ALISON DECK, Applicant v. SEIU-WEST, Respondent and SASKATCHEWAN HEALTH AUTHORITY

LRB File No. 073-18; November 13, 2018

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

For the Applicant:	Self Represented
For the Respondent SEIU-West:	Ms. Heather Jensen
For the Respondent Saskatchewan Health Authority	Mr. Eric Sarauer

Sections 6-59 & 6-60 – Duty of Fair Representation – Employee faces issues in workplace and seeks Union assistance. Union provides assistance. Union advises Employee to make applications to Saskatchewan Human Rights Commission and to Occupational Health and Safety – Union does not consider respectful workplace provisions of Collective Bargaining Agreement.

Sections 6-59 & 6-60 – Duty of Fair Representation – Employee laid off as a result of elimination of position – Employee seeks assistance of Union regarding placement into similar position which was not eliminated – Union does not consider Employee' skills and ability to perform other jobs with IT Department.

Sections 6-59 & 6-60 – Duty of Fair Representation – Employee's position eliminated due to change from one form of Telephony equipment to internet based equipment (VOIP) – Union fails to consider Collective Bargaining Agreement provisions related to Technological Change.

Sections 6-59 & 6-60 – Duty of Fair Representation – Board reviews and confirms its jurisprudence with respect to the Duty of Fair Representation of members by Union.

REASONS FOR DECISION

Background:

[1] Alison Deck ("Deck" or the "Applicant") brings this application against her Union, SEIU-West ("SEIU") alleging that her Union failed to properly represent her contrary to sections 6-59 and 6-60 of *The Saskatchewan Employment Act* (the "*SEA*"). She was employed by the Saskatoon Health Authority at all times material to this application. The Saskatoon Health Authority has now been merged into the Saskatchewan Health Authority (the "SHA").

[2] The Applicant was employed by SHA in its Information Technology Services, Infrastructure Department at all times material to this application as an Information Technology Telecommunications Analyst. During the course of her employment she encountered difficulties in her job in respect of which she sought the help of the Union.

Facts:

[3] The following is an outline of the facts heard from the Applicant and 2 Union witnesses and numerous documents filed by the parties. Other material facts will be referred to as necessary during the analysis portion of these reasons.

[4] There were some prior events referenced in the evidence, but the Applicant's involvement with the Union commenced in January or February of 2016. The Applicant called the Union's member resource centre and was called back by Ms. Sinda Cathcart, a Field Representative for the Union. The Applicant's concerns related to inappropriate comments and actions in her workplace which she found to be offensive and harassing. In response to a request to provide details, she sent two emails[1] to Ms. Cathcart outlining the conduct she found to be problematical.

[5] The Union arranged a meeting with Mr. Alexander Morgun, to discuss the Applicant's concerns. That meeting was held on April 25, 2016. This meeting canvassed a variety of concerns held by the Applicant. It was attended by Deck, Alexander Morgun, Sinda Cathcart, Angela Hosni (another Union Rep.) and Eric Sarauer, from SHA's Human Resources

[1] Exhibits E-1 and E-2 dated February 17, 2016 and March 14, 2016 respectively

Department. Ms. Cathcart's notes of that meeting were entered into evidence as Exhibit U-7. No response regarding the issues raised at the meeting was provided to me by SHA.

[6] On May 14, 2016, the Applicant was advised by her Team Lead, Justin Thomas that the Employer was making changes to the day to day work assignments for the Information Technology Telecommunications Analysts positions. The Applicant, in her email communication to the Union suggested that the Information Technology Telecommunications Analyst positions were being reduced in scope and that "[I]n order to keep our current level of pay we are being forced to "*move to*" an IT Analyst position from Telecom Analyst".

[7] Again, we had no response to this initiative from the Employer. However, the evidence established that the proposed changes did not occur. We heard some evidence that the Telecommunications Analyst positions were to be converted to IT analyst positions, but again, this did not occur.

[8] The Union responded on July 14, 2016 that they would look into the matter and that the Union would get back to the Applicant. Later, the Union suggested setting up a further meeting with Mr. Morgun and the It Manager, Regan Biehn once "the summer vacation season is wrapped up". The Applicant responded that she would check with her co-worker as to whether to take the matter further. She later suggested that they "wait and see how this develops in the fall, but I will let you know". Witness testimony established that no further contact was made concerning this issue.

[9] The Applicant contacted the Union again on August 17, 2016 regarding the hiring of a former employee as a contractor. The Union reviewed the matter and found that the employee in question had been hired into an out-of-scope position which was outside their jurisdiction. In her response, Ms. Hosni says, in part, "[Historically, project management roles have been out of scope (although not exclusively) so we can't really suggest that it was required to have been posted as available to in scope staff".

[10] The Applicant contacted the Union again on January 30, 2017 regarding having been bypassed for a team lead position in 2014, On that occasion, the Union responded, in part, that, "[T]he window of opportunity to file a grievance on such a situation…is 14 calendar days".

[11] The Applicant again raised issues concerning her working environment with the Union. A meeting with her was arranged at the Union's offices to discuss the situation. The discussion dealt with several topics, including the Applicant's concerns about workplace behavior, that she had been overlooked in favour of a junior employee to do project IT work, a threat from her team lead that she would be "demoted if she could not learn how to install the routers",[2] the work of the contract employee hired into an out-of-scope position, her exclusion by her manager from recognition and assignment of project work and its impact upon her health. The Applicant was advised that she should report incidents of harassment and inappropriate behavior to management through the Incident Report Line ("1600" line). At the meeting, the Union also posed the question to the Applicant, "[W]hat do you want?"

[12] The Applicant responded to the Union's question as to what she wanted, in an email dated May 13, 2017[3]. In her response, she outlined 5 items:

> 1. *Back pay compensation since 2006 for fulfillment of the Telecommunications Manager duties, after the Telecom Manager job was eliminated from the IT department.*
>
> 2. *Clear and concise expectations regarding position roles and responsibilities.*
>
> 3. *A professional, civil, considerate, kind and respectful workplace.*
> 4. *A positive workplace defined by values of trust, honesty, integrity and fairness.*
>
> 5. *A workplace where employees are included in discussions and/or invited to participate in decisions about change management, support and how important decisions are made.*

[13] Following the meeting on May 8, 2017, the Union arranged a meeting with the Manager – Unified Communications and the Director of Information Technology on May 29, 2017. The subject line of the email string[4] setting up the meeting was "RE: Inquiry into Contracted Out Work".

[14] That email string included an email from Ms. Cathcart to Ms. Hosni responding to her wish to know the outcome of the meeting, as she was unable to attend. Her response outlined the discussion topics as follows:

---

[2] See exhibit U-8
[3] Exhibit U-5

> *Topics discussed (and by discussed, I mean provided by the union for the employer's ongoing consideration) included:*
>
> 1. *Our expectation for respectful communications and non-discriminatory treatment and heads-up that future incidents would be strongly encouraged to be reported to the Safety Line.*
>
> 2. *Inquiry into the method by which work is assigned to out of scope individuals (the L.K[5] consultant piece), and our expectation that work that is able to be done by in scope staff will be provided to them where capacity exists, as well as any necessary training.* (reference mine0
>
> 3. *A review of the IT Telecom analyst JJE Job Description in the context of the work AD is performing and our expectation that she continue to be assigned work appropriate to her classification.*

[15] In that same email string, Ms. Hosni asked Ms. Cathcart if she had a sense of the Employer's "level of 'genuine' interest in attending to the points the Union presented?" Ms. Cathcart responded "[T]hey were definitely listening and taking notes. Let's see, I guess.".

[16] Just prior to the May 29th meeting, the Applicant emailed[6] the Union on May 25, 2017, saying, "[I] have decided to file a grievance for pay equity and discrimination and possibly harassment. Are either of you able to assist or should I call the main member support number/". Ms. Hosni responded saying that …"pay equity and/or discrimination piece(s) would be handled by the Saskatchewan Human Rights Commission" and provided a link to the Commission's website. Ms. Hosni also suggested that the harassment should be reported to the Incident Reporting Line (1600) "and you would be required to follow their internal process prior to us filing a grievance…".

[17] On that same day, the email string also shows that Deck also complained about being required to perform work not provided for in her job description. She asked: "Should I take that to the human rights commission too?". Ms. Cathcart responded simply: "What I can tell you is that is not a grievance.".

---

[4] Exhibit U-9
[5] Name anonymized
[6] Exhibit E-9

[18] On July 26, 2017, the Applicant again initiated an email string[7] with Ms. Cathcart and Ms. Hosni. In that email, she complained about what she perceived as a conflict of interest with respect to one of the panelist on an interview panel when she had applied for a team lead position in the IT department in 2003. The Union did not support her analysis of the situation after obtaining clarification from her.

[19] The Union received notice from the Employer of pending layoffs which would impact the Applicant in accordance with the collective agreement, Article 12.02 which requires that the Employer provide 14 calendar days' notice to the Union prior to issuance of any initial notice of layoff. The Union's witnesses confirmed receipt of this notice in accordance with that provision, but were required to keep that information confidential.

[20] On August 10, 2017, the Applicant's position, along with another similar position with SHA was eliminated. The letter, signed by Mr. Morgun reads in part:

> *I regret to inform you that as a result of telephony in the region moving to VOIP, your position of Information Technology Telecommunications analyst at Saskatoon City Hospital will be eliminated effective October 22, 2017.*

[21] On August 10, 2017[8], the Applicant wrote to Ms. Hosni with a cc: to the Human Resources Dept. of the SHA. In that email, she noted that she had been comparing the job descriptions for the IT Analyst position and the IT Telecom Analyst position which she felt were "equally similar". At the hearing of this matter, she also testified that she had the requisite skills and ability to fill the position as an IT Analyst. In her email, she asked if her position could not be "reclassified".

[22] Ms. Hosni replied on that same date as follows:

> *If these two jobs were as similar as you have speculated below, they would not have come out differently under JJE[9]. JJE would have just said, "Sorry, we already have this." They always choose the wording of the provincial job descriptions very carefully, and as such, intended for those two experience descriptions to be interpreted differently (as written), not the same.* (notation mine)

---

[7] Exhibit U-6
[8] Exhibit E-10
[9] Joint Job Evaluation

[23] The Applicant responded to this email, again on August 10, 2017, noting that the job descriptions were developed well before the SHA began implementing VOIP for its telephony system. She noted that they had been working with the technology since 2007, "long before any current "IT Analysts" were working with the technology.

[24] Again that day, the Applicant wrote again to Ms. Hosni in response to her reply to her earlier email suggesting that the jobs being eliminated were all filled by female workers and the jobs being retained were all filled by male workers. To that email, Ms. Hosni wrote: "[C]oncern regarding potential job loss is not the trigger for a reclassification request, substantial change to the work being performed is.". To this, the Applicant responded:

> *Substantial change and constant learning of VOIP in our daily work activities, while in the 100% female-dominated IT Telecom Analyst job class, has been a constant since 2007. We were unaware substantial change in key work activities belonged specifically under the "IT analyst" 89% male-dominated job class.*

[25] The Applicant again wrote to Ms. Hosni on August 13, 2017[10] regarding the two positions and their similarities. In a continuation email that day she says:

> *Also I failed to mention, the other two employees working in ITS Infrastructure Unified Communications are IT Analysts (male), P.S. has worked with VOIP since April 16, 2016 and S.P[11] has worked with VOIP since May 1, 2017. Conversely, there is no requirement on the male job class for experience with telecommunications, or any reference to telecommunications within key activities; VOIP is a telephony telecommunications service. Once again I will mention, IT Telecom Analysts have been instrumental in the "move to VOIP" transition which is near completion and have worked with VOIP telecommunications equipment, infrastructure, services, software, resources and voicemail for 10 years or longer, while the combined amount of time the two male IT Analysts have worked with VOIP is approximately 1 year and 6 months. P. – one year and 4 months and S. – 2 and a half months.* (notation mine)

[26] In her response, Ms. Hosni noted: "We do not hold jurisdiction over layoff decisions, only layoff process.

---

[10] Exhibit E-11

[11] Names anonymized

[27] On August 14, 2017, the Applicant again contacted the Union with respect to a concern she had based on the fact that she was on disability when she was laid off. Ms. Hosni responded that there was no "nexus between the current status of the member and any reorganization of work (including layoff)." This was due to the fact that the language "is designed to capture owned position, as opposed to current status…". As such, it allowed impacted employees to engage in bumping without regard to "current level of ability, or considerations such as maternity leave, sick leave, etc."

[28] On October 26, 2017, the Applicant again wrote to Ms. Hosni with respect to her complaint to the Saskatchewan Human Rights Commission and OH&S complaint. In her emails she says:

> *In a post layoff meeting August 28 with Alex Morgan [sic] in his office he told me they knew about the job eliminations in January 2017. He also claimed he tried to reclassify the jobs to IT analyst and was advised by SEIU he could not. Is that a truthful statement?*

[29] In her response on that same date, Ms. Hosni says:

> *After a little digging, I have been able to find some info for you for the SEIU piece of your below question:*
>
> *It appears that what happened is that we indicated that the Employer cannot just unilaterally determine a new classification for the role you or Emily performed, it would have to go through the formal JJE process. The reason we would have provided this advice it is because it is completely accurate.*

Relevant statutory provision:

> ***Fair representation***
>
> ***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.*

Applications re breach of duty of fair representation

6-60*(1) Subject to subsection (2), on an application by an employee or former employee to the board alleging that the union has breached its duty of fair representation, in addition to any other remedies the board may grant, the board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of that time, if the board is satisfied that:*

(a) the denial of fair representation has resulted in loss of employment or substantial amounts of work by the employee or former employee;

(b) there are reasonable grounds for the extension; and

(c) the employer will not be substantially prejudiced by the extension, either as a result of an order that the union compensate the employer for any financial loss or otherwise.

(2) The board may impose any conditions that it considers necessary on an order made pursuant to subsection (1).

Employee's arguments:

[30] The Applicant argued that the Union had failed in its duty of fair representation by acting in an arbitrary or discriminatory fashion with respect to her concerns. In support of her case she cited the Board's decision in *K.H. v. Communications, Energy and Paperworkers Union, Local 1-S and Sasktel*[12].

Union's arguments:

[31] The Union argued that the Applicant had the onus of proof of a violation of the Duty of Fair Representation and that the Applicant had failed to satisfy that onus. The Union also argued, in the alternative, that it had not failed to discharge its Duty of Fair Representation. In support, the Union cited *Banks v. CUPE, Local 4828*[13], *Chessall v. Communications, Energy and Paperworkers Union, Local 649*[14], *Hargrave v. CUPE, Local 3833*[15], *Hartmier v.SJBRWDSU, Local 955*[16], *Judd v. CUPE, Local 2000*[17], *Kasper v. SGEU*[18], and *McLeod v. CUPE, Local 3766*[19].

[12] [1997] Sask. L.R.B.R. 479
[13] 2013 CanLII 555451 (SK LRB)
[14] 2015 CanLII 80545 (SK LRB)
[15] 2003 CanLII 62883 (SK LRB)
[16] 2017 CanLII 20060 (SK LRB)

Analysis:

[32] The Board's jurisprudence with respect to the Union's Duty of Fair Representation of its members is well established. In *Lyle Brady v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*[20], the Board extensively reviewed the history of the development of the Duty of Fair Representation and its previous jurisprudence under *The Trade Union Act* in light of the provisions of the *SEA*. At paragraph [41] of that decision, the Board concluded:

> [41] Part VI of the *SEA* is a recasting and modernization of the TUA. The basic model of labour relations has not changed from the Wagner Act model embodied in the TUA. Placed in this context, I am of the opinion that, while not identical, section 6-59 is a recasting of section 25.1 and our former jurisprudence is applicable to the new provision.

[33] The Board most recently reviewed it jurisprudence with respect to the Duty of Fair Representation in its decision in *CB, HK, & RD v. CUPE, Local 21*[21]. At paragraphs 146 to 154, former Vice-chairperson Mitchell distilled the Board's jurisprudence as follows:

> [146] This Board has often reviewed and reaffirmed general principles that over the years have emerged respecting the duty of fair representation. In most of the recent cases, the Board has consistently returned to its Decision in *Hargrave, et al. v Canadian Union of Public Employees, Local 3833, and Prince Albert Health District*, LRB File No. 223-02, [2003] SLRBR 511, 2003 CanLII 62883 (SK LRB) [*Hargrave*].
>
> [147] In *Hargrave*, *supra*, former Chairperson Seibel surveyed case law from this Board and other Canadian labour relations boards, and summarized the relevant legal principles emerging from them with particular emphasis on the concept of "arbitrariness". For present purposes, the most salient portions of the Decision are paragraphs 27-28, and 34-42. Those paragraphs read as follows:
>
> > ***[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*

---

[17] 2003 BCLRBRD No. 63, 91 CLRBR(2d) 33 (BC LRB)
[18] 2010 CanLII 25541 (SK LRB)
[19] 2010 CanLII 4982 (SK LRB)
[20] 2017 CanLII 85456 (SK LRB)
[21] 2017 CanLII 68786 (SK LRB)

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. …mistakes 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] 1 S.C.R. 509]. The Supreme Court of Canada reconfirmed the utilization of serious negligence as an element to be considered in Centre Hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330.*

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

> *A union is not required to be correct in every step it takes on behalf of an employee. Moreover, mere negligence on the part of a union official does not ordinarily constitute a breach of section 68. See Ford Motor Company of Canada Limited, [1973] OLRB Rep. Oct. 519; Walter Princesdomu [sic] 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 [sic], 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 2003 CanLII 62883 (SK LRB) 16 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 v. International Association of Firefighters', Local 510, [1992] 4th Quarter Sask. Labour Rep. 133; LRB File No. 003-92]*

[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 fulltime 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.*

[148] *Hargraves*, *supra*, focused primarily on the element of arbitrariness which typically is the central issue in most duty of fair representative claims. However, it is important to remember that subsection 6-59 also covers a union's actions that may qualify as discriminatory treatment of one of its members, or bad faith.

[149]Turning first to discriminatory treatment, the consensus emerging from the decisions of this Board as well as other Canadian labour relations boards is that for purposes of duty of fair representation claims the prohibition against discriminatory treatment by a union of one or more its members means there "can be no discrimination, treatment of particular

employees unequally whether on account of such factors as race and sex (which are illegal under the *Human Rights Code*) or simple, personal favouritism". See: *Rayonier Canada (B.C.) Ltd*, *supra*, at p. 201. See also: *Glynna Ward v Saskatchewan Union of Nurses*, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at p. 47, and most recently, *Hartmier v Saskatchewan Joint Board Retail, Wholesale and Department Store Union, and Retail, Wholesale and Department Store Union, Local 955*, 2017 CanLII 20060, 290 CLRBR (2d) 1, LRB File Nos. 226-14 & 016-15, at para. 180. As proscribed grounds of discrimination have been enlarged over the years by subsequent revisions to provincial and federal human rights legislation as well as the proclamation of section 15 (1) of the *Canadian Charter of Rights and Freedoms* [*Charter*], the ability of a complainant to base a duty of fair representation claim on other enumerated and analogous grounds of discrimination – sexual orientation, being a good example – has increased.

[150] In *Noël*, *supra,* at paragraph 49, LeBel J., for the majority, described discriminatory conduct for purposes of duty of fair representation claims this way:

> *The law also prohibits discriminatory conduct. This includes any attempt to put an individual or group at a disadvantage where this is not justified by the labour relations situation in the company. For example, an association could not refuse to process an employee's grievance, or conduct it differently, on the ground that the employee was not a member of the association, or for any other reasons unrelated to labour relations with the employer*
> . . . . . .
> *Bad faith and discrimination both involved oppressive conduct on the part of the union. The analysis therefore focuses on the reasons for the union's action.*

[151] Respecting the element of alleged bad faith on the part of a union, LeBel J. in *Noël*, *supra*, stated at paragraph 48 that the concept of bad faith "presumes intent to harm or malicious, fraudulent, spiteful or hostile conduct". He further acknowledged that "[i]n practice, this element alone would be difficult to prove." See also: *Hargrave*, *supra*, at paragraph 28; *Toronto Transit Commission*, [1997] OLRD No. 3148, at para. 9, and

Zalopski v Canadian Union of Public Employees, Local 21 and City of Regina, LRB File No. 009-16, at paragraph 50.

[152] *Hargrave*, *supra*, and the other Saskatchewan cases referred to in it, all were decided under section 25.1 of the *TUA*. It is well-established that section 25.1 did not exhaustively define the scope of a union's duty to fairly represent its members, however. This point was made in *Mary Banga v Saskatchewan Government Employees Union*, LRB File No. 173-93, [1993] 4th Quarter Sask. Labour Report 88, at 98 as follows:

> *The concept of the duty of fair representation was originally formulated in the context of admission to union membership. In the jurisprudence of the courts and labour relations boards which have considered this issue, however, however, it has been applied as well to both the negotiation and the administration of collective bargaining agreements. Section 25.1 of The Trade Union Act, indeed, refers specifically to the context of arbitration proceedings. This Board has not interpreted the section in a way which limits the duty to that instance, but has taken the view that the duty at "common law" was more extensive, and that Section 25.1 does not have the effect of eliminating the duty of fair representation in the context of union membership, collective bargaining, or the grievance procedure. [Emphasis in original.]*

[153] The broader duty of fair representation is now reflected legislatively in section 6-59 of the *SEA*. Subsection 6-59(1) sets out the general right of employees or former employees "to be fairly represented by the union that is or was [their] bargaining agent with respect to [their] rights pursuant to a collective agreement or this Part." It is not limited to grievance or rights arbitration proceedings as was section 25.1 of the *TUA*. Subsection 6-59(2) goes on to stipulate that "[w]ithout restricting the generality of subsection (1)" the union has a duty not to "act in a manner that is arbitrary, discriminatory or in bad faith" when representing its members in all matters covered by the relevant collective agreement or Part VI. See further: *Chessall v Communications, Energy and Paperworkers Union of Canada, Local 649/Unifor and SaskEnergy*, LRB File No. 099-14, 2015 CanLII 80545 (SK LRB), at paras. 20-22.

> [154] Since the advent of the *SEA*, this Board has not had to address what may be connoted by the broader duty of fair representation, nor is there any need to do so in this case. However, the Board has indicated that its section 25.1 jurisprudence applies with equal force to claims brought pursuant to section 6-59. See especially: *Coppins*, *supra*, at para. 33; *Chessall*, *supra*, at paras. 27-28, and *Billy-Jo Tebbitt v Construction and General Workers Union, Local 151 (CLAC)*, LRB File No. 264-14, 2014 CanLII 93080.

[34] It is these principles which will inform our review of the relevant evidence and the actions taken by the Union and the impact upon the Applicant.

[35] It is clear from the evidence that the Applicant was requesting assistance in 2 areas. First, she was concerned about the workplace environment and its impact upon her given her hearing disability. She was also concerned about an imbalance in the workplace between male roles and female roles in the workplace. Secondly, she was also concerned about her skills and abilities being overlooked insofar as her ability to have her job reclassified to an IT Analyst position.

[36] There is also an issue which arose during the hearing of the evidence of Ms. Hosni regarding technological change which resulted in the Applicant's layoff.

Issues Related to Workplace Environment – Respectful Workplace

[37] A good deal of the Applicant's materials which she filed and the evidence she presented dealt with issues related to her disability and a failure to accommodate that disability, issues related to gender discrimination between IT Analysts and IT Telecom Analysts and concerns related to being able to work in a respectful workplace. From her evidence, I understand that she has also lodge complaints regarding discrimination with The Saskatchewan Human Rights Commission and the Occupational Health and Safety Branch of the Ministry of Labour Relations and Workplace Safety related to concerns regarding harassment. As I understand it, these complaints have not, as yet, been determined.

[38] In *Lyle Brady v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*[22], the Board reviewed the obligations falling upon a trade union in respect to these other statutory schemes. While recognizing that any rights under this scheme are personal in nature, the Board says at paragraph 47:

> *[47] Because of the personal nature of the rights under these other statutory schemes, a union does not have the obligation to bargain collectively with respect to these rights. However, the union may include such rights*[23] *within its collective bargaining mandate. Clearly, when it does so, and when such improved rights become enshrined in a collective agreement, the union's duty of fair representation regarding those now collectively bargained rights becomes engaged.*

[39] The Collective Bargaining Agreement ("CBA")[24] between SHA and the Union contains provisions related to Non-discrimination in Article 4. Within that provision is a definition of "harassment" as well as a process to be followed in respect to complaints under that Article. Furthermore, it includes provisions for a "Duty to Accommodate" resultant from an occupational or non-occupational disability.

[40] The Union met with management of the IT department on 2 separate occasions with respect to the issues faced by the Applicant in her workplace. The first meeting on April 25, 2016 dealt with, among other things, the expectations for a respectful workplace as well as other issues related to work assignments and whistleblowing.[25]

[41] Throughout this process, the Applicant was constantly referred to the Incident Report Line ("1600" line) as being a pre-requisite to action by the Union. The Applicant's evidence was that she did not want to be held responsible for making a complaint.

[42] The CBA makes provision to protect employees in Article 4.03. It says:

> ***4.03 Reporting of Alleged Wrongdoing***
>
> *An Employee will not be penalized, harassed or disciplined for bringing forward, in good faith, an alleged wrongdoing to the Employer and/or and lawful authority either directly or through the Union.*

---

[22] 2017 CanLII 85456 (SK LRB)
[23] Eg. Minimum wage standards and holiday entitlements
[24] Exhibit U-10
[25] See Exhibit U-7

We have no evidence to show that this provision was ever made known to the Applicant.

[43] Notwithstanding this lapse, and that a grievance could undoubtedly have been filed under this Article, the Board's policy is that it will usually defer any determination regarding matters within the jurisdiction of another adjudicative body, like the Saskatchewan Human Rights Commission or Occupational Health and Safety, where the issue raised in those forums could be determinative of the issue. While we have no direct evidence regarding the nature of the complaints to the Saskatchewan Human Rights Commission or Occupational Health and Safety, it does not seem to us to be prudent, at this stage, to prejudge those processes and whether or not they will be successful in resolving any outstanding issues. Nor, however, has the Union sought any deferral of these proceedings with respect to those other adjudicative proceedings. Nevertheless, the Order issued by the Board in respect of this decision will take this into account.

The Reclassification Issue:

[44] We have evidence that the IT Manager attempted to have the IT Telecommunications Analyst positions reclassified to be IT Analyst positions. That attempt was unsuccessful as the Union, correctly, it says, required that the positions be subjected to the JJE process to evaluate them. That was not done and the issue died.

[45] The evidence also established that the Employer knew as early as January, 2017 that the positions were to be eliminated. Notice of the elimination of the positions was given to the Union in accordance with Article 12 of the CBA, 14 calendar days prior to the jobs being eliminated. The Applicant was afforded the right to bump other employees. However, she was advised that she could only bump employees who were in a lower paid job classification such as housekeeping. She declined to do so and took a severance payment.

[46] I am concerned about the information given to her regarding her rights to bump. In the collective agreement, provision is made for employees, "provided they have the necessary qualifications required to fill the position and the ability to perform the work", to bump into a "higher paid, lower paid or same paid job classification". When answering questions related to this issue, the Union witnesses constantly referred to different job classifications as

distinct from pay bands into which bumping could occur. Nor did they make any inquiry as to the Applicant's qualifications and ability to perform the work of an IT analyst.

[47] The Applicant's request was given perfunctory treatment by the Union. As was noted above, a Union is held to a higher standard in its representation of a member when "critical job interests" are at stake. Here, we have a lay off situation which resulted in the Applicant choosing severance rather than bumping into a lesser position.

[48] The Applicant testified that she had the necessary skills and ability to perform as an IT Analyst. She even went so far as to suggest to the Union that her position be reclassified as an IT Analyst on the day of her layoff meeting. Again, she was rebuffed by Ms. Hosni saying, "[C]oncern regarding potential job loss is not the trigger for a reclassification request, substantial change to the work being performed is."

[49] There was, in my opinion, a fundamental misunderstanding of what the Applicant was asking the Union to do. She had just been laid off and was trying to find a way whereby she could remain employed rather than being laid off. However, the Union took her request literally with respect to reclassification. Rather than seeking a creative solution which might be accomplished through the bumping provisions of the collective agreement, they chose instead to rebuff the Applicant due to her lack of knowledge of the collective agreement and the reclassification system.

[50] I find that the Union was arbitrary in dealing with the Applicant's concerns over her layoff and the advice given to her regarding the bumping rights to which she was entitled. Ms. Hosni testified that the choice of which positions the Applicant could bump into was provided by the Employer and not challenged by the Union. Furthermore, the Union made no inquiry as to what skills and abilities the Applicant could demonstrate which might allow her to bump into an IT Analyst position. The evidence established that 2 incumbents in the IT Analyst position, which is in the same pay band as the It Telecommunications Analyst[26], were junior to the Applicant and the other IT Telecommunications Analyst laid off.

[51] It is not up to this Board to determine if the Applicant has the necessary skills and abilities to perform the role of an IT Analyst. However, I take the view that the Union, in its representation of the Applicant should have at least considered this possibility and, in

[26] Pay Band 15. See Exhibit U-10.

necessary, objected to the list of possible bumping locations or by filing a grievance to support the Applicant's desire to retain her position or another position with the Employer.

[52] The Union is the steward of the CBA and must be taken to have a great deal more familiarity with the CBA than a member of the bargaining unit. I would have expected, given the severity of the consequences of the layoff decision and its potential impact upon other members of the bargaining unit, that the union would have been more pro-active in its support of the member and in insuring that any rights granted to such employee under the CBA were properly explained and canvassed. I think it is clear, contrary to the position taken by Ms. Hosni in her response that the Applicant was seeking to be placed into the IT Analyst position rather than being laid off. That plea went unheeded.

[53] At no time did the Union turn its mind to the possibility of the Applicant being able to bump into the IT Analyst position and did not make any inquiry as to her skills and ability to perform that work. This is not a case of an error having been made, or a deadline having been missed. It is a case where the Union failed to make any inquiry into the situation and seemingly, they just accepted what they were told by the Employer to the detriment of their member. To have made no inquiry to inform themselves with respect to the Applicant's situation, given their level of experience and knowledge of the CBA shows that their decision making process was totally arbitrary and not based upon any factual basis.

The Technological Change Issue:

[54] It was clear from the evidence that the Applicant's position was eliminated due to the switch from PBX telephony systems to VOIP telephony systems. But for the fact that the change only involved 2 persons, the provisions of Division 10 of the *SEA* might have been engaged. However, section 6-57(1)(a) also renders the Division inapplicable where the collective bargaining agreement contains provisions intended to assist employees affected by the technological change. The CBA contains such provisions in Article 22.

[55] Ms. Hosni testified that the Union gave no consideration to the provisions of Article 22 and dealt with the layoffs strictly under Article 12. Furthermore, when asked if she had negotiated a "Workplace Adjustment Plan" for affected employees, her response was, "I don't even know what that is.".

[56] The notification requirements regarding Technological Change in the CBA are 3 months, rather than the fourteen (14) day notice provided regarding the layoff of the Applicant. Furthermore, there is a requirement that the Employer and the Union "commence discussion as to the effect on the existing workforce and application of this Article". This also was not done based upon the testimony of the Union's witnesses.

[57] This total disregard of the provisions of the collective agreement is also troubling and the actions of the Union in disregarding the CBA are, in my view, also arbitrary in accordance with the Board's established jurisprudence.

Decision and Order:

[58] Based upon the above, I find that the actions of the union were arbitrary and breached the Duty of Fair Representation owed to the Applicant. However, the Board cannot presume to engage in a determination as to the meaning of the words of the CBA. That role is reserved to an arbitrator appointed by the parties pursuant to the CBA. This Board oversees the processes employed by the Union in respect of its members to insure that those members are given procedural fairness. With that in mind, I do not believe that the matter should be referred to an arbitrator without giving the Union the opportunity to engage in a meaningful process with respect to the issues identified above.

[59] The Board's usual practice in granting a remedy is to try to put the parties into the situation they were in but for the breach of the Duty of Fair Representation. To that end, we Order as follows:

1. That the Union shall prepare and file on behalf of the Applicant and the other effected employee, a grievance or grievances (the "grievanace") under Articles 12 and 21 of the CBA.
2. That the grievance shall be processed pursuant to Article 7 of the CBA in the normal manner. Any timelines in the CBA related to the filing of such grievances are hereby waived and extended pursuant to section 6-60(1) of the *SEA*.
3. The Union shall follow its normal process for dealing with grievance, in accordance with the standards set out by this Board in *Lucyshen v. Amalgamated Transit Union*, (2015 CanLII 15756), including, but not

limited to the referral of the grievance to arbitration, if warranted. The Applicant is granted the right to file a further complaint under sections 6-59 and 6-60 related to such process, if necessary.

4. The Applicant is also granted leave to continue her complaint regarding a respectful workplace should the applications filed with the Saskatchewan Human Rights Commission and the Occupational Health and Safety Division of the Ministry of Labour Relations and Workplace Safety not fully resolve her issue. However, the Union shall also be permitted to seek a preliminary determination as to whether or not the Board has any remaining jurisdiction regarding such complaints. I will not be seized with any such further proceedings.
5. No Order is made under section 6-50(1)(c) at this time. Should the parties not be able to resolve the grievance, and the matter proceeds to arbitration, the SHA may, at that time, request the Board to make an Order under section 6-50(1)(c).

DATED at Regina, Saskatchewan, this 13th day of November, 2018.

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.
Vice-Chairperson