GARY MAKUCH, Applicant v CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 21, Respondent and CITY OF REGINA, Respondent

LRB File No. 092-17; September 16, 2019

Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act*)

For the Applicant:	Deidra Roberts, as agent
For the Respondent Union:	Sachia Longo
For the Employer:	No one appearing

Duty of Fair Representation – Union decided not to advance grievance to arbitration – Union chose not to follow recommendation of National Representative – Summary of legal opinion suggesting that grievance may be pursued to arbitration – Special Committee formed to avoid conflicts of interest – Local Grievance Chair explained three-stage test for determining whether to proceed to arbitration – Committee sat in appeal of its decision – Arbitrary and unfair – Declaration granted.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an application filed May 29, 2017 ["Application"], alleging that the Canadian Union of Public Employees, Local 21 ["Union"] failed to fairly represent a member, Gary Makuch ["Makuch" or "Applicant"]. The Union is certified to represent certain employees of the City of Regina ["Employer"].[1] The Union and the Employer are parties to a collective agreement with a term running from January 1, 2016 to December 31, 2018. For the following reasons, the Board has found that the Union failed to fairly represent the Applicant.

[2] On or about January 2, 2016, the Union filed a grievance alleging that Makuch had been unjustly disciplined following an investigation into an alleged harassment complaint. As a result of the investigation, Makuch had been suspended for three days. A Special Committee was formed to consider whether to refer the grievance to arbitration. At a meeting of the Special

[1] LRB File No 135-47, as amended in LRB File No 268-94.

Committee, Makuch made a presentation and responded to questions from the committee members. Following the presentation, the committee members decided not to proceed to arbitration.

[3] According to Makuch, the Union's decision ignored the National Representative's recommendation to proceed to arbitration, a recommendation that was based on a legal opinion from the CUPE lawyer. The Union acted arbitrarily and in bad faith, including by appointing untrained committee members to determine the outcome of the grievance, and acted with undue influence from the Local President, Tim Anderson ["Anderson"] in refusing to proceed. In response, the Union denies the allegations and asks the Board to dismiss the Application in its entirety.

[4] The hearing of this Application took place on January 23, 2018 before then Vice-Chairperson Graeme Mitchell, Q.C. sitting alone pursuant to subsection 6-95(3) of the Act. On September 21, 2018, Vice-Chairperson Mitchell was appointed as a Judge of the Court of Queen's Bench. The parties have recently agreed that the Chairperson or Vice-Chairperson may review the audio recording of the hearing and issue a decision on the matter. This is that decision.

[5] The Board has also reviewed and considered all of the written materials, including exhibits, filed in this proceeding.

Argument on Behalf of the Parties:

[6] Makuch argues that the City's third party investigation into his conduct was fundamentally flawed. While he has reviewed the investigation report, he is unaware of the witnesses' identities and he wants to have his "day in court" so that he can cross examine them, and let the "chips fall where they may". He did nothing malicious. His goal, at all times, was to engage more employees in the affairs of the Union. Makuch believes that Anderson had influence over the grievance committee and its decision not to proceed. To support his assertions, Makuch led witness testimony about Anderson's conduct in Union meetings and beyond. Makuch also provided two previous cases in which Anderson was implicated.[2]

[2] *CB, HK & RD v CUPE, Local No 21, CUPE National, and the City of Regina*, LRB File No 034-15, 035-15, & 037-15 (October 3, 2017) (SK LRB); *CUPE v Canadian Staff Union*, In the Matter of a Grievance Arbitration, July 13, 2016 (Bilson).

[7] As for remedy, Makuch asks that the Board grant costs in the amount of a day's lost wages for the hearing, parking fees, and witness expenses.

[8] The Union reviewed the alleged grounds for a violation, and concluded that Makuch failed to satisfy his onus on the evidence presented. First, the evidence demonstrated that the Union considered the lawyer's recommendations, and besides, was not bound by the legal opinion or the summary. Second, individuals were named to the Special Committee because they had no relevant connection to the individuals involved in the incidents. The Special Committee is entitled to some latitude in arriving at its conclusions.

[9] Third, the onus is on Makuch to show ill will, malice, or arbitrariness. Instead of satisfying that onus, Makuch focused on Anderson's conduct, who is not on trial. The real issue is whether the Special Committee turned its mind to the issues and made a reasonable decision in the circumstances, which it did. Fourth, there was simply no evidence of undue influence or improper interference. Anderson was the alleged victim, and when the grievance was filed, a different representative was appointed to deal with the grievance. The long history of animosity between Anderson and Makuch was taken into account. Overall, the Union's actions in refusing to proceed to arbitration were entirely appropriate.

Evidence:

[10] By way of background, in or around 2016 a harassment complaint was filed against Makuch. The alleged victim was Anderson. The Employer hired a third party to conduct the investigation, and as a result of its conclusions, suspended Makuch for three days. CUPE filed a grievance alleging that Makuch had been unjustly disciplined. At the time, Local 21 was under administration and David Stevenson was the Administrator appointed to take over the operations. The National Representative was Bill Cronin ["Cronin"], a former member of the Local.

[11] The grievance was denied at Step Two, and proceeded to an executive meeting, and then to a Special Committee formed to determine the merits of referring the grievance to arbitration. The Special Committee consisted of Laird Williamson, Sherri Hartman, Hugh Bigler, Dennis Kreklewich, and Lucas McKay. The Special Committee held a meeting to hear from Makuch directly. After hearing from Makuch, the Special Committee voted not to proceed to arbitration.

[12] Makuch called three witnesses: Debbie Mihial, David Stevenson, and Deidra Roberts. The Union called Laird Williamson.

Debbie Mihial ["Mihial"]

[13] Instead of Cronin, Mihial was assigned as the National Representative for purposes of the grievance. After the Employer denied the grievance at Step Two, Mihial requested an opinion from the National Office's lawyer. At an executive meeting on February 2, 2017, Mihial recommended that the matter be referred to arbitration, and provided copies of her summary of that legal opinion. By this point, the Local was no longer under administration. Anderson was in attendance at that meeting and did not excuse himself. Most if not all of the executive members were in attendance.

[14] Mihial also attended a grievance appeal meeting of the Special Committee on March 9, 2017. She presented no information at that meeting.

[15] At the hearing, Mihial explained why she had wanted to proceed to arbitration. Mihial felt the harassment investigation was flawed and the disciplinary decision was based solely on the investigation report, which was hearsay. In arbitration there would be an opportunity to cross examine the witnesses who had been interviewed. Furthermore, the harassment allegations focused on Makuch's conduct in his capacity as a member of the working committee while the Local was under administration. The Employer should not be disciplining a Union member for actions as a Union officer. Makuch had had no discipline on his record for years and yet he was given a three-day suspension. This was not progressive discipline.

[16] On cross, Mihial acknowledged that she had had a chance to make a presentation to the executive. After the executive meeting, Mihial's involvement was limited mainly to attending the appeal meeting.

David Stevenson ["Stevenson"]

[17] Stevenson is a National Representative, working out of the Regina office. He was assigned to work as an Administrator of the Local in February, 2015. He worked in that role until around June 2016, when Cronin took over. Acting as Administrator was challenging. When the Local was placed under administration, everyone who was on the executive was relieved of their duties but certain supporters of Anderson made it difficult to get things done.

[18] Stevenson formed a working committee, of which Makuch was a member. As Administrator, Stevenson went on "tailgate talks", and before each meeting, Stevenson reminded

Makuch that the talks were not the place for badmouthing previous members of the executive. Makuch refrained. Still, it was clear that Makuch and Anderson were not friendly.

[19] After Anderson was re-elected, Stevenson met with him and advised that he wanted Anderson on board with educating the new executive. Anderson commented that three newly-elected executive members would not be there for long. Makuch took that as a warning that individuals, who were not supporters of Anderson, would not last. At one point, Anderson advised Stevenson that two individuals had resigned from the Pension Committee, an assertion that was later contradicted by the individuals themselves. When he confronted Anderson about lying to him, Anderson boldly proclaimed that he would do whatever he wanted after Stevenson was gone. More generally, Stevenson spoke to some problems uncovered in relation to Anderson, while the Local was under administration.

[20] At some point, Stevenson was advised that Anderson had brought a harassment complaint against Makuch. Stevenson believed the complaint was retaliation for Makuch's trial procedure complaint, and asked the investigation be held off.

[21] On cross, Stevenson stated that he had no involvement in the grievance process. He could not remember filing the grievance. He acknowledged that representatives from outside of Regina were used for the grievance, in part to avoid conflicts.

Deidra Roberts ["Roberts"]

[22] Roberts served as an executive member at large with the Local, both during Anderson's time as President, and while the Local was under administration. While under administration, Anderson was not the President, but an executive member at large. Around the time of her retirement (after 39 years), she was serving as the Secretary-Treasurer of the Local. Through her extensive work in various LGBTQ forums, Roberts has come to recognize the signs of bullying and harassment.

[23] Roberts observed bullying and intimidating behavior at executive meetings. There was a clear connection to Anderson. When Anderson returned as President, the problems returned with him. Everything went through him. He would sort through old emails for dirt. He spoke to other executive members inappropriately, scolding the Vice-President on one occasion and declaring, "I have to train you properly." When Anderson lost on a motion, he made a point of berating everyone who was against him.

[24] Roberts took notes at the Special Committee meeting. Three of the five people present did not seem to be engaged. Dennis Kreklewich, in particular, was on his phone and did not appear to be paying attention. Lucas McKay was newly appointed. The only persons who were engaged were Laird Williamson and Hugh Bigler.

Laird Williamson ["Williamson"]

[25] Williamson started working for the City in 2010 and has served as the second Vice-President Grievance Chair for Community Services for the Union since 2016. He has taken training in stewardship, initiating grievances, finances, and harassment.

[26] Generally, Williamson becomes involved in a grievance the moment a member raises concerns. A member will contact him, thereby launching the informal process. After Step Two the Grievance Chair decides whether to proceed to arbitration. An appeal process is available through the appointment of a Special Committee pursuant to the bylaws.

[27] Williamson was in attendance at the February 2, 2017 meeting. After Mihial's presentation, the floor opened up to questions. Then, several members of the executive, including Anderson, excused themselves to allow for further discussions. Only four individuals remained in the room. On this latter observation, Williamson's evidence was detailed and the Board accepts it. Furthermore, it does not directly contradict Mihial's observation that Anderson was present at the meeting.

[28] The Special Committee was formed shortly after, pursuant to the bylaws, to determine whether to proceed to arbitration, and it met shortly after that. The composition of the Special Committee was motivated, in part, by an effort to avoid conflicts. After the Special Committee met, a letter was sent to Makuch to advise that the decision was made not to proceed to arbitration. He was advised of his right to appeal.

[29] Another meeting was held for purposes of the appeal. This meeting was held on March 9. At this meeting, the members of the Special Committee were in attendance, along with Roberts, Makuch, Cronin, and Mihial. Makuch was advised that the March meeting was his opportunity to present his case and ask questions. Makuch presented his case, the members of the Committee asked several questions, and then took a fifteen-minute break. The members returned, asked a few more questions, and then each member presented an individual rationale for that member's decision. At some point, Makuch read from the investigation report. Williamson asked Makuch

whether he had distributed certain posters inside the workplace on City tables, and he replied "yes". The whole meeting lasted about two hours.

[30] In the meeting, Williamson presented his own rationale for the decision not to proceed to arbitration, which involved a three-step test. Williamson described this test in the meeting. The first step asks whether the act or omission occurred. If it did not occur, then there is a legitimate grievance. If it did occur, then it is necessary to move on to the second step. The second step asks whether the act or omission violates a policy or practice. If it does not, then there is a grievance. If it does, then it is necessary to move on to the next step. The last step asks whether the punishment fits the crime. Williamson applied this test to the current case. In doing so, he observed that the act did occur and did violate the harassment or respectful workplace policies. Due to the whole of the circumstances, in his opinion, the "punishment fit the crime".

[31] In the hearing, Williamson explained his rationale further. Makuch had distributed documents on City property, bringing his conduct under the umbrella of City policies and practices. His actions fell into one of the "big three" categories, which can fall outside the strict path of progressive discipline: theft, assault, or harassment/disrespectful workplace. While Makuch's prior discipline was not recent, there was no sunset clause on past behavior. He had a history of "not playing nice". The third party investigation was appropriate – the Union has requested third party investigations in the past. Williamson weighed the testimony from the investigation, and took into account the persuasive testimony from five witnesses, in contrast with the less persuasive testimony from two. He also took into account the cost and resources for an arbitration involving a three-day suspension, as opposed to a termination.

[32] On cross, Roberts challenged Williamson's training and experience. Williamson acknowledged that he was acclaimed, not elected, and has not taken any labour law training or been involved in any arbitrations. He has read cases, as it is a hobby of his to read "about these things". He acknowledged having shadowed Anderson, as well as others.

[33] Williamson said he was aware of the issues with the executive but had not attended the meetings mentioned by the other witnesses. He criticized the legal summary for failing to provide a list of objective facts, and for instead presenting an argument about "how you could win at a grievance". He found this unhelpful. He suggested that parts of the summary were inaccurate. Williamson was dissatisfied with the answers received at the executive meeting, and so was

pleased that the Special Committee had another opportunity to obtain more information through the appeal process.

Relevant Statutory Provisions:

[34] The following provisions of the Act are applicable:

> ***6-58****(1) Every employee who is a member of a union has a right to the application of the principles of natural justice with respect to all disputes between the employee and the union that is his or her bargaining agent relating to:*
>
> > *(a) matters in the constitution of the union;*
> > *(b) the employee's membership in the union; or*
> > *(c) the employee's discipline by the union.*
>
> *(2) A union shall not expel, suspend or impose a penalty on a member or refuse membership in the union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the union if:*
>
> > *(a) in doing so the union acts in a discriminatory manner; or*
> > *(b) the grounds the union proposes to act on are that the member or person has refused or failed to participate in activity prohibited by this Act.*
>
> ***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.*

Analysis:

General

[35] The Applicant does not specify whether the alleged contravention is based on section 6-58 or 6-59 of the Act. Nonetheless, Makuch's arguments are sufficiently clear to permit the Board to focus its analysis on section 6-59. To the extent that the arguments raise issues pertaining to section 6-58, the Board will assess whether Makuch demonstrated a contravention pursuant to that provision.

[36] On a duty of fair representation application, the applicant bears the onus of proving the requisite elements of section 6-59 of the Act, on a balance of probabilities.[3] To satisfy that onus,

[3] *Zalopski v Canadian Union of Public Employees, Local 21,* 2017 CanLII 68784 (SK LRB) ["*Zalopski*"] at para 42.

the evidence presented must be "sufficiently clear, convincing, and cogent".[4] In assessing the allegations, it is the Board's duty to determine whether the evidence demonstrates that it is more likely than not that the union failed to represent the applicant fairly.

[37] Likewise, on an application alleging a breach of natural justice, the applicant bears the onus of proving the requisite elements of section 6-58, on a balance of probabilities.

[38] Sections 6-58 and 6-59 set out a union's foundational obligations to employees both in matters of internal union affairs and union representation. By enacting these sections, the legislature has recognized that the union has the exclusive power to act as the representative for its members. This power necessitates a corresponding obligation to apply the principles of natural justice with respect to certain internal union affairs and to fairly represent employees or former employees, who are or were members of the bargaining unit, with respect to their rights pursuant to a collective agreement or Part VI.[5] Section 6-58 and 6-59 provide avenues, through resort to the Board's processes, for the resolution of employee-union disputes.

[39] Over the course of its many decisions on the duty of fair representation, the Board has seen fit to assess the impugned union conduct in the context of three separate requirements: whether the union has acted arbitrarily, has discriminated, or has acted in bad faith. If the evidence discloses that the union has acted in one or more of these ways in the scope of its duty, a breach is made out. Helpfully, the Board has repeatedly adopted key descriptions of these requirements, which guide the Board's analysis in this case.

[40] One of these descriptions arises from the Board's decision in *Glynna Ward v Saskatchewan Union of Nurses*, [1988] Winter Sask Labour Rep 44 at 47, in which it states:

> *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. [Emphasis added]*[6]

---

[4] *Zalopski* at para 43, citing *F.H. v McDougall*, 2008 SCC 53, [2008] 2 SCR 41 at paras 49, 52.
[5] On the issue of fair representation, see *Canadian Merchant Service Guild v Gagnon et al.* [1984] 84 CLLC 12, 181, ["*Canadian Merchant Service*"] as cited in *Zalopski* at para 37.
[6] For example, as cited in *Canadian Merchant Service*; *R.R. v CUPE, Local 4777 & Prince Albert Parkland Health Region*, 2011 CanLII 10994 at para 41.

[41] The Board has also adopted the description contained in the Ontario Labour Relations Board decision in *Toronto Transit Commission*, [1997] OLRD 3148, at paragraph 9. In that case, the Ontario Board explained that an applicant must demonstrate, to the satisfaction of the Board, 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.*[7]

[42] The Board must be alert to the principles governing the particular facts in the current case. Here, the Applicant cites a failure to prosecute a grievance through the Union's decision in refusing to proceed to arbitration. The Board in *Zalopski v Canadian Union of Public Employees, Local 21*, 2017 CanLII 68784 (SK LRB) ["*Zalopski*"] summarized the principles relevant to allegations of a union's failure to prosecute, at paragraph 40:

> *…A helpful summary of these principles is found in Mwemera v United Brotherhood of Carpenters and Joiners of America, Local Union No. 2010. There the Alberta Board stated as follows at para. 20:*
>
> > *This Board's decision in Reid v United Steelworkers of America Local Union No. 7226, [2000] Alta. L.R.B.R. LD-064 (at para. 3) summarizes some of the key principles underlying the duty of fair representation:*
> >
> > - *The Union need not take every grievance to arbitration. It need not take a grievance to arbitration just because the grievor asks the Union to do so. The Union is entitled to assess the merits of the grievance, the chances of success at arbitration, the costs of the arbitration process and other factors when deciding whether or not to advance a grievance to arbitration.*
> > - *The Board focuses its examination on the Union's conduct and considerations while the Union represented the employee and in making its decision, rather than on the merits of the grievance, which is the question an arbitrator would answer.*
> > - *The Union is entitled to make a wrong decision, as long as it fairly and reasonably investigates the grievance and comes to an informed decision.*
> > - *The Union must give the employee a fair opportunity to present the employee's own case to the Union and to provide input on the result of the Union's investigation.*
> > - *The Union should communicate fairly with the employee about all aspects of its representation. Communication with the employee can play a significant role in representation, but the union need not take direction from the employee or answer all questions to the employee's satisfaction nor must it act within the employee's time limits.*
> > - *A Union does not breach its duty of fair representation just because it reaches a conclusion with which the employee does not agree.*

[7] For example, as cited *in Owl v Saskatchewan Government and General Employees' Union*, 2014 CanLII 42401 (SK LRB), at para 43.

[43] In assessing the union's conduct, it is not appropriate for the Board to embark on a fact-finding mission or conduct its own investigation of the union leadership.[8] Nor is it up to the Board to determine whether the grievance has merit, or to sit in appeal of the union's decision about pursuing a grievance.[9] If the union "took a reasonable view of the circumstances and made a '*thoughtful decision'* not to advance…to arbitration", then a breach may not be made out.[10]

[44] Taking into account the foregoing principles, the Board will consider each of the three requirements, in turn.

Arbitrariness

[45] The first requirement is that the Union not act arbitrarily. The Board has elaborated on this requirement in *Owl v Saskatchewan Government and General Employees' Union*, 2014 CanLII 42401 (SK LRB), at paragraph 43, relying on the following description from the Canada Labour Relations Board's decision in *Rousseau v International Brotherhood of Locomotive Engineers et al.,* 95 CLLC 220-064 at 143, 558-9:[11]

> *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.*

[46] It is also worth reciting the Board's comments in *Radke v Canadian Paperworkers Union, Local 1120*, [1993] 2nd Quarter Sask Labour Rep 57 at 64, 65:[12]

> *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.*

---

[8] *McRaeJackson v CAW-Canada*, 2004 CIRB 290; 2004 CarswellNat 6044, at para 49.
[9] *R.R. v CUPE*, at para 44.
[10] *Ibid.,* at para 45.
[11] Also cited at 1996 CarswellNat 2721. On reconsideration, a newly convened panel found that the original panel's finding on the facts was contrary to Board policy: *B.L.E. v. Rousseau*, 1996 CarswellNat 2721.
[12] As cited in *Larry Hernandez v Teamsters Local Union 395 and Saputo Dairy Products Canada G.P.*, 2015 CanLII 50198 (SK LRB), at para 33.

[47] To recap, Makuch's complaints are this: the Union ignored recommendations from the National staff, including in relation to the legal opinion and summary; the Union appointed untrained and inexperienced committee members; the Union acted under undue influence from the Local President; and the Union refused to advance the grievance. The Board must consider whether the evidence, in relation to any of these allegations or the process overall, demonstrates that the Union acted arbitrarily.

[48] The first issue is the recommendation and the legal summary created by the National Representative. It is worth repeating that arbitrariness is not equivalent to simple errors in judgment. The Board cannot sit in appeal of the Union's decision. Barring arbitrary, discriminatory, or bad faith conduct, the Board cannot substitute the Union's decision for its own conclusions. If the Union's process was sufficiently fair, the Board cannot place itself in the driver's seat and declare a breach based on its subjective, and by necessity less informed, assessment of the persuasive value of the legal summary.

[49] In all, the evidence fails to demonstrate that the Special Committee dismissed the summary out of hand, acted in a capricious manner, fundamentally misapprehended the facts or took a totally unreasonable approach to its assessment. It is clear on the evidence that the Special Committee considered the summary and made a rational decision as to whether it should adopt the recommendation from the National Representative. Williamson, in particular, was aware of the summary, had considered it, found alleged flaws with it, including inaccuracies, and attempted to clarify his concerns through the Special Committee process.

[50] Williamson asked whether Makuch had committed certain acts complained of, and turned his mind to whether the Employer's discipline, in relation to that conduct, was appropriate. Besides, as Williamson noted in his testimony, the summary is purportedly provided for "the purpose of determining" if the grievances should be referred to arbitration, but it recommends simply that the grievances "may be pursued to arbitration". According to Williamson, the summary reads like an argument for how to win at an arbitration.

[51] While the summary certainly raises concerns with Makuch's circumstances, Makuch has failed to persuade the Board, on the evidence, that the Union acted arbitrarily in choosing not to adopt the recommendation of the National Representative, alone.

[52] A further note is warranted about the third party investigation. While Makuch and Mihial raised concerns with the Employer's reliance on a third party investigation, it seems likely that, under the circumstances, they would have raised more serious concerns if the Employer or the Local had conducted its own investigation into Makuch's conduct.

[53] Nonetheless, the Board is cognizant of the requirement for a Union investigation, as alluded to by the Board in *R.R. v CUPE, Local 4777 & Prince Albert Parkland Health Region*, 2011 CanLII 10994 (SK LRB) ["*R.R. v CUPE*"], at paragraph 49, and proposed in *Lucyshyn v Amalgamated Transit Union, Local 615*, 2010 CanLII 15756 (SK LRB). Although there was no evidence of an actual Union investigation report, it is clear that the Union gathered information and sought legal advice. Significantly, Williamson asked Makuch directly whether he had distributed the papers and Makuch admitted as much. Williamson concluded, based on Makuch's response and the totality of circumstances, that the Employer was within its right to impose discipline as a consequence of Makuch's actions.

[54] The evidence does not disclose sufficient problems with the investigation such that it warranted the Union conducting a wholly new investigation, outside of the inquiries that it did make and the process that it followed. The Union's decision not to launch a formal, substitute investigation into the appropriateness of the discipline, in general, was not arbitrary.

[55] In *R.R. v CUPE*, the Board found that the union's investigation was satisfactory, stating,

> *…the primary issue for the Union was not whether or not the impugned conduct occurred but rather the appropriateness of the discipline imposed by the Employer and the potential for persuading the Employer (and/or an arbitrator) to allow the Applicant to return to the workplace; all of which were issue [sic] to which the Union gave thoughtful consideration.*[13]

[56] Likewise, the remaining issue that fell to the Union was whether the discipline was appropriate. The Board observes, as did CUPE's legal counsel, that a three-day suspension is a serious matter, albeit not as serious as a termination. Clearly there was some disagreement between CUPE's legal counsel and Williamson as to the appropriateness of the discipline relative to Makuch's record, taking into account the timing. However, the limited evidence means that the Board is not privy to the details of Makuch's conduct or his discipline history. As such, the Board cannot conclude that the Special Committee's decision was sufficiently unreasonable such that it acted arbitrarily. The Board is compelled, on the existing evidence, to find that the Union turned

[13] At para 49.

its mind to the issue of appropriateness, and considered the matter thoughtfully and came to a conclusion in a rational manner.

[57] The second issue is whether the Union acted arbitrarily by appointing untrained committee members to determine the outcome of the grievance. The Board finds that there is no evidence that discloses flagrant, capricious, totally unreasonable, or grossly negligent conduct, in relation to the appointment of the Special Committee members, specifically. The Board observes that the appointment of the Special Committee was motivated in part to avoid conflicts of interest and was comprised of members of the executive. There was no evidence to suggest that members of the Special Committee were inadequately trained for the work. The Board will address other issues with the Special Committee process in the following paragraphs.

[58] It is not the role of the Board to micro-manage the training of the Union representatives. Nor is there any flagrant gap in training that would persuade the Board that the Union acted arbitrarily. Despite Williamson's lack of labour law training or personal involvement in arbitrations, he clearly took an interest in personal education, and had shadowed others in the course of his work, as a form of informal training. There was no evidence that his shadowing of Anderson, in the past, impacted his partiality in his handling of this particular grievance.

[59] Third, the evidence about Anderson's past behavior cannot result in a finding that Anderson had actual influence or control over the members of the Special Committee in the course of their deliberations in this case. To be sure, it does not escape the Board's notice that, anecdotally, Anderson is depicted as someone who dominates meetings, acts in a domineering manner with co-workers, and exerts undue control over Union matters. The fact that Anderson has been observed on many occasions to act in an intimidating manner is concerning, but the Board cannot draw an inference that his past intimidating conduct has influenced the Special Committee's decision in this instance.

[60] On the other hand, the Board finds it concerning that Anderson was present in the executive meeting while Mihial made her presentation. This aspect of the process shows poor judgment, and was ill-advised and less than careful. As is often said, "no person shall be the judge in his own cause".[14] Justice must not only be done; it must be seen to be done. Why was Anderson privy to this information? At this point, it was not his concern.

---

[14] Adams, *Canadian Labour Law*, 2nd ed, Thomson Reuters (updated March 2019) ["*Adams*"], at 4.920.

[61] On the other hand, Anderson recused himself and absented himself from the room following the presentation. He did not serve on the Special Committee. There is no evidence of conversations between Anderson and members of the Special Committee, on this topic. There is no evidence that Anderson was involved in the work of the Special Committee. The Board has no reason to believe that the members of the Special Committee acted in a manner that was less than professional. In effect, Anderson did not sit in decision of the question before the Union. The Board has concluded, after careful consideration of the evidence, that this aspect of the process, in the balance, was not arbitrary or unfair.

[62] However, the Board is concerned that the Special Committee, in effect, sat in appeal of its own decision. The Special Committee was made up of the same individuals who made the initial decision. In turn, it conducted a reconsideration or a rehearing of the matter, as opposed to a true appeal. Albeit, Williamson was relieved to have that opportunity, as he had unanswered questions arising from the initial presentation. On the other hand, he "informed" the Applicant at the Special Committee "appeal" that the Union had decided not to take the matter to arbitration but that this was his opportunity to present his case. It was a flawed opportunity. In all, the Union's rehearing was not an appropriate substitute for an appeal. The Board finds that this procedural defect renders the Special Committee process arbitrary, and therefore, unfair.

[63] Despite this finding, the Board will proceed to consider the remaining issues.

Discrimination

[64] The second requirement is that the Union not act in a discriminatory manner, that is, based on invidious distinctions without reasonable justification or labour relations rationale. Makuch does not formally argue that the Union discriminated against him. But while his arguments were not the expert submissions of a seasoned lawyer, they were sufficiently clear to disclose an allegation of undue influence, resulting in distinctive treatment.

[65] In effect, this is the reverse of what the British Columbia Labour Relations Board observed in *Rayonier Canada (B.C.) Ltd. (1975)*, 2 CLRBR 196, when it held that a union is prohibited from discriminating for or against particular employees based on factors, such as personal favouritism.[15] Instead of asserting personal favouritism, Makuch asserts a personal dislike, rivalry

[15] Also cited at: 1975 CarswellBC 1238, at para 17.

or retribution that allegedly served as Anderson's motivation in influencing the Special Committee not to proceed to arbitration.

[66] However, Makuch must draw some connection between the alleged "personal dislike", the influence, and the decision not to proceed to arbitration. As concerning as it is, Anderson's prior conduct does not translate into actual influence or control over the members of the Special Committee, specifically in relation to the arbitration decision. The connection has not been made. For this reason, the Board is not persuaded that the Union discriminated against Makuch in the manner contemplated pursuant to section 6-59 of the Act.

Bad Faith

[67] Lastly, a union is required to not act in bad faith, that is, motivated by ill-will, malice, hostility or dishonesty. Makuch has presented no evidence of dishonesty or hostility on behalf of the Union. The composition of the Special Committee was motivated by the desire to avoid the many conflicts that could arise on the grievance. As discussed, any evidence of influence is, at best, circumstantial.

Section 6-58

[68] Lastly, Makuch did not raise section 6-58 in his submissions.

[69] Nonetheless, the Union made submissions in relation to this Board's holding in *Westfield et al v CUPE, Local 8443 & Saskatoon Public Board of Education*, 2017 CanLII 20062 ["*Westfield*"]. In *Westfield*, the Board held that, as part of a union's obligation to afford members natural justice in disputes with the union, it is required to provide access to an appeal process to challenge a decision not to proceed to arbitration.[16] In that case, the union had failed in its duty of natural justice when the applicants were not informed that the union was reconsidering a decision to proceed to arbitration. In arriving at this conclusion, the Board relied on the principle that persons affected by a decision have the right to be heard with respect to that decision.

[70] As the Board observes in *Pidmen v Canadian Union of Public Employees, Local 1975-01*, 2005 CanLII 63108 (SK LRB), at paragraph 46, the content of procedural fairness is context-dependent. It depends on the nature of the decision and the overall scheme, the importance of

[16] See, *Westfield et al v CUPE, Local 8443 & Saskatoon Public Board of Education*, 2017 CanLII 20062.

the decision, the impacted individual's legitimate expectations, and choices of procedure.[17] It is abundantly clear that the decision whether to proceed to an arbitration falls to the Union. A grievor does not have an absolute right to an arbitration, in particular where the discipline representing the subject-matter of the grievance falls short of termination.

[71] In the current case, Makuch was aware of the proceedings and was given an opportunity to provide input into the decision. But he had a right to an appeal. As outlined, his right to an appeal was abridged. This defect, in the circumstances of this case, is sufficient grounds for a breach.

[72] In conclusion, the Board finds that the Applicant has satisfied the onus of demonstrating, on a balance of probabilities, that the Union violated the Act in discharging its duties.

Remedy and Order:

[73] The Board has decided to make a declaratory order, only, under the circumstances. The Applicant is no longer employed by the City. The grievance does not pertain to a termination. The Board finds that there is no labour relations purpose in ordering that the Union reconstitute an appeal committee or proceed to an arbitration. On the other hand, a declaratory order serves as an affirmation for the Applicant, and is instructive for the Union.

[74] The Board is authorized, pursuant to clause 6-111(1)(s), to direct a union to "post and keep posted in a place determined by the board … any notice that the board considers necessary to bring to the attention of any employee". The exercise of this authority is not contingent upon a request for such relief being made by an applicant.[18] The Board believes that the educational purpose of this provision is well-served in the current case.

[75] The Applicant requested "costs" in the amount of a day's lost wages for the hearing, parking fees, and witness expenses. An award of costs is discretionary.[19] The Board awards costs only infrequently. The Board is not persuaded that the present case is so unusual or egregious so as to warrant an award of costs.

---

[17] Adams, *supra*, at 4.912; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817.
[18] *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*, 2017 CanLII 20060 (SK LRB), at para 254.
[19] *Hartmier,* at para 243.

[76] On the foregoing basis, the Board makes the following Order:

a. A declaration that Local 21 contravened section 6-59 of the Act by acting in an arbitrary manner in failing to fairly represent Gary Makuch;
b. An order that within seven days of receipt of these Reasons, Local 21 post a copy of these Reasons, together with the Order, for a period of 30 days, in a conspicuous location in the workplace.

DATED at Regina, Saskatchewan, this **16th** day of **September, 2019.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson