GALINA MIROSHNICHENKO, Applicant v. SEIU WEST and YWCA SASKATOON Respondents

LRB File No. 052-17; April 20 , 2018

Chairperson, Kenneth G. Love Q.C., sitting alone pursuant to section 6-95(3) of *The Saskatchewan Employment Act*

This decision has been completed pursuant to section 6-94 of *The Saskatchewan Employment Act*

For the Applicant:	James Streeton
For the Respondent SEIU West:	Heather Jensen
For the Respondent YWCA Saskatoon:	No-one Appearing

Duty of Fair Representation – Applicant involved in several workplace incidents leading to discipline and ultimately to her termination – Union grieves all incidents and processes grievances under the collective bargaining agreement. All grievances ultimately referred to arbitration. Prior to arbitration, Union's Grievance Committee reviews grievances, requests that a legal opinion be obtained. Following further review, Grievance Committee determines to abandon grievances. Applicant appeals decision to Executive Committee of Union and to International Vice-President, but is unsuccessful in her appeals.

Duty of Fair Representation – Applicant raises issue regarding Union's investigation of grievances complaints arguing that the Union failed to properly investigate the complaints, citing the Board's decision in *Lucyshyn v. Amalgamated Transit Union, Local 615*.

Duty of Fair Representation – Board reviews factors set out in *Lucyshyn v. Amalgamated Transit Union, Local 615*. Board determines that Union conducted a sufficient investigation of the grievances. Board dismisses complaint.

REASONS FOR DECISION

Background:

[1] Ms. Galina Miroshnichenko ("Galina") applied to the Board alleging that SEIU West ("SEIU" or the "Union") had failed to properly represent her contrary to section 6-59 of *The Saskatchewan Employment Act* (the "*SEA*")

[2] The application involved 4 grievances filed by the Union on behalf of Galina, the final one as a result of her termination from her employment with the YWCA Saskatoon (the "YWCA").

[3] For the reasons which follow, I am unable to find any breach of the Duty of Fair Representation owed to Galina by SEIU pursuant to section 6-59 of the *SEA*.

Facts:

[4] The following is an outline of the facts heard from 4 witnesses and numerous documents filed by the parties. Other material facts will be referred to as necessary during the analysis portion of these reasons.

[5] Galina was employed by the YMCA as an early childhood educator. She has been a member of the SEIU since 2009.

[6] Events began in April of 2013 when an interpersonal dispute arose between Galina and a co-worker. Galina complained to her manger that she was being harassed and discriminated against by this co-worker. The Co-worker also filed a complaint against Galina.

[7] Galina sent 3 memos to her manager during the month of April, 2013 complaining about the co-worker. On April 23, 2013, Galina was advised by her manager that she would be assigned a different co-worker as a work partner. On that same date, Galina again sent a complaint to her manager about the co-worker. The Executive Director of the YWCA, on May 2, 2013, wrote to both parties expressing her view that both parties bore responsibility for the conflict and urged both parties to accept their manager's coaching and direction.

[8] On November 20, 2013, another co-worker filed a formal workplace harassment complaint against Galina. In response, on December 16, 2013, Galina sent a memo to the executive director of the YWCA complaining about her manager's actions in allowing objectionable conduct towards her by co-workers and complaining about the co-worker who had made the formal workplace harassment complaint.

[9] On December 16, 2013, Galina also sent a memo to her manager alleging harassment and discrimination against her by the complaining co-worker. The Executive Director of the YWCA scheduled a meeting with Galina to December 18, 2013 to discuss the complaint. Galina called in sick on the morning of the meeting. On December 19, 2013, the Executive Director again wrote to Galina to advise that the meeting was not optional and that she was required to attend. The meeting was rescheduled to December 20, 2013. In her testimony, Galina denied receiving this memo. She also left work early on December 20, 2013 before the meeting could be held.

[10] The Executive Director again rescheduled the meeting for January 7, 2014. Galina advised the Executive Director that she had a scheduled doctor's appointment and could not attend on that date. The Executive Director then rescheduled the meeting for January 9, 2014. In the interim, on January 8, 2014, Galina writes a memo to her manager continuing her complaint against the co-worker.

[11] On January 9, 2014, Galina is at work, but refuses to attend the meeting scheduled by the Executive Director to discuss the interpersonal relationship issues. The Executive Director then writes to Galina advising that the YWCA would be proceeding to investigate the harassment complaint lodged against her without her participation. She did, however, provide Galina with one final opportunity to meet with her on January 13, 2014. Galina finally agreed to meet with the Executive Director after the proposed meeting was moved to January 15, 2014.

[12] On January 24, 2014, the Executive Director wrote to Galina to outline the findings from the investigation of the workplace harassment complaint against her. The complaint was upheld and Galina was given a written reprimand concerning her behavior. She was also provided some coaching in respect of her future interactions with the co-worker.

[13] Notwithstanding the determination regarding the harassment complaint, Galina continued to make complaints[1] respecting the co-worker. On January 31, 2014 Galina met with the Director of Programs and her manager. She is informed by them that she requires coaching in respect to interpersonal skills, teamwork and effective workplace communication. In a follow up letter on February 3, 2104, Galina is advised that the coaching is not voluntary and she would be required to participate. Galina was advised that should she fail to participate that disciplinary action could be taken. Dates for a coaching session are offered on either February 6 or 7, 2014. On February 3, 2014[2], Galina contacts the Union for assistance.

[14] Judy Horsman testified for the Union. She testified that she was the usual Union rep for members at the YWCA. When Galina contacted the Union, the matter was referred to Ms. Horsman. Ms. Horsman testified that she had a conflict with respect to representation of Galina due to the fact that she was already representing and advocating on behalf of the member who had filed the formal harassment complaint against Galina. She consulted with her director who assigned Ms. Tracy Goodheart, another Union rep., to represent Galina in respect of her issues with the YWCA.

[15] The coaching session scheduled for February 6 or 7 did not occur. It is rescheduled to February 13th or 14th. Ms. Goodheart attempts to contact Galina at home to discuss her request for assistance, but is unable to reach her, leaving a voicemail message. Galina does not attend the scheduled coaching session on February 13th or 14th.

[16] Following on Galina's failure to attend the coaching session, the Director of Programs for the YWCA wrote to the Union to advise that they intended to take disciplinary action against Galina for her failure to attend the coaching session. The date proposed for this meeting was not convenient for the Union and it was postponed until February 21st. Ms. Goodheart, the bargaining unit chairperson for the members at the YWCA, and Galina met to discuss the issue at the YWCA prior to the meeting regarding the disciplinary action.

[17] Ms. Goodheart, the unit chairperson, and Galina meet with the Director of Programs for the YWCA as scheduled on February 21, 2014. At that meeting the Director of

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[1] See memos dated January 29, 2014 and February3, 2014

[2] While nothing turns on this point, the Board received exhibit A-6 from Galina which is a letter addressed to Ms. Horsman of the Union dated January 13, 2014. It does not fit the time line regarding the evidence of first contact given by Ms. Horsman which she testified to be March 3, 2014.

Programs for the YWCA provides a written reprimand letter to Galina which imposes a one day suspension without pay.

[18] Immediately following the meeting, Galina signed 3 blank grievance forms grieving her written reprimand, ("Grievance #1") the imposition of the one day suspension, ("Grievance #2") and that the YWCA had failed to provide her with a safe and healthy workplace. ("Grievance #3) These grievance forms were subsequently completed as to the details of the grievance by Ms. Goodheart All 3 grievances were filed with the YWCA by the Union on February 25, 2014.

[19] On March 3, 2014, Ms. Goodheart contacted the YWCA to request a meeting concerning the 3 grievances and to gather more facts related to the grievances. The YWCA agreed to meet. On March 5, 2014, Ms. Goodheart contacted the YWCA to obtain a copy of Galina's personnel file. She was advised by the YWCA that their policy was not to provide copies of employee personnel files.

[20] On March 11, 2014, Ms. Goodheart wrote to the Executive Director of the YWCA requesting that Grievance #3 be held in abeyance pending development of a policy/process for dealing with harassment complaints. That request was granted.

[21] On or about March 24, 2014, Galina sent a package of materials to her manager. Upon its receipt, it was given to the Executive Director of the YWCA who found the materials to be inappropriate. She communicated with the Union to advise that she would be writing directly to Galina to advise her that she was expected to immediately stop any further communication of this nature. This was done by letter dated March 27, 2014.

[22] On March 28, 2014, Ms. Goodheart communicated by email with Galina concerning her grievances as well as the package of materials send to her manager. In that email, she said:

> *In your email, you referred to your letter with attachments that you provided to Linda and asked her to send them to me. I also know that you provided this particular package to your Manager, Shumi.* ***I am requesting that you do not provide any more written documentation to anyone at the YWCA until such time as we have dealt with your three grievances.*** *If you feel the need to provide any further documentation on any issues, please forward it to me only.*

> *I also want you to know that I am in receipt of this package and have some concerns regarding the confidentiality of the documents you have included and over some of your comments …**Continued behavior, such as this, could lead to discipline, including immediate termination.***
>
> *I understand that the Employer has requested your attendance in a coaching session. I have asked Judy Horsman to attend this meeting with yourself and Linda as I will be out of the office from March 31st until my return on April 8th. I also want you to understand that you must attend this coaching session otherwise you could be further disciplined, up to and including termination as this would be insubordination.* [Emphasis in the original]

[23] On April 2, 2014, the YWCA provided the Union with requested information regarding each of the three grievances.

[24] A coaching meeting was held with Galina on April 7, 2014. After the meeting, the Union reps had wanted to meet with Galina to discuss the meeting and what had occurred, but Galina did not wait for them. Ms. Horsman followed up with an email to Galina expressing her disappointment that she had not stayed to further discuss the issue.

[25] Galina responded to Ms. Horsman's email expressing disappointment in the conduct of the coaching meeting. She also said, in part:

> *Of course, I hoped to be helped during the meeting and saved, because of your presence. You were really professional and constructive during the first 30 minutes when the management did not know what to say and what to do at all. Unfortunately, after that, you turned into Ms. A's*[3] *representative, took over the meeting and finally helped them (with Linda's support) to get their desired result.*

[26] On April 14, 2014, the YWCA sent a letter to Galina setting out their expectations for improvement in her dealings with other employees in the workplace. On April 16, 2014, the Executive Director by email advised the Union that they would be prepared to meet to discuss the grievances and provide additional information to the Union with respect to those grievances on April 22, 2014. Ms. Goodheart advised Galina of this meeting by email on April 15, 2014.

[3] This provision has been anonymized to protect the identity of persons not party to this application

[27] Sometime in late April, 2014, Ms. Goodheart was given another assignment by SEIU. Ms. Horsman advised Galina on April 25, 2014 that she would take over from Tracy as her Union representative.

[28] On April 27th, Galina emailed both Ms. Goodheart and Ms. Horsman expressing some concerns about the nature of her representation and requesting an update on the progress and asking some questions. On April 30, 2014, she again made complaint to her manager concerning a co-worker by email.

[29] On June 2, 2014, the YWCA wrote to Galina to follow up on their letter of April 14th and to advise her that they had made arrangements for Galina to meet with a "third party provider for coaching, R. M.[4]" An appointment with this third party provider was set for June 10, 2014 from 12:30 – 3:30 PM.

[30] The meeting with the Executive Director of the YWCA did not resolve any of the grievances filed on Galina's behalf. On June 3, 2014, Ms. Horsman wrote to the YWCA to request that the 2 grievances that were not being held in abeyance[5] go forward to the Board of Directors for adjudication in accordance with the Collective Agreement between the Union and the YWCA. She confirmed that communication with Galina.

[31] On June 3, 2014, Galina emailed Ms. Horsman to inquire as to her thoughts on the June 2nd letter from the YWCA setting the appointment with R.M. She also inquired about the whereabouts of a blue binder which was sent to her manager. On June 4, 2014, she addressed another memo to her personnel file at the YWCA and sought to have that memo placed on her file.

[32] Galina declined to meet with R.M. on June 10th. The Union was advised of this by the Director of Programing on June 6, 2014. In an email to Galina, Ms. Horsman said, in part:

> *… I am assuming then that you are in agreement that there is no problem in the workplace and all is well which means the complaint that you filed against your co-worker was invalid and no longer needs to be addressed!*

Galina responded to this email by saying that this comment was not true.

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[4] Again, this name has been anonymized to protect the identity of persons not party to this application.
[5] See paragraph 20 above

[33] The Union was able to get the YWCA to agree that no disciplinary action would be taken against Galina as a result of her failure to attend the coaching session with R.M. During June, 2014, Galina made numerous calls to the SEIU offices regarding her union representation. On June 23, Ms. Horsman emails Galina to remind her that the Executive Director was on holidays and that her grievances had been referred to the Board of Directors of the YWCA. She confirmed that she would be back in contact after the Executive Director had returned from holidays.

[34] Also, in late June, 2014, Galina's job responsibilities were changed by the YWCA. She was moved from her former position to a position where she was covering breaks for other early childhood educators in a "floating" role. This change was challenged by the Union by an email from Judy Horsman dated July 3, 2014.

[35] Galina again requested, by voice message, that she be given a copy of her file by the Union. Ms. Horsman emailed to request clarification of that request. On July 28, 2014, Galina forwards a memo to Barb Cape, the President of SEIU which, in part, requests that Ms. Cape assign a different representative to her case.

[36] Galina again expressed concerns regarding her representation in an email dated August 9, 2014 to Ms. Horsman. She again requested her documents which she thought were in the Union's possession. She complained of a lack of support and understanding of her position commenting that Ms. Horsman declined to initially represent her due to a conflict.

[37] Ms. Horsman responded to Galina in a somewhat terse email on August 11, 2014. She refuted the allegations made against her by Galina in respect to her representation. She also sent the files Galina had requested in an email dated August 18, 2014.

[38] The grievance meeting with the Board of Directors for the YWCA was finally set for October 14, 2014. Ms. Horsman requested access to meet with Galina prior to the Board meeting to review the presentation to the Board. On that date, the Board of Directors began to hear the grievances, but was unable to conclude the hearing on that date. Continuation dates were sought, but were not readily available.

[39] While the hearing process with the Board of Directors was adjourned, Galina continued to make accusations against her co-workers and to make other inappropriate communications with the YWCA President. In a letter dated December 3, 2014, the Director of Programs outlined these concerns and placed Galina on notice that her behavior was inappropriate and would not be tolerated. She was advised that should such behavior continue that her employment would be terminated.

[40] On December 11, 2014, Galina wrote to Ms. Horsman and Ms. Goodheart to voice her disagreement with the comments made by the Director of Programs in the December 3rd letter. She also sent a similar letter to the YWCA addressed to her personnel file.

[41] By letter dated December 29, 2014, the Executive Director of the YWCA wrote to Galina terminating her employment as threatened in the December 3rd letter. The Union grieved her termination by grievance dated January 8, 2015.

[42] By letter dated January 14, 2015, the Union advised the YWCA that they wished to bypass the other steps of the grievance procedure and proceed directly to arbitration with respect to the termination of Galina. By letter dated February 18, 2015, the YWCA Board advised that they were not prepared to adjudicate the grievances and wanted to move the 3 original grievances to arbitration.

[43] Due to the grievances being referred to arbitration, the Union was required to have the grievances reviewed by their Grievance Committee to confirm that the grievances were well founded and that arbitration was appropriate. The grievances were presented to the committee by Ms. Horsman. On the first review, the Committee requested that Ms. Horsman obtain a legal opinion from counsel for the Union as to the prospects for success in the arbitration proceedings.

[44] Galina met with Ms. Jensen, counsel for the Union who interviewed Galina with respect to the grievances filed on her behalf. At that meeting she was provided an information sheet which outlined the relationship between Ms. Jensen, the Union and the grievor.

[45] Ms. Jensen provided her opinion regarding the prospects for a successful arbitral outcome to the Grievance Committee of the Union. After consideration, the Grievance Committee determined that the grievances should be withdrawn. Galina was advised of her right to appeal that decision to the SEIU Executive Board. She exercised that right of appeal.

[46] Galina met with the SEIU Executive Board on December 2, 2015 to appeal the Grievance Committee's decision to withdraw her grievances. She was advised by Barb Cape, SEIU's President on December 18, 2015 that her appeal had been denied. She was advised of a further right of appeal to the SEIU International Vice-President for Canada, Sharleen Stewart.

[47] Galina exercised this further right of appeal on January 13, 2016. She received a response to her appeal on March 10, 2016. The SEIU International Vice-President for Canada did not support her appeal and it was denied.

[48] Galina then filed this application on March 15, 2017.

Relevant statutory provision:

[49] The relevant statutory provision is:

> ***6-59****(1) An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.*
>
> *(2) Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee.*

Union's arguments:

[50] The Union provided both oral argument and written submission which we have reviewed and found helpful.

[51] The Union first argued that the Applicant bore the burden of proof and had not satisfied that burden.

[52] The Union also argued that the evidence did not show that the Union had acted in an arbitrary or discriminatory manner. Nor, it argued it had not acted in bad faith. It argued that the Union had taken sufficient steps to investigate the grievances and to make representations in respect thereto.

[53] The Union argued that it processed the grievance applications fairly, obtained a legal opinion concerning the probability of success. It argued that the grievance committee did not act in an arbitrary fashion, nor was it discriminatory, nor did it act in bad faith. Furthermore, it argued, Galina was afforded the opportunity to appeal that decision in accordance with the Union's constitution to the SEIU Executive Committee and to the SEIU International Vice-President for Canada.

Applicant's arguments:

[54] The Applicant also provided both oral argument and written submission which we have reviewed and found helpful.

[55] The Applicant relied primarily upon this Board's decision in *Lucyshyn v. Amalgamated Transit Union, Local 615*[6], arguing that the Union failed to make and adequate investigation of the grievances and hence did not properly represent Galina in respect of her grievances with the YWCA.

Analysis:

[56] The Board's jurisprudence with respect to the Duty of Fair Representation is well settled. Most recently, the Board reviewed its jurisprudence in its decision in *Lyle Brady v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771 and Jacobs Industrial Services Ltd.*[7]. That decision also noted the extensive review of the Duty of Fair Representation as outlined in *Banks v. CUPE, Local 4828 and SFL*.[8]

[57] In *Banks*, the Board summarized its 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*[12], the Board set out the principles applicable to an analysis of the duty of fair representation, with a particular focus on arbitrariness and the scope of the Union's duty. In that case, the Board said:
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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*

[6] 2010 CanLII 15756, LRB File No. 035-09
[7] 2017 CanLII 85456 (SK LRB)
[8] 2013 CanLII 55451 (SK LRB)

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".*
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> *The concept of arbitrariness, which is usually more difficult to identify than discrimination or bad faith, is not equivalent to simple errors in judgment, negligence, laxity or dilatoriness. In Walter Prinesdomu v. Canadian Union of Public Employees, [1975] 2 CLRBR 310, the Ontario Labour Relations Board stated, at 315:*
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> > *It could be said that this description of the duty requires the exclusive bargaining agent to "put its mind" to the merits of a grievance and attempt to engage in a process of rational decision making that cannot be branded as implausible or capricious.*

> *This approach gives the word arbitrary some independent meaning beyond subjective ill will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.*

. . . .

[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 . . . .*
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> *And further, at 194-95, as follows:*
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> *[219] In Rousseau v. International Brotherhood of Locomotive Engineers et al., 95 CLLC 220-064 at 143, 558-9, the Canada Labour Relations Board described the duty not to act in an arbitrary manner as follows:*
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> > *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct*

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

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

> *A union is not required to be correct in every step it takes on behalf of an employee. Moreover, mere negligence on the part of a union official does not ordinarily constitute a breach of section 68. See Ford Motor Company of Canada Limited, [1973] OLRB Rep. Oct. 519; Walter Princesdomu and The Canadian Union of Public Employees, Local 1000, [1975] OLRB Rep. May*

> *444. There comes a point, however, when "mere negligence" becomes "gross negligence" and when gross negligence reflects a complete disregard for critical consequences to an employee then that action may be viewed as arbitrary for the purposes of section 68 of the Act. In Princesdomu, supra, the Board said at pp 464-465:*
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> > *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 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.*

Did the Union Fail to Properly Investigate the Grievances?

[58] The Applicant's primary argument is that the Union failed to conduct an adequate investigation of the facts surrounding the grievances. In support, she cited the Board's decision in *Lucyshyn*[9]. In that decision, the Board outlined what it considered to be the minimum standard of conduct by a Union in the handling of a grievance. At paragraph [36], the Board set out the following 7 requirements:

> 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;*
>
> 4. *The Union, Grievance Committee, or person charged with the conduct of grievances, should determine if the grievance merits being advanced. Legal advice may be sought at this time to determine the prospects for success based on prior arbitral jurisprudence;*
>
> 5. *At this stage, the Union may determine to proceed or not proceed with the grievance. However, in making that determination, the Union must be cognizant of the duty imposed upon it by s. 25.1 of the Act;*
>
> 6. *At each stage of the grievance procedure, the Union will be required to make a determination as to whether to proceed with the grievance or not. Again, its decision to proceed or not must be made in accordance with the provisions of s. 25.1 of the Act; and*
>
> 7. *It must also be recognized that the Union has carriage of the grievance, not the grievor. There may be instances where the common good outweighs the individual grievor's interest in a matter. Where such a decision is made (i.e.: not to proceed with a grievance) which is not arbitrary, discriminatory, or in bad faith, that decision will undoubtedly be supported by the Board.*

[9] Supra note 6

[59] The first three items above relate to the conduct of an investigation. In the *Lucyshyn* case, the Union failed to conduct any meaningful investigation of the complaints. At paragraphs [38] and [39], the Board said:

> ***38]*** *The Board finds the conduct of the Respondent Union in this case to be arbitrary. The evidence discloses that it did not conduct any meaningful investigation of the complaints alleged by the Applicant. Furthermore, it took a superficial or cursory view of the grievances filed. They maintained no record of the grievances (as demonstrated by their inability to even locate copies of the grievances). Furthermore, they failed to communicate with the Applicant concerning his grievances after the initial meetings with Mr. Heusdens, where the majority of the grievances were denied, following up on only one grievance, which was subsequently accepted and paid out. Arbitrariness was further demonstrated when the grievances were withdrawn by the Respondent Union without consultation or communication with the Applicant. Nor was the Applicant offered any opportunity to be heard in respect of the Respondent Union's decision to withdraw his grievances.*
>
> ***[39]*** *Throughout the hearing of this matter, the Board was shocked by the apparent lack of any defined process or procedure to deal with grievances. They appeared to be handled in an offhand and disjointed manner. There was clearly a lack of any process as described in paragraph [36] above.*

[60] Those comments are not applicable in this case. Here, the Union had a very disciplined process for dealing with grievances. Firstly, they took steps to promptly file grievances to insure that the grievance was filed in a timely manner and to avoid any possible complaint that the grievance was not timely. While that may have been done without any prior investigation, other than its prior knowledge of Galina's situation, it showed that they respected the grievance process as set out in the collective bargaining agreement. On occasion, this Board has been critical of unions who failed to advance a grievance to preserve their right to file a grievance under a collective agreement.

[61] Once the grievances were filed, the Union then took steps to investigate the grievances. In the circumstances, not much investigation was necessary as the facts were fairly straightforward and known to both Galina and the Union. Nevertheless, the Union requested information regarding the grievances from the Executive Director and also had Galina review her personnel file when they were denied access to that file by the YWCA. They conducted this

investigation prior to meeting with the YWCA Board of Directors in furtherance of the grievance procedure.

[62] The Union, in this case, conducted an investigation, which, in my opinion, was a meaningful investigation, having regard to the circumstances of the cases. The Union did not, in my opinion, lack understanding of the issues behind the grievances or their factual backdrop.

[63] Having regard to the first three elements of the *Lucyshyn* case, the Union filed the first 3 grievances in a timely manner following the February 21, 2014. The Union was at the meeting, which was arranged to provide a letter of suspension to Galina. The background was known to the Union as they had had prior involvement in the process as well as discussions with Galina. Secondly, there is no evidence to suggest that the union did not investigate the grievances in a fair and objective manner. Galina was interviewed and no other employees were involved except with respect to Grievance #3, which grievance was placed in abeyance.

[64] Upon the determination by the Union to proceed directly to arbitration and the YWCA's determination to refer the first three (3) grievances to arbitration, the Union sought direction from their Grievance Committee. A report was prepared for the Grievance Committee, outlining the background of the grievances. The Grievance Committee initially reviewed the report and requested that their legal counsel provide an opinion as to the likelihood of success at arbitration. To that end, the Union's legal counsel met with Galina, reviewed the arbitral jurisprudence, and made a recommendation to the Union.

[65] The Grievance Committee reviewed the legal opinion and concluded that the grievances should be abandoned. In so doing, it satisfied point 4 from *Lucyshyn*.

[66] There is no evidence that the Grievance Committee failed to observe the Duty of Fair Representation in its deliberations. There is nothing to suggest that the Grievance Committee proceeded in a manner which was arbitrary or discriminatory as those terms are defined above. Nor did the Committee act in bad faith, in accordance with the definition above. This satisfies point 5 in *Lucyshyn*.

[67] At pointed out in point 6 of *Lucyshyn*, the Union must, at every stage of the grievance process, evaluate as to whether to proceed or not. That was the purpose for the review by the Grievance Committee of the Union. The Union prudently wanted to determine if the grievances merited referral to arbitration and had a good likelihood of success.

[68] As pointed out in point 7 of *Lucyshyn*, the grievance is the property of the Union, not the grievor. They have the right, in appropriate circumstances[10] to determine not to proceed with a grievance. Such a determination is, undoubtedly, disappointing to the grievor and often results in a complaint to this Board. However, this Board does not sit in appeal of a union's decision not to proceed with a grievance, as it oversees only the process being followed by the Union to insure that the Duty of Fair Representation has been met by the Union. This Board does not sit in appeal with respect to the merits of a grievance.

[69] In this case, the Grievance Committee recommended that the grievances not proceed. Galina was given the opportunity to appeal this decision to both the Executive Board of the Union as well as to SEIU International Vice-President for Canada. Both the SEIU Executive Board and SEIU International Vice-President for Canada upheld the determination by the Grievance Committee.

Decision:

[70] I find that SEIU did not fail to meet its obligations as set out in section 6-59 of the *SEA*. The Union did conduct a proper and meaningful investigation and had a well-established process for dealing with grievances. Both Ms. Horsman and Ms. Goodheart were responsive to Galina's requests and the grievance process. While the result was difficult for Galina, I am of the view that the Union conducted itself properly in its representation of Galina.

[71] The Application is dismissed. An appropriate order will accompany these reasons.

DATED at Regina, Saskatchewan, this 20th day of April, 2018.

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.
Chairperson

[10] i.e., when there is no breach of the Duty of Fair Reorientation by the Union in the process.