HARRY BRAUN, Applicant v. AMALGAMATED TRANSIT UNION, LOCAL 615, Respondent Union and THE CITY OF SASKATOON, Respondent Employer

LRB File No. 042-14; December 4, 2015

Chairperson, Kenneth G. Love, Q.C.; sitting alone pursuant to Section 4(2.2) of *The Trade Union Act*

For the Applicant:	Ms. Kimberly Chatfield
For the Respondent Union:	Mr. Jim Yakabowski
For the Respondent Employer:	Mr. John Danyliw

Section 25.1 of *The Trade Union Act* – Employee involved in incident at his workplace – Employee seeks medical assistance and is given medical note suggesting he not return to that area of workplace due to harassment from co-workers.

Section 25.1 of *The Trade Union Act* – Employee seeks legal assistance and the assistance of his trade union – Legal counsel obtains further medical certificates and makes offer of resolution to Employer which is rejected – Counsel requests union's assistance to obtain financial resolve or workplace accommodation.

Union assists by making offer to resolve the workplace matter and/or allow the employee to be accommodated – Employer requests employee provide medical certification regarding what accommodation must contain – Employee fails to respond to repeated requests for information by Employer.

Employee terminated by Employer – Union seeks legal advice as to prospect of success in grievance arbitration – determines not to pursue grievance based on advice – Union fails to advise employee or his counsel of decision not to proceed with grievance.

Section 25.1 of *The Trade Union* Act – Onus of Proof – Employee fails to provide evidence to show that Union acted in a manner that was discriminatory, arbitrary or in bad faith – Board reviews well established jurisprudence regarding the duty of fair representation and the onus of proof.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Chairperson: The Applicant, Mr. Harry Braun brings this application against the Amalgamated Transit Union, Local 615 pursuant to Section 25.1 of *The Trade Union Act*[1]. This application was filed with the Board prior to the proclamation of *The Saskatchewan Employment Act* on April 29, 2014 and all material facts arose prior to that date. Accordingly, the matter will be dealt with under the provisions of *The Trade Union Act.*

Facts:

[2] The Applicant, Harry Braun (the "Applicant") was a long term employee of the City of Saskatoon (the "Employer"). He worked for many years with the Parks Department of the City of Saskatoon and then took a part-time position, which became a permanent position with the Transit Department. While employed in the Transit Department, he was represented for the purposes of collective bargaining by the Amalgamated Transit Union, Local 615 (the "Union").

[3] The Applicant was a utility person with the Transit Department. He started with that department on July 3, 2012 and held a part-time position for a (6) six month period. He commenced working in a full time position in early 2013. Sometime prior to March 11, 2013, Mr. Braun claimed he was harassed by a supervisor and another employee at his workplace. He claimed that the supervisor and the other employee had used unacceptable language in addressing him while at work. He complained about this incident to his union on March 11, 2013 and also sought legal advice.

[4] The Applicant sought medical advice and, Dr. Joseph Balaton, in a medical note dated May 3, 2013, advised that "Harry can return to work as of May 14, 2013, but cannot rtw to his job with the City of Saskatoon" [sic]. This note was provided to the Employer by the Applicant.

[5] A meeting was arranged with the Union, on June 18, 2013 to discuss the Supervisor incident. The Union had offered to support the Applicant, but suggested (2) two options which were to either sit down with the person with whom the Applicant had had the conflict to discuss and hopefully resolve the interpersonal issue, or to report the matter to the Employer's personnel department under the Employer's harassment policy.

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[1] R.S.S. 1978 c. T-17

[6] The Union's notes from the meeting on June 18, 2013 state that the Applicant was concerned that he was not being paid. During the meeting, it was suggested that he had used up all his available sick time. It was suggested that he try to make amends with his supervisor, but the Applicant refused. The Applicant stated during the meeting that he was not going to go back to the Transit Department.

[7] At that meeting, the Union raised the prospect of an accommodation for the Applicant to allow him to work under a different Supervisor. The Union noted that this type of accommodation had been approved by the Employer in the past.

[8] There was also some discussion concerning a registered letter which the Union was aware had been sent to the Applicant by the Employer.

[9] Prior to the meeting, the Applicant had contacted his legal counsel for advice as to how he should approach the meeting with the Union. He noted in his correspondence to his counsel that he would not go back to work for the Transit Department.

[10] The Applicant's counsel wrote to the Union on June 21, 2013, following the meeting on June 18, 2013. In her letter, counsel demanded that the Union investigate the incident and requested a plan to deal with the Applicant's concerns. She also included further medical notes from Dr. Balaton regarding Mr. Braun's medical condition.

[11] In a June 14, 2012 letter to the Applicant's counsel, Dr. Balaton says:

> *…Due to this situation, Harry Braun now suffers from Adjustment Disorder with anxiety and severe depression resulting in a less than 45 GAF (a functional scale measurement) and trouble sleeping due to the severity of stress. Harry has been referred to Dr. Rahmani who is a psychiatrist in consult and has been put on Mirtazapine. The City of Saskatoon needs to find Mr. Braun a job in a different department since he can no longer return to City Transit due to the situation with his supervisor.*

[12] On June 18, , 2013 the Applicant's counsel received a medical report from Dr. Rahmani, the psychiatrist he was referred to by Dr. Balaton. In his medical report, Dr. Rahmani says:

> *Because of job related issues, he started to get anxiety symptoms and felt irritated. He was unable to sleep as his mind was not stopping to think. He lost*

> *20 pounds over 7 months. He got forgetful. He smashed the bus twice because of lack of concentration. His alcohol intake increased his ability to fall asleep and his wish to pass out.*
>
> *Based on the information provided, it is quite evident that Mr. Braun's problems with overwhelming stress and anxiety are related to work stress.*

[13] Another medical note dated June 20, 2013 from Dr. Balaton states the "Due to excessive stress induced by Harry's meeting with Union, HR, and management, he cannot attend these meetings until he's feeling better".

[14] On July 9, 2013, Mr. Yakubowski, the President of the Union, wrote to the Applicant. In his letter, he summarized the events to date as follows:

> 1. *He acknowledged the meeting on March 11, 2013 to discuss the workplace incident. He noted that at the meeting, two options were presented for resolution of the issue. The first was to coordinate a meeting with the Applicant and the other parties in an effort to resolve the matters to everyone's satisfaction. The other option was to pursue a formal complaint under the respectful workplace policy in force in the workplace, a copy of which was provided to the Applicant. The Union agreed to contact both of the other parties to determine if they would participate in the process. The Applicant was to get back to them on which of the two processes he wished to follow.*
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> 2. *The letter notes that nothing was heard from the Applicant until June 16, 2013 when the Union was contacted regarding the fact that the Applicant had not been paid since April, 2013. As a result of that call, the Union immediately set up a meeting with the Applicant on June 18, 2013. The letter also noted that the Union had made inquiries concerning the Applicant's status and discovered that the Applicant's benefits would cease by June 26, 2013 unless the Applicant provided the City with additional information regarding his health status.*
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> 3. *The letter notes that at the meeting on June 18, 2013, the Applicant had provided some medical documentation which the Union had provided to the Employer's HR consultant by fax. The Union also set up a further meeting between the HR consultant and the Applicant on June 20, 2013, which meeting, the letter notes, the Applicant did not attend. The Union did meet with the HR consultant to request that the Applicant be provided his holiday pay, which the Employer agreed to do on July 15, 2013.*
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> 4. *The letter also notes that the Applicant had stated that he felt the Union was overwhelming him, bullying him, or harassing him. In the letter he was invited to contact the International Vice-President of ATU to explain options available to the Applicant in regards to this issue.*

> 5. *Finally, the letter noted that the Applicant continued to have the opportunity to file a Respectful Workplace Policy Complaint and/or an Occupational Health and Safety complaint.*

[15] On July 12, 2013, the HR Department of the Employer wrote to the Applicant advising that they had tried to contact the Applicant by letter on June 13, 2013, but that they had the wrong address for the Applicant. That letter requested that the Applicant provide specific information from Dr. Rahmani regarding the Applicant's condition. The letter noted that in order for the Employer to consider an accommodation for the Applicant it would need to have information regarding the Applicant's condition in order to properly tailor the accommodation.

[16] The letter also provided the Applicant with the opportunity to access the respectful workplace policy to address the harassment issue. It noted that the supervisor involved had indicated a willingness to resolve their differences.

[17] The letter also made reference to the "sick bank" established pursuant to the collective agreement between the Employer and the Union which was the equivalent of a long term disability provision. The letter advised that the prospect of the Applicant qualifying for that benefit would be looked into. It noted that the provision of such benefits would require the Applicant to work with the HR consultant. Additionally, the letter advised that the HR consultant would be available to work with the Applicant in regards to a claim for Employment Insurance Sickness benefits.

[18] The Applicant's counsel wrote to the Union, enclosing, *inter alia*, Dr. Rahmani's medical note, on September 20, 2013. In her letter she says, in part:

> *…*
>
> *We would ask that a meeting be set up with the Union and Mr. Braun at which I will be attending in order this matter be moved forward.*
>
> *Mr. Braun, considering all problems he has encountered, has made an offer of settlement with the City. I enclose a copy of my letter to them and their response. Please advise if you can help with this process.*
>
> *If there can be no resolution regarding Mr. Braun leaving the City of Saskatoon, then we would like to proceed with the process of returning him to work. However, as his Doctor's notes have said, he cannot return to the same position so he will have to be accommodated….*

[19] The Union responded to the letter from the Applicant's counsel on September 28, 2013. In that letter the Union noted:

> 1. *That the Applicant's counsel had made an unsuccessful offer to resolve the matter with the City;*
> 2. *They denied that ATU had failed to address the Applicant's concerns in that they had had several discussions with the Employer in the attempt to find a resolution and a suitable accommodation.*
> 3. *That if the Union was to be a party to a proposal to the Employer for a resolution of the issue, that the Union needed to know the Applicant's "total expectation" in that respect.*

[20] A meeting with the Applicant, his counsel, the Union and representatives of the Employer was held on September 30, 2015. This meeting focused on what was necessary to get the Applicant back to work. Employer representatives noted that in order to provide an accommodation for the Applicant that they would need to meet with him. It was noted that in order to provide an accommodation the Employer needed to know what his medical limitations were and that needed to be addressed by his physician.

[21] The meeting also discussed a proposal for settlement of the issue with a cash payment to the Applicant. The Applicant noted that he did not want to be accommodated. The Union agreed to put forward a proposal for a financial settlement.

[22] The following day, on October 1, 2013, the Union put forward a proposal to the City for a settlement of the issue. The Employer advised on October 15, 2013 that the proposal was not acceptable.

[23] On October 17, 2013, the HR consultant again wrote to the Applicant requesting the same medical information he had requested in his letter of July 12, 2013. The letter also notes that another letter had been sent on August 23, 2013 (a copy of that letter was not placed in evidence). The letter requested that the Applicant see Dr. Rahmani as soon as possible and provide him with the requested information by October 29, 2013.

[24] On November 14, 2013, the Union wrote to the Applicant to advise of a meeting scheduled for November 20, 2013. In that letter, the Union urged the Applicant to participate in the accommodation process, "otherwise the Employer may consider you to have not complied and possibly face termination". Brian McLaren, who testified for the Union, testified that the

Union was notified when termination was a possibility, and they had been notified of such in this case, hence the warning in the letter to the Applicant of that possibility.

[25] Notes of the meeting on November 20, 2013, show that the Applicant was again requested to submit the documentation requested regarding the accommodation. The Applicant refused to talk to the HR consultant involved, calling him a liar. The Applicant was then provided a termination letter. The Union advised the Applicant that they would be willing to represent him with respect to the termination, but that he could work with his counsel if he wished.

[26] On February 11, 2014, the Applicant's counsel wrote to the ATU requesting that the Union file a grievance on behalf of the Applicant in respect to his termination. The Union did not respond to the Applicant's counsel, and did not file a grievance. Mr. McLaren testified that the Union had sought legal advice with respect to the prospects of being successful in respect to a grievance and that the Union's counsel had not been optimistic regarding the chances of success. A letter provided to the Board from the Union's counsel confirmed that he had been consulted in both November of 2013 and March of 2014 in respect of the issue.

Relevant statutory provision:

[27] Relevant 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:

[28] The Applicant filed a written Brief which I have reviewed and found helpful. In it, the Applicant argued that the Union had been arbitrary in his representation of him, citing *Rousseau v. International Brotherhood of Locomotive Engineers et al.*[2] The Applicant also argued that the Union had been arbitrary in failing to conduct an investigation of the termination, and, as such, had failed to follow one of the steps directed by this Board in *Lucyshen v. Amalgamated Transit Union, Local 615*[3].

[2] [1996] CLLC 220-059
[3]]2010] CanLII 15756

[29] In his Brief, the Applicant pointed to a number of instances where he alleged that the Union did not properly represent him. He also argued that the Union was complicit in the harassment and bullying suffered by the Applicant.

[30] The Applicant argued that the Union acted in bad faith when they refused to grieve his dismissal from his employment. Generally, the Applicant argued that the Union overall, did not fairly represent the Applicant.

Union's arguments:

[31] The Union argued that the onus of proof fell upon the Applicant to show that the Union had been discriminatory, arbitrary, or had acted in bad faith in its representation of the Applicant. The Union argued that the Applicant had never advised them what he wanted with respect to the harassment issue, that is to attempt to mediate the issue between the parties, or to pursue a complaint under the Respectful Workplace Policy or Occupational Health and Safety legislation.

[32] The Union argued that the Applicant refused to help himself when he was requested to provide medical support for an accommodation or to work with the Employer and the Union to effect such accommodation.

[33] The Union argued that it did its best to represent the Applicant, but ultimately, the failure of the Applicant to cooperate and provide the necessary information to the Employer, something which was outside the Union's control, led to his dismissal.

Employer's arguments:

[34] The Employer made no arguments with respect to the issues between the Union and the Applicant, but filed with the Board a copy of its decision in *Beauchamp v. SGEU*[4] in respect of the onus on the Applicant.

Analysis and Decision:

[35] The Board's jurisprudence with respect to section 25.1 was most recently reviewed in *Banks v. CUPE*[5]. At paragraph [65], the Board set out the following:

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[4] [2014] CanLII 46061 (SKLRB)
[5] [2013] CanLII 55451

[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 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:*

> *[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 25.1 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.*
>
> *[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:*
> >
> > *(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 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".

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:*
>
> > *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 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 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.*

[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 Johnsonand 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.*

[36] The Board has consistently followed the definitions provided by the Ontario Labour Relations Board in *Toronto Transit Commission*[6] set out above. That is:

> *. . . a complainant must demonstrate that the union's actions were:*

[6] [1997] OLRD No. 3148, at para. 9

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.*

[37] In *Lucyshen*, *supra*, the Board was dealing with a situation much different that the facts in this case. A reading of that case will show that the Union, in that case, was disorganized and lacking any proper procedures to deal with grievances by its members. That was not the case here. In this case, the Union sought to represent the Applicant, but its efforts were thwarted by either the Applicant's refusal to provide direction, by his deferral to his legal counsel to attempt negotiate directly with the Employer for a resolution, and finally by his refusal to assist the Union by obtaining the information necessary to allow the proper formulation of a accommodation for him.

[38] The Union was not arbitrary in its dealings with the Applicant. There was no evidence to show that they acted flagrantly, capriciously, totally unreasonably, or were negligent in any way, let alone grossly negligent. Admittedly, the Union erred when it failed to communicate to the Applicant or his counsel its decision not to pursue a grievance related to his termination, but it took that decision based upon a review of the probability of success of a grievance from its legal counsel.

[39] Nor can it be said that the Union was discriminatory with respect to its representation of the Applicant. There was no distinction made between this grievor and others.

[40] Nor was there any evidence of bad faith on the part of the Union. There was no evidence of ill-will, malice, hostility or dishonesty on the part of the Union. Throughout, the Union attempted to assist the Applicant, but their best efforts were foiled by the Applicant's conduct and actions in his refusal to cooperate in providing the information necessary for an accommodation to be made. Additionally, even after a settlement proposal from the Applicant's counsel had been rebuffed, the Union, nevertheless, attempted to resolve the issue through a monetary settlement for the Applicant. We can find no fault in the Union's representation of the Applicant on the evidence as presented.

[41] For these reasons, the Application is dismissed.

DATED at Regina, Saskatchewan, this **4th** day of **December, 2015.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson