GLEN KNAPP, Applicant v UNITE HERE, LOCAL 41, Respondent and RAMADA PLAZA CONVENTION CENTRE, Respondent

LRB File No. 143-19; December 12, 2019
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

The Applicant:	Glen Knapp
For Unite Here, Local 41:	Garry Whalen
For Ramada Plaza Convention Centre:	Terrence Groff

Duty of Fair Representation – Section 6-59 of The Saskatchewan Employment Act – Applicant receives layoff notice – Contacts Union a year after layoff – Union conducts investigation – No grievance filed.

Duty of Fair Representation – Whether Union acted in manner that was arbitrary, discriminatory or in bad faith – Unprofessional communications – Layoff and failure to consider bumping rights – Arbitrariness – Application granted.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: Glen Knapp, the Applicant, ["Knapp"] has filed an application with the Board alleging that the Union failed to fairly represent him with respect to employment with Ramada Plaza Convention Centre ["Employer"], contrary to section 6-59 of *The Saskatchewan Employment Act* ["Act"]. This Application was filed on June 28, 2019. On July 3, 2019, the Union filed its Reply, sworn by Local President, Garry Whelan ["Whelan"]. A hearing on the Application was held on November 19 and 20, 2019. The main issue is whether the Union breached its duty of fair representation in deciding not to file a grievance on Knapp's behalf.

[2] The Application provides an outline of the facts giving rise to the underlying dispute. As the Applicant alleges:

> *I received a layoff notice in May 2018. I received no information or instruction from the union regarding recall or bumping rights. In fact I was told that I was not entitled to any because the union had no knowledge of my layoff and I hadn't paid union dues for nearly a year. The union sent me a letter advising that they agreed with the employer's decision. Also the union said that I only had 10 days to file a grievance from the date of my layoff.*
> …

> *The union first told me that they would set up a meeting with the employer. Then I was told that the employer was refusing a meeting and for the reasons stated in #4 above they are agreeing with the employer and Garry Whelan told me to drop dead.*
>
> *I would also like to ask for monetary compensation for lost wages because I believe the union willfully gave me unfair representation, possibly in collusion with the employer.*

[3] In the Union's Reply, Whelan suggests that at no time did the Union say that it agreed with the Employer. Instead, it properly based its representational decision on the Collective Agreement.

Argument on Behalf of the Parties:

[4] Knapp argues that he has been treated unfairly. He is the victim of a grudge that Whelan has held against him ever since Knapp had to work during a strike a number of years ago. Whelan was motivated by resentment when he chose not to file a grievance on Knapp's behalf. The notion that Knapp should have asked for assistance after his discharge is completely unreasonable. The Union apparently places all of the onus on its members without taking into account their personal circumstances, including their relative Union knowledge or experience.

[5] At the time of his layoff, Knapp was concerned about and preoccupied with his injury - the circumstances of his layoff were the last thing on his mind. Besides, it was a full year later that he finally came to learn that the Employer had hired staff only shortly after his departure. It was only then that he realized that he was not going to be recalled to work in his former position or any other position. When Knapp approached the Union, Whelan sided with the Employer and gave little if any consideration to Knapp's perspective. Throughout this ordeal, Knapp has been unjustly disparaged by both the Union and the Employer, who have clearly colluded against him.

[6] From the Union's perspective, this is a straightforward case. Knapp contacted the Union at least a year after the occurrence, long after the grievance deadline had passed. Despite Knapp's total disregard for the deadline, Whelan investigated his concern. In the course of that investigation, he learned (or was reminded) that Knapp's position had been eliminated with no expectation of recall, and that the Employer had entered into a contract to replace his services. After speaking with the Employer's representative, Whelan conferred with other Union members, and then called Knapp, relaying what he had learned. Whelan was deeply dissatisfied with, and frustrated by, the conversation. In the course of the conversation, Whelan was the target of "badmouthing" and "slander", and at a certain point he just "lost it" and told Knapp to "drop dead".

This one mistake should not override the fact that there has to be a good reason to extend a grievance deadline, and in this case, there was not.

[7] The Employer's argument focuses on Knapp's credibility. Much of the Employer's closing presentation involved a recitation of details not in evidence, against the Board's direction. The Board is inclined to assume that this approach stemmed from a failure to understand the process, or to appreciate the distinction between the broad themes that were generally in evidence and the details that were not. As is appropriate, the Board has been careful not to take into consideration any details that were not properly in evidence.

Evidence:

[8] Three witnesses testified: Knapp, Whalen, and Terrence Groff, the General Manager ["Groff"] of the hotel. A summary of the evidence is as follows.

[9] At the time of his layoff, Knapp was a ten-year employee. Knapp described his progression through the organization over the years. He first started working for the Employer in 2008 as a maintenance worker, began doing boiler tests a few months later, started to take charge of equipment shortly after that, and then in 2014 assumed a management role. Around 2015, he became a site engineer. In 2016, he suffered an accident and, as a result of his injuries, his duties were modified.

[10] On May 11, 2018, Knapp was provided six weeks of working notice via a written letter presented to him at an in-person meeting. In attendance at the meeting were a fellow employee and two representatives of the Employer, including Groff. The written letter reads:

> *Please let this letter serve as your official six (6) weeks working layoff notice from the Ramada Plaza Regina. This is our legal obligation as we are laying off the Maintenance Supervisor/Boiler position from our hotel which you currently occupy. As discussed we will no longer require your services of June 22, 2018 this will be your last day of work to ful fill* [sic] *the notice period. We will ask you to work with us as per your usual schedule till your final day as noticed above.*
>
> *We appreciate all you* [sic] *dedication to our hotel and are willing to help with any reference you require. We wish you all our best and know you will shine in your new position.*

[11] According to Knapp, no one raised his work performance at that meeting. Based on the meeting, he assumed that he would have a right of recall – he insisted that he was led to believe as much during that meeting, while not in so many words. He had no opportunity to read the layoff notice at the meeting, but did review it shortly afterwards. When asked what he gathered from the

phrase “are willing to help with any reference you require,” he offered that the letter was another example of his special treatment at the hands of the Employer. He understood that the letter had been provided to assist him in the collection of employment insurance.

[12] Knapp worked for most of the remaining six weeks, as per the written notice he had received. The day after he was officially “laid off”, he stopped doing boiler tests, and started to train Kevin Lang [“Lang”] on the equipment. And then, on the last day of work he injured himself while unloading a truck in the course of his duties.

[13] He was aware that a specific contractor, who he named, would be doing the boiler tests after his layoff. He suggested that he was unaware of the details of the contract. He understood that once the boiler work had been completed, he would be recalled. Due to his right of recall, he did not think that it was necessary to contact the Union. Besides, the Union should have been aware of his circumstances and should have been proactive in reaching out to him.

[14] In his request for bumping rights, Knapp relies on Article 8:02 of the Collective Agreement, which reads:

> ***8.02 Layoffs***
>
> *When lay-offs occur within any department, the last Employee hired shall be the first Employee to be laid-off, based on length of service within the particular classification. It being understood that:*
>
> *a) Employees in one classification may bump Employees in another classification within their own department based on their departmental seniority only, provided they are qualified to perform the duties of the position.*
> *b) An Employee who has been promoted from one classification to another and subsequently demoted to their previous lower classification shall, have seniority within that lower classification according to length of service in the department and, if a lay-off occurs, he shall be laid-off accordingly and recalled in inverse order to that in which he was laid-off.*
> *c) Employees shall be returned to service in the order of their seniority within their classification and department. Employees desiring to avail themselves of this rule must file their names, phone numbers, and addresses with the Employer and thereafter keep the Employer informed of their current address and phone number. Employees failing to report for duty within sixty (60) hours, excluding Saturdays and Sundays, from the time of notification by direct contact or registered mail, shall be considered to have resigned without notice.*

[15] Knapp later applied for and collected workers’ compensation and employment insurance, and then in the Spring of 2019, when he learned through another Union member that the Employer

had hired staff a month or two after his departure, he realized that he was not being recalled. Knapp's employment insurance payments ended sometime around June or July.

[16] Around that time, he called the Union office. He spoke to whomever answered the phone and that person promised to pass on his information. He later received a call from Whelan and was advised that the General Manager had refused a meeting. Whelan asked what he wanted to do. Knapp indicated that he wanted to know why he was not being recalled.

[17] In the end, Whelan stated that, due to the ten-day window, Knapp's "failure to pay Union dues", and the Union's unawareness of the layoff at the time that it occurred, the Union chose not to file a grievance.

[18] Knapp suspects that the Employer was trying to eliminate the expense associated with his position and that the Union chose not to represent him because of a personal grudge, based in part on his conduct in working through the strike. He testified that he was ordered to work through the strike and was paid cash to avoid Union scrutiny. Whalen asked to meet with him after the strike and Knapp refused. This is the likely source of Whalen's hostility.

[19] On June 13, 2019, Knapp received a letter from Whalen indicating that,

> *The Union has investigated your complaint and from the evidence given by the employer it is the Union's position that you are out of time and do not have a valid grounds* [sic] *for a Grievance.*
>
> *It is unfortunate that we can not* [sic] *you at this time, however feel free to contact this office at anytime* [sic] *should you have any further questions.*

[20] In his testimony, Whalen explained that he had spoken with Knapp about his complaint on two occasions. The first conversation took place about a year after the layoff. On this occasion, Knapp advised that he was laid off and wanted to return to work. Whalen explained that he would look into the issue, and proceeded to request a meeting with Groff. Groff advised that he could meet but explained that Knapp had been laid off without recall based on work performance. Whalen considered filing a grievance, and discussed the issue with other Union members. In the end, he decided it was not a good idea.

[21] Whalen's thought process was as follows. First, it had been almost a year since Knapp had been laid off and during the intervening months, Knapp had made no genuine effort to speak with the Employer. Despite the timeline, Whelan had chosen to investigate the complaint. He spoke with the Employer. He gathered information. After doing so, he concluded that the Union's

chances of success at arbitration were low - less than 50%. To file a grievance in the face of those odds ran counter to his training. Finally, the circumstances did not justify the money and resources and the Union was already stretched on both fronts.

[22] It would be an understatement to describe Whalen's next conversation with Knapp as unproductive. It went very poorly indeed. Whalen attempted to explain the rational for his decision, but Knapp responded with "slanderous remarks and badmouthing". Whelan, in turn, lost his temper and told Knapp to "drop dead".

[23] At the hearing, Whalen apologized for his unprofessional behavior. To his credit, although the Board expects nothing less, Whelan made no attempt to hide or downplay his conduct.

[24] In cross, Knapp asked Whelan whether he should have asked Knapp if there was any merit to the complaints about him. Whelan's reply was "no".

[25] For the grievance timeline, Whalen relies on Articles 16:01 and 16:02 of the Collective Agreement, which read:

> ***ARTICLE 16 – GRIEVANCE PROCEDURE***
>
> ***16.01*** *It is the mutual desire of the parties hereto that complaints of Employees shall be adjusted as quickly as possible, and it is generally understood that an Employee has no grievance until he has first given his immediate supervisor an opportunity to adjust his complaint.*
>
> ***16.02 Step One***
>
> *The aggrieved Employee or the Union shall present such grievance in writing to the General Manager within ten (10) days of the occurrence, excluding Saturdays, Sundays, and paid holidays. The written grievance shall include details regarding the date of alleged violation, the clause(s) of the Agreement which were violated, and the remedy sought by the Employee.*
>
> *A discussion or discussions will be then held between the Employer and the Employee concerned and/or the party designated by the Union for the Employee within seven (7) days of receipt of the grievance…*
>
> *…*

[26] The timeline is related to the issue of bumping rights. The parties have conflicting accounts as to what was said about bumping rights. Knapp insists that he asked the Union to represent him in pursuing his bumping rights. Whalen maintains that Knapp had indicated only that he wanted to return to work. He did not ask about bumping rights. Besides, Whalen viewed the bumping procedure as inappropriate because Knapp had no right of recall.

[27] Despite being reminded of the relevant test on this Application, the parties devoted an unwarranted amount of time on matters involving Knapp's record of employment and a package of undated photos revealing various, mostly unmarked pieces of equipment. Although very little turns on either of these pieces of evidence, it is necessary for the Board to briefly describe the issues that they raise.

[28] The first piece of evidence is the record of employment. Whelan obtained the record without a consent to the release of personal information, in the course of his investigation. Knapp took issue with Whelan's methods but consented to the record as evidence in these proceedings.

[29] The record of employment is a one-page document. It contains a boxed category with the caption, "expected date of recall", filled in with the letter "N". Whelan testified that, based on a conversation with the Employer, "N" meant that there was no date of recall. Knapp makes the point that the letter "N" is too vague to be amenable to interpretation in the absence of a direct explanation, at the time of the issuance of the record. While there is merit to this argument, the Board observes that Knapp did not provide any viable alternative interpretation. On the balance, the Board assigns minimal weight to the record of employment alone.

[30] The second piece of evidence is the package of photos. The Employer, in leading this evidence, suggests that the photos expose the neglected condition of various pieces of equipment, that Knapp was in charge of this equipment, that Groff had presented the photos to Knapp at the layoff meeting, and that Groff had explained clearly why Knapp's position was being eliminated. The Employer relies on this evidence to argue that Knapp was fully aware of the consequences of the layoff meeting and that Knapp's own version of events is not credible. Knapp counters that the photos could have been taken by anyone, anywhere. The photos were unmarked and undated.

[31] The Board will deal with the significance of the photo evidence in its overall analysis.

Relevant Statutory Provisions:

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

> ***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.*
>
> ***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).*

Analysis:

[33] The onus is on the Applicant to prove his claim, on a balance of probabilities.

[34] Section 6-59 of the Act requires evidence that the Union acted in a manner that is arbitrary, discriminatory or in bad faith. The Board in *Glynna Ward v Saskatchewan Union of Nurses*, [1988] Winter Sask Labour Rep 44, LRB File No 031-88, at 47, described the concepts of arbitrariness, discrimination and bad faith, as used in the predecessor section 25.1 of *The Trade Union Act*:

> *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.*

The foregoing description has been carried forward and applied in decisions based on section 6-59 of the Act.

[35] Another helpful, and commonly cited, description arises from the decision of the Ontario Labour Relations Board in *Toronto Transit Commission*, [1997] OLRD 3148 [“*Toronto Transit Commission*”], at paragraph 9:

> *. . . a complainant must demonstrate that the union’s actions are:*

> *(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.*

[36] The Applicant raises issues that potentially touch on each of these three categories. Of these categories, only the third involves an element of intention on the part of the Union. Overall, the focus of the Board's inquiry is the conduct of the Union. The more critical the job interest, the more the Board may scrutinize the Union's conduct. Still, harm to the Applicant is not the ultimate barometer.

Arbitrariness

[37] In assessing the Applicant's allegations, the Board begins by reviewing whether the Union's conduct was arbitrary. The Board has found that, to constitute arbitrariness, the Union's conduct must consist of something more than "mistakes, errors in judgment or 'mere negligence'".[1] In *Rousseau v International Brotherhood of Locomotive Engineers et al*., 95 CLLC 220-064, 1995 CarswellNat 1622 ["*Rousseau*"] at paragraph 107, the Canada Labour Relations Board provides a helpful description, and one that this Board relies on with frequency:

> *… 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. …*[2]

The Board later reconsidered and reversed *Rousseau* for reasons unrelated to the Board's reliance on the foregoing description.[3]

[38] Even in cases involving critical job interests, such as here, the Union has the right to make the decision whether to file a grievance. It is not required to file every grievance presented to it. In deciding whether to grieve or to arbitrate, the Union is entitled to consider the merits of the case, the chances of success, and the potential cost, among other factors.[4]

---

[1] *Toronto Transit Commission* at para 34, cited in *CB, HK & RD v Canadian Union of Public Employees, Local No. 21*, 2017 CanLII 68786 (SK LRB) ["*CB, HK & RD*"] at para 147.
[2] As cited in *CB, HK & RD* at para 147, citing from *Hargrave. v Canadian Union of Public Employees, Local 3833,* 2003 CanLII 62883 (SK LRB) ["*Hargrave*"].
[3] *B.L.E. v Rousseau*, [1996] CLRBD No 35, 1996 CarswellNat 2721.
[4] *CB, HK & RD* at para 155.

[39] In assessing the Union's conduct, it is not appropriate for the Board to conduct its own investigation. Nor is it up to the Board to determine whether the grievance has merit, or to sit in appeal of the Union's decision. The Board focuses its examination on the Union's conduct and considerations in making its decision, rather than on the actual merits of the grievance. It is sufficient if the Union took a reasonable view of the circumstances and made a thoughtful decision not to file a grievance. A union does not breach its duty just because it reaches a conclusion with which the employee does not agree.

[40] The Board proceeds to consider whether Whelan took a reasonable view of the circumstances and made a thoughtful decision not to advance the case to a grievance. First, the timeline is a central issue in this case. By the time Knapp contacted Whelan, the deadline for a grievance had long passed. The Union was entitled to impose parameters around whether it would attempt to have the timeline extended. In deciding whether to do so, it was completely reasonable to consider what Knapp ought to have known at the time of the occurrence.

[41] Second, Whelan found it implausible that Knapp did not know that his position was being eliminated. The written notice stated that the Employer was "laying off" the position that Knapp occupied and that his services were no longer needed. It offered Knapp a reference. It ended with, "[w]e wish you all our best and know you will shine in your new position". It is the Board's view that this letter, despite the phrase "lay off", made the Employer's intention, in relation to Knapp's recall rights, quite clear.

[42] Moreover, Knapp's supposed ignorance about the true state of his predicament lacks an air of reality. Knapp was provided notice at an in-person meeting. At that meeting, he had an opportunity to ask about his future prospects. Groff's insistence that he communicated his dissatisfaction, including through photos, is rational. His account of the related events is consistent and credible.

[43] Whalen proceeded to undertake an investigation in an effort to arrive at an informed decision. He quite properly turned his mind to the merits of the case and the chances of its success. From his perspective, pre-arbitration settlement was unlikely. Whelan considered the cost of an arbitration, which he was entitled to do. The Local is small and its resources are limited. A Union has to work within the resources available to it. It has a responsibility to its membership to use its resources wisely.

[44] The Union must also give the member a fair opportunity to present his or her case and provide input into the results of the investigation. Whelan testified that he had two conversations with Knapp, for a total of 12-13 minutes. In the first conversation, Whelan took information from Knapp and decided to investigate. In the second conversation, Whelan reported the results of his investigation to Knapp, the conversation devolved into "badmouthing" and "slander", and then Whelan told Knapp to "drop dead". In the hearing, neither party seemed willing or able to describe exactly what was said in the course of that conversation. As is often the case, it appears that both individuals were responsible for the direction that the conversation took.

[45] What can the Board take from this exchange? Does Whelan's unprofessional conduct translate into a failure to allow a fair opportunity to Knapp to present his case or to provide input into the investigation's results? The Board will consider these questions in turn.

[46] Whelan provided Knapp a fair opportunity to present his case during the first conversation. He then pursued Knapp's complaint despite the long expired grievance deadline. Whelan made a judgment call about Knapp after having heard from both sides, and with the benefit of his significant experience as a Union representative. At a certain point, Whalen had to make a decision about whether he could trust Knapp's version of events, and he decided that he could not. Whelan concluded that Knapp was aware of the Employer's decision to eliminate his position and to hire a contractor to address the issues with the equipment.

[47] On the other hand, through his conduct during the second conversation, Whelan signaled that he was disinterested in Knapp's input into the results of the investigation. When he told Knapp to "drop dead", he put an end to any further discussion. He did not reach out to repair the damage that he caused or open the door to any further conversations.

[48] This problem was compounded by the fact that Whalen did not consider the bumping rights issue, other than in a summary manner. During the hearing, Whelan made two simple, but revealing, admissions. First, Whelan freely admitted that he had little experience with bumping rights cases. Second, Whelan admitted that he should have asked Groff why Knapp was not being terminated. The Board will explain the significance of each as follows.

[49] The Employer's characterization of Knapp's discharge as a "layoff" meant that the rights attached to a termination with cause were not pursued or considered. Knapp worked throughout his notice period and proceeded to train new staff. While the Employer benefited from the

characterization of Knapp's discharge as a layoff, the Union chose not to consider the rights that attach to layoffs, as set out at Article 8:02 of the Collective Agreement.

[50] Whalen insisted that Knapp failed to raise the issue of bumping rights. The Union should not be entitled to rely on this technicality to avoid a measured consideration of the nature and extent of Knapp's entitlements. Whalen assumed that Knapp was not entitled to bumping rights because he had been laid off "without recall". As a consequence, Knapp's discharge fell within a category to which neither termination with cause nor layoff rights could be applied. The Union provided no evidence that it had considered these implications.

[51] Whelan says that he has taken the timeline into account in deciding whether to file a grievance in this case, but this is not entirely accurate. The date of the occurrence, or the date on which the clock starts to tick, may be dependent on whether the bumping rights apply. The Union provided no evidence that it had considered the impact of bumping rights on the determination of the date of the occurrence.

[52] To be clear, the Board is not providing the parties with its interpretation of the Collective Agreement. It is not suggesting that the bumping rights apply or the occurrence falls on a specific date. The Board notes that, due to the selective manner in which the evidence was presented, the Board is privy only to limited provisions of, rather than the entire, agreement.

[53] In making these observations, the Board is fully aware of the Union's concerns with the grievance timeline and its view that Knapp has taken advantage of the circumstances to gain an advantage over the Union and the Employer. He may have done so. For the reasons outlined in the preceding sections, the Board does not accept Knapp's asserted belief that the Employer intended to implement a recall protocol.

[54] However, for the foregoing reasons, the Board has found that the Union contravened subsection 6-59(2) of the Act by acting in an arbitrary manner in failing to fairly represent the Applicant. The Board will proceed to consider the remaining two categories of the duty, separately.

Discrimination

[55] 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. Knapp suggests that Whalen held a grudge against him as a result of his work history during the strike,

as well as his decision not to attend Union meetings over the years. The Board will address each of these allegations, in turn.

[56] The first allegation is that Whalen acted on a pre-existing grudge and was motivated by spite when he chose not to file a grievance on Knapp's behalf. The problem with this allegation is that there is no evidence that Whelan held a pre-existing grudge against Knapp, independent of Knapp's suggestion. Nor is there evidence of any connection between Knapp's strike activity and Whelan's decision not to file a grievance; or evidence of any connection between Knapp's failure to attend Union meetings and Whelan's decision not to file a grievance.

[57] Knapp's argument is based on his own conjecture. There is no basis to conclude that Whelan and Knapp were adversaries prior to the events that led to the filing of this Application. Whelan insisted that he has represented individuals who were previously his adversaries. Here, he made his decision based on his analysis of the merits, informed by his assessment of Knapp's credibility. A determination on credibility is not the same thing as a grudge.

[58] Knapp seemed to be fashioning the second allegation, about the Union meetings, in real time during the hearing. At one point, Knapp relied on his absence from Union meetings as a reason for his unfamiliarity with Union policies. This testimony was subject to cross examination. Knapp relied on the cross examination as evidence of the supposed grudge, and as a springboard for the expansion of his argument.

[59] For the foregoing reasons, the Board does not find that the Union's conduct was based on any prohibited grounds as set out in *The Saskatchewan Human Rights Code, 2018,* SS 2018, c S-24.2, or on other bases, such as personal favoritism or enmity. Although the Board takes issue with the Union's labour relations rationale in the preceding section, it does not find that the Union based its decision on invidious distinctions.

[60] It bears mentioning that, during the hearing, all of the parties were guilty of disruptions, interruptions, and to some extent, exaggerations. As the tension rose throughout the day, there was an upsurge in these incidents. The Board has had to assess these exchanges in context, taking into account the events leading up to the hearing, as well as the parties' respective vested interests.

Bad Faith

[61] The third requirement is that the Union not act in bad faith. Bad faith conduct has been described as conduct that is motivated by ill-will, malice, hostility, or dishonesty. It is the only category that involves an element of intention on the part of the Union. Whelan demonstrated a lapse in judgment and professionalism, and in this way contributed to the escalation of an existing conflict. The hearing dynamics make apparent his frustration with Knapp's style. He let his frustration get to him, and acted out; but this does not mean that he chose not to represent Knapp due to malice or ill-will. The decision not to grieve was made before the final heated exchange. Furthermore, there is no evidence of dishonesty. Although a certain hostility had developed over time, the Board does not find that the Union or Whelan were motivated by hostility in deciding not to file the grievance on Knapp's behalf.

Conclusion:

[62] The Board has found that the Union has breached its duty of fair representation toward the Applicant, Glen Knapp. The Board has a wide discretion in crafting a remedy appropriate to the circumstances. Overall, the Board should seek to place the applicant in the position in which he would have been, prior to the breach.

[63] In this case, prior to the breach, the Union had failed to consider the layoff/bumping rights provisions of the Collective Agreement, other than in a cursory manner. The Union failed to assess whether Knapp was entitled to take advantage of the bumping provisions as an employee who had been laid off, and if so, when the "occurrence" took place for purposes of the grievance timeline under the Collective Agreement.

[64] The Board has authority, pursuant to section 6-60 of the Act, to extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of that time. The Board can exercise that authority if it is satisfied that the three preconditions outlined in subsection 6-60(1) are met. In this case, the Board is satisfied that the failure to fairly represent Knapp resulted in substantial amounts of work by him, that there are reasonable grounds for an extension, and that the Employer will not be substantially prejudiced by the extension, subject to the following comments. However, the issue of timeliness is central to this case. Therefore, it is not appropriate for the Board to extend the time for any period prior to Knapp's first telephone call to the Union in May, 2019.

[65] Therefore, the Board is remitting the complaint back to the Union to decide whether to file a grievance on Knapp's behalf, taking into account the layoff/bumping provisions of the Collective Agreement. In so ordering, the Board expects that the Union will take steps to investigate the complaint, take a measured view of the complaint, and make a reasoned decision as to whether to file a grievance on Knapp's behalf.[5] The Board will order that the time for the taking of any step in the grievance procedure be extended, for the time period starting with Knapp's first phone call to the Union office in May, 2019.[6] The parties can negotiate any additional extension, if they so desire.

[66] Finally, the Board has authority to order compensation pursuant to clause 6-104(2)(e) of the Act, which authorizes the Board to determine the monetary loss suffered by an employee and require the persons responsible for that loss, in contravening Part VI, to pay to the employee all or any portion of the monetary loss considered appropriate. Under the circumstances, such an order is not appropriate. There is no way in which the Board can determine with any accuracy how much, if any, loss has been suffered by Knapp. Given Knapp's contributing conduct, the Board does not find it appropriate to order a symbolic amount.

[67] The Board hopes that these Reasons will motivate Whelan to reflect on his conduct and reconsider how he chooses to react to demanding and unpleasant predicaments in the future. The Board has considered whether to order that these Reasons, and the accompanying Order, be posted, and has decided against doing so. The Board is confident that the necessary behaviour modifications will occur in the absence of such an order.

[68] Therefore, the Board makes the following orders:

a. A declaration that the Union contravened section 6-59 of *The Saskatchewan Employment Act* by acting in an arbitrary manner in failing to fairly represent the Applicant, Glen Knapp;
b. An order that the Union refrain from contravening section 6-59 of the Act;
c. An order that Glen Knapp's complaint be remitted to the Union and the Union reconsider whether to file a grievance on the basis of Glen Knapp's complaint, taking into account Article 8.02 of the Collective Agreement, and any other relevant provisions of the Collective Agreement;

---

[5] See, *SEIU-WEST v Alison Deck and Saskatchewan Health Authority*, 2019 CanLII 57387 (SK LRB) at para 24, considering *Lucyshyn v Amalgamated Transit Union, Local 615*, 2010 CanLII 15756 (SK LRB).
[6] Which according to Whelan, is when the first phone call occurred.

d. If the Union decides to file a grievance, it shall follow the normal procedures as set out in the Collective Agreement, including but not limited to the referral of the grievance to arbitration, if warranted;
e. The time for filing a grievance is extended pursuant to subsection 6-60(1) of the Act, which extension is effective beginning on May 1, 2019, and not before.

DATED at Regina, Saskatchewan, this **12th** day of **December, 2019.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson