. For example, it would be wrong to process grievances only from people who had red hair. That would be discriminatory against those persons without red hair.

[48] What is at play here is that, in order for discrimination to be found, there must be an unequal treatment of one person or group versus another person or group by the union. It does not strictly mean racial discrimination, although, if proven, racial discrimination would offend the provision.

[49] There was no evidence provided to show that Mr. Buchinski's comment, even if made, had any impact on the representation that the Union provided. It processed the grievance up to and including arbitration.

[50] On the issue of failure to include relevant evidence in its submission to the arbitrator, this omission was with respect to a letter that the Applicant alleged had not been

before the arbitrator. The Union pointed out that that letter was indeed placed before the arbitrator as an Exhibit. This fact was admitted to by the Applicant in her testimony.

[51] The Applicant also complained that the arbitrator did not have knowledge of her cultural and spiritual beliefs. She also complained that a witness who would have spoken to those beliefs was not called to testify at the arbitration hearing.

[52] The Applicant admits that there was some mention of her spiritual and cultural beliefs in the Union's submission to the Arbitrator.[23] and goes on to say that those statements "hardly suffices to describe the wealth of spiritual and cultural testimony that the Grievor provided as mitigating factors for her case…". There was no evidence provided to link the nature of the evidence provided regarding these elements of the case to any discrimination on the part of the Union.

[53] With respect to the calling of a witness who could testify about the Applicant's cultural and spiritual beliefs, the evidence established that the Union had arranged to call a Mr. Cal Carey to provide evidence in this regard. Mr. Carey failed to appear voluntarily and it was impractical to request a Subpoena for his attendance. This failure to provide evidence was in no way the fault of the Union nor does it provide any evidence of discriminatory conduct by the Union.

[54] The Applicant made much of the fact that the Union did not rely upon the Longman arbitration decision or to make similar arguments that the Relationships Policy was applied by the Employer in a discriminatory fashion. The Union had initially put the Applicant's grievance on hold pending a determination through the Longman decision as to the validity of the Relationships Policy, due to the Union's belief that it had been applied in a discriminatory fashion.

[55] That arbitral decision was decided on different grounds. It found that the Employer, in that case, had falsified a Police Report, which was the basis of its investigation and allowed the grievance. The arbitrator did not deal with the discrimination issue regarding the Relationships Policy.

[56] Nevertheless, the Longman decision was filed with Arbitrator Ready and was referenced in his decision. However, rather than raise the same issue as in the Longman case, the Union determined to attack the policy based upon the arbitral decision in *KVP v. Lumber and Sawmill Workers Union, Local 2537*[24] on the basis that the Relationships Policy was not "clear and unequivocal" and "consistently enforced". The arbitrator did not determine the Relationships Policy to be subject to this attack.

[57] It is clear that a Union has carriage of grievances or, as has sometimes been stated, owns the grievance.[25] It is also clear that the Board will not sit "on appeal" of a Union's decisions in how it conducts a grievance. At para [24] of *Taylor v. SGEU*[26] the Board said:

> *[24] With respect to the Applicant's complaint that the Union should have called more or different witnesses, this Board has previously stated that we will not, with the benefit of hindsight, sit "on appeal" of a trade union's decision on how it conducts its arbitrations, including which witnesses should have been called, and/or what evidence should have been tendered and/or what arguments should have been advanced or abandoned, 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; Sheldon Mercer v. Communication, Energy and Paperworkers Union, Local 922 and PSC Mining LTD, [2003] Sask. L.R.B.R. 458, LRB File No. 007-02; and D.M. v. Canadian Union of Public Employees, supra.*

[58] For the above noted reasons, the Applicant's allegations that the Union discriminated against her must be dismissed.

Arbitrariness:

[59] The definition utilized by the Board with respect to arbitrariness is also a definition adopted from the Ontario Labour Relations Board in <u>*Toronto Transit Commission*</u>, [1997] OLRD No. 3148, at paragraph 9, "that is, flagrant, capricious, totally unreasonable, or grossly negligent".

[60] The Applicant raised issues under the heading of arbitrariness insofar as the Union allegedly failed to utilize all of the mitigating factors in the Human Resource Manual, that

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[23] See page 7 of the Application
[24] 1965] 16 LAC 73
[25] *D.M. v. Canadian Union of Public Employees, Supra* Note 12
[26] *Supra* Note 9

the Union did not conduct a proper investigation of the grievance, that the Longman discrimination argument referenced above was not used, and the arbitrator made numerous errors in his decision.

[61] The Applicant raised the issue that the Union failed to provide the arbitrator all of the mitigation factors set out in the Employer's Human Resource Manual. The Union argues that it did set out the relevant factors for consideration of the arbitrator, *albeit* not all of the factors set out in the Human Resource Manual.

[62] With respect, there is nothing in this argument or allegation that shows that the Union was flagrant, capricious, totally unreasonable or grossly negligent in its representation of the Applicant. It is also instructive to note that the arbitrator chose to utilize mitigating factors not from the Human Resource Manual, but rather from other arbitral decisions.

[63] The issue of a proper investigation of a grievance was raised by the Board in *Lucyshyn v. Amalgamated Transit Union, Local 615.*[27] In *Lucyshyn*, the Board outlined the minimum standard of conduct by a Union in the processing of a grievance. The first three (3) of those steps involved the conduct of an investigation by the Union. The Board said in that case:

> *1. Upon a grievance being filed, there should be an investigation conducted by the Union to determine the merits or not of the facts and allegations giving rise to the grievance;*
>
> *2. The investigation conducted must be done in an objective and fair manner, and as a minimum would include an interview with the complainant and any other employees involved;*
>
> *3. A report of the investigation should go forward to the appropriate body or person charged with the conduct of the grievance process within the Union. A copy of that report should be provided to the complainant;*

[64] In this case, there was no evidence that there had been no investigation or improper investigation by the Union. The Applicant's arguments were that the Union had failed to interview what she considered to be supportive witnesses for her case. Again, these allegations go to the nature and manner in which the Union chose to present the case. Absent

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[27] *Supra* Note 4

gross negligence or extraordinary circumstances in the handling of the case, the Board should not interfere in second guessing or micro-managing the Union's case.[28]

[65] In *MacNeill,* the Board referenced the Supreme Court of Canada decision in *Noel v. Societe d'Engergie de al Baie James and United Steelworkers of America.*[29] At p. 231, the Court stated:

> *The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible. The association's resources, as well as the interests of the unit as a whole, should also be taken into account. The association thus has considerable discretion as to the type and extent of the efforts it will undertake in a specific case.*

[66] While the Applicant alleged negligence in the Union's presentation, she neither alleged nor proved any gross negligence. Nor did she provide any evidence of extraordinary circumstances in the handling of the Union's case before the arbitrator.

[67] The Applicant also alleged numerous (15) errors in the arbitral decision. This Board does not sit in appeal of decisions made by arbitrators. That supervisory responsibility rests with the Court of Queen's Bench. However, the Board has authority under s. 25.1 to ensure that the Union acts in manner which is not discriminatory, arbitrary or in bad faith with respect to judicial review of an arbitration decision. This could include a breach of the duty of fair representation in failing to judicially review an arbitral award.

[68] In *Noel* (*supra*), the Supreme Court said at pages 233 to 235:

> *However, the duty of representation is not limited to bargaining and the arbitration process. Where the union has an exclusive representation mandate, the corresponding duty extends to everything that is done that affects the legal framework of the relationship between the employee and the employer within the company. This Court has clearly recognized that a union could be in breach of its duty of representation by failing to bring an action in nullity against an arbitration award. As the following comments by L'Heureux-Dubé J. in Centre hospitalier*

[28] See *MacNeill v. RWDSU, supra Note 11; Craib v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, supra Note 13;Peter Elcombe, supra Note 14.*
[29] [2001] SCC 33 (CanLII), 2 S.C.R. 207

Régina, supra, at p. 1347, suggest, the release of the arbitration award neither terminates nor circumscribes that duty:

> *In this connection I should say at the outset that a union's duty of fair representation does not cease in relation to a grievance proceeding once the grievance has gone to arbitration. It may continue even after the arbitrator's final decision ... subject to Gendron v. Municipalité de la Baie-James, supra, which held that in such a case the s. 47.5 L.C. procedure could not be applied.*

After the arbitration award is made, the union still has the exclusive right to represent the employees. As a corollary, the decision to challenge the legality of an arbitration award is still governed by the principles relating to proper performance of the duty of good faith and by the same prohibitions on acting in bad faith, in a discriminatory manner or without giving the case the appropriate consideration.

The union may believe that at this stage, by taking the grievance to arbitration, it has applied the procedure that is routinely followed in a case of its nature. It does not have a duty to obtain a result for the employee. An unfavourable arbitration award does not create a presumption of improper performance of the duty of representation.

How can it be determined whether the union's failure to challenge an arbitration award is a breach of the duty of fair representation?

In a case like that, the actual nature of the arguments that would be made in a judicial review application to challenge the legality of an arbitration award and asking the Superior Court to exercise its superintending power will have to be examined. This brings us back to the general principles governing judicial review. The grounds on which the validity of an arbitration award could be questioned and the power of the Superior Court to review the award invoked will vary. The inferior tribunal may have been improperly constituted, in a manner contrary to the law. It may also have acted without jurisdiction within the strict meaning of that expression, if the subject matter was not within its authority, having been assigned to another body. The arbitration board may also have committed an error that could be characterized as "patently unreasonable", and in accordance with the decisions of this Court over a period of more than 20 years, this would mean that the legality of the award could be reviewed.

(Emphasis added)

[69] The Court also went on to say at pages 235 to 236:

Given the day-to-day reality of managing collective agreements, the interpretation of arbitration awards, and the abundance of litigation in this area, a union cannot be placed under a duty to challenge each and every arbitration award at the behest of the employee in question on the ground of unreasonableness of the decision, even in dismissal cases. The rule is that the employer and the union are entitled to the stability that results from s. 101 L.C., which provides: "The arbitration award is without appeal, binds the parties and, where such is the case, any employee concerned...". Judicial review must therefore not be seen as a routine way of challenging awards or as a right of appeal. Accordingly, even in discipline and dismissal cases, the normal process provided by the Act ends with arbitration. That process represents the normal and exclusive method of resolving the conflicts that arise in the course of administering collective agreements,

> *including disciplinary action. In fact, this Court gave strong support for the principle of exclusivity and finality in Weber v. Ontario Hydro, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929, at pp. 956-957 and 959, per McLachlin J. That approach is also intended to discourage challenges that are collateral to disputes which, as a general rule, will be definitively disposed of under the procedure for administering collective agreements. While judicial review by the superior courts is an important principle, it cannot allow employees to jeopardize this expectation of stability in labour relations in a situation where there is union representation. …*
>
> *Recognition of this kind of right to challenge an arbitration award would necessarily offend the fundamental principles governing relations with the employer where there is a right of exclusive collective representation. In a case where the arbitration process has been carried out, in accordance with the collective agreement, the employer is entitled to expect that a grievance that has been disposed of by the arbitrator will, as a rule, be disposed of permanently, and that the arbitration process will not be exposed to challenges that are launched without any control being exercised by its union interlocutor. As a general rule, the proper performance by the employer of the duty to negotiate and apply collective agreements must carry with it an assurance of stability in terms of the conditions of employment in its company.*
>
> **(Emphasis added)**

[70] The evidence at the hearing was that the Union did not routinely seek judicial review of arbitral decisions. That factor as well as the factors mentioned by the Supreme Court above, mitigate toward instances where a duty to seek judicial review of an arbitral decision being extremely rare.

[71] In *Rousseau v. International Brotherhood of Locomotive Engineers et al.,*[30] the Canada Labour Relations Board considered the scope of the duty of fair representation and determined that the duty continues after an arbitration award with respect to implementation and enforcement of the award, but also, in certain circumstances, with respect to judicial review of that decision. In that decision, it said:

> *The duty owed by a union in determining whether or not to proceed with a judicial review application does not exceed that required in deciding to proceed to arbitration in the first place. Indeed, it is exactly as expressed by the Supreme Court of Canada in the Gagnon case. As indicated by this Board in Eamor, supra:*
>
> > *The union's obligation, pursuant to section 37, to represent its members in grievance matters, does not cease when the arbitration process commences… . It begins at the time the union becomes aware of circumstances which require it to perform in a representational capacity and continues until the final conclusion of the matter. In the appropriate circumstances, it may include the conduct of the union at the arbitration and/or*

[30] [1996] 96 CLLC 220-059

> *the obligation to proceed to judicial review of the arbitration decision. Section 37 imposes an obligation on the union to make a determination regarding a judicial review application based on the same standards developed with respect to its decision not to proceed to arbitration.*

[72] The response by Mr. Buchinski to the Applicant's query as to whether the Union would be seeking judicial review of the arbitral award was a perfunctory "No". More than this perfunctory response is expected of the Union. As a minimum, the Union must address the question in the same manner as it would address the question of referring the grievance to arbitration, including, where appropriate, obtaining a legal assessment of its chances of success.

[73] The evidence on this point was sketchy at best. The Applicant concentrated her evidence on perceived errors in the Arbitration Award and in the manner in which the arbitration was conducted. She provided no evidence that the Union's decision not to take the matter to judicial review was in any way tainted by a breach of s. 25.1 of the *Act.* As a result, I have no basis to conclude that the Union's decision not to seek judicial review breached the duty of fair representation.

[74] In *Presseault v. International Brotherhood of Locomotive Engineers and VIA Rail Canada Inc.,*[31] the Canada Board said, in relation to a situation similar to this, where Mr. Presseault complained that his Union failed to represent him adequately during the arbitration process and refused to refer the arbitrator's decision to judicial review, the following:

> *32 The Board does not sit in appeal of a union's decision, nor will it substitute its opinion or second-guess the union's assessment of a particular situation. It is not a tribunal of last resort, intended to deal with union members who are disgruntled over the results of the union's success at arbitration. A complainant must be able to persuasively demonstrate, in a timely fashion, that the union acted in a manner that was arbitrary, discriminatory or in bad faith.*
>
> *33 The union's obligation to represent its members does not include the duty to pursue a judicial review of an arbitral award (see Aditya N. Varma (1991), 86 di 66; 15 CLRBR (2d) 307; and 92 CLLC 16,020 (CLRB no. 894)). Thus, where a collective agreement does not provide for a right to have an arbitral award judicially reviewed, the union's decision not to seek judicial review cannot be seen as a breach of s. 37 (see Gordon Newell (1987), 69 di 119 (CLRB no. 623)). Accordingly, a union member does not have an absolute right to judicial review.*

[31] [2001] C.I.R.B. No. 138

> *34 It is up to the union to decide how it will deal with the outcome of an award. Even if the union is wrong, in the absence of unlawful motives or serious negligence in its assessment, there is no redress available under the Code. Unless the collective agreement provides otherwise, which is not the case here, the processing of a grievance is reserved to the union, and the decision to further an award to judicial review is an integral part of that process. The union is entitled to consider the legitimate interests of the bargaining unit, as well as those of the employee, as a whole. It is entitled to base its decision on its experience in prior matters. It is not even the Board's role to rule whether the union has done a good job, or whether it could have proceeded otherwise.*
>
> *35 In deciding whether to intervene, the Board will consider the union's level of sophistication, its resources and its expertise. The Board will be more demanding if a union has the means to rely on experienced and competent representatives and to seek independent legal opinions in order to guide its decisions. Disputes between a union member and the union about the quality of the legal opinion or its counsel are not within the realm of the Board's jurisdiction, for that would be to second-guess the opinion of a competent professional. Whether the union member agrees or not with that opinion does not mean that the opinion is invalid, or that the union should not have considered it.*
>
> *36 When a section 37 complaint is referred to the Board, it considers the union's attitude, in light of the principles set out by the Supreme Court of Canada in Canadian Merchant Service Guild v. Guy Gagnon et al., supra. It will assess whether the union's actions were discriminatory, wrongful or in bad faith, in light of the nature of the complaint and the actions taken by the bargaining agent. The Board does not rule on the grievance's merits or the arbitrator's award.*
>
> *37 It is only where the Board finds that the union's handling of the grievance - and in this case, the decision not to refer to judicial review - was "arbitrary, discriminatory or in bad faith" that it will intervene and become involved in the merits (see Robert Adams, [2000] CIRB no. 95; and 73 CLRBR (2d) 132; andRobert Adams, [2001] CIRB no. 121). Even if it was unsuccessful in obtaining Mr.Presseault's entry into the locomotive engineer training program, and did not obtain all the compensation that Mr. Presseault felt he deserved, this is no justification for finding that the union's representation was other than genuine, undertaken with integrity and competence. The conduct of the union is not judged by the results obtained at arbitration.*

[75] This case is similar to the above noted case insofar as the Applicant must show that there was something underlying the Union's representation of her which was arbitrary, discriminatory or in bad faith.

Bad Faith:

[76] The definition utilized by the Board with respect to bad faith is also a definition adopted from the Ontario Labour Relations Board in *Toronto Transit Commission*, [1997] OLRD No. 3148, at paragraph 9, "that is, motivated by ill-will, malice, hostility or dishonesty".

[77] Again, the Applicant raises numerous allegations concerning bad faith on the part of the Union including her work as a shop steward for the Union and her advocacy for other aboriginal females, stifling her advocacy for Laurie Pelletier, allegations of a personal relationship between Corey Hendricks and the wife of one of the Employer representatives, allegations that the Union had admitted she breached the Relationships Policy, refusal to provide copies of notes by Union officials at the arbitration.

[78] Apart from the allegation that the Union had somehow interfered with her work as shop steward and advocate for other aboriginal females, there was no evidence to show that this in any way showed the Union to be motivated by ill-will, malice, hostility or dishonesty in its dealings with the Applicant.

[79] Ms. Hendricks testified with respect to her relationship with the wife of one of the Employer representatives. The relationship as described did not show that her knowing the individual involved (and with whom she did not have a social relationship outside of the work environment) caused her to be motivated by ill-will, malice, hostility or dishonesty in her dealings with the Applicant.

[80] The testimony at the hearing established that the Union only admitted the breach of the Relationships Policy as a part of an alternative argument with respect to mitigation of the penalty by the arbitrator. That is, the Union argued that even if the Relationships Policy was found to have been breached, that the penalty was too severe.

[81] The failure to provide notes of the Union officials at the arbitration was testified to by Mr. Buchinski. He testified that his notes remain as his personal notes and are not released to anyone. This policy is not objectionable in the light of it not showing that the Union was motivated by ill-will, malice, hostility or dishonesty in its dealings.

General Allegations:

[82] There was one general allegation that transcended the silos of arbitrariness, discrimination or bad faith. That was the issue of critical job interests. In facing discharge as the

punishment for the breach of the Relationships Policy, the Applicant argues that the Union owes her a higher standard of care.[32]

[83] As noted above, and as stated in the *Brenda Haley* decision, this factor of critical job interests should be evaluated along with the other aspects of the decisions taken by the Union. At page 614, the Canada Board says:

> *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.*

[84] The Canada Board went on to say on that same page:

> *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.*

[85] There is also 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*.

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[32] *See Brenda Haley v. Canadian Airline Employees' Association, [1981] 81 C.L.L.C. 16,096, (supra)*

[86] In this case, the Applicant has failed to provide any evidence that the Union acted in a fashion which was arbitrary, discriminatory or bad faith. There is no conduct on the part of the Union, with one exception, to which a higher standard of care should be attached.

[87] The exception to which I refer is the Union's determination not to take the arbitral decision to judicial review. Again, however, as noted above, there was no evidence of a failure to properly represent the Applicant, to which a higher standard could be attached.

Decision:

[88] For the above noted reasons, we have determined that the Applicant has failed to satisfy the onus of proof that the Union has acted in a manner which was arbitrary, discriminatory or in bad faith. The Application is denied. An appropriate Order will accompany these Reasons.

DATED at Regina, Saskatchewan, this **29th** day of **July, 2014.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson