Saskatchewan
Labour Relations Board

**ELIZABETH EMEKA-OKERE, Applicant v CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 5430, Respondent and SASKATCHEWAN HEALTH AUTHORITY, Respondent**

LRB File No. 021-20; September 21, 2021
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

| | |
|---|---|
| Counsel for the Applicant, Elizabeth Emeka-Okere: | Emily R. Erhardt |
| Counsel for the Respondent, Canadian Union of Public Employees, Local 5430: | Jake Zuk |
| Counsel for the Respondent, Saskatchewan Health Authority (formerly Regina Qu'Appelle Health Region): | Amelia Lowe-Muller |

**Duty of Fair Representation – Consecutive disciplinary matters – First discipline to remain on file for five years – Grievance filed – Resolution of first grievance was delayed – First grievance formed basis for later progressive discipline – Final discipline matter results in 30-day suspension – Employee takes early retirement – Union bundles all four grievances and reaches $2,000 settlement.**

**Union filed grievances in respect of each disciplinary matter – Grievances proceeded through process – Union provided no rational explanation for abandoning the goal of first grievance – Union considered the likely success at arbitration of the remaining grievances – Made a reasoned and considered decision to settle with respect to three latter grievances.**

**Applicant appealed Union's decision to settle – Appeal hearing scheduled – Prior to appeal hearing Applicant filed application with the Board – Did not attend appeal hearing – Union seeks ruling on arbitrariness up until the appeal.**

**Board finds that the Union acted arbitrarily with respect to first grievance but the Applicant has forfeited any potential claim for lost wages due to her failure to attend her appeal.**

## REASONS FOR DECISION

**Introduction:**

**[1] Barbara Mysko, Vice-Chairperson:** Elizabeth Emeka-Okere [the Applicant] has filed an application alleging that the Union, CUPE Local 5430, failed in its duty of fair representation, as

set out at section 6-59 of *The Saskatchewan Employment Act* [Act]. These are the Board's Reasons for Decision in relation to that application.

**[2]** In 2018, the Applicant retired from her position as a Licensed Practical Nurse with the Saskatchewan Health Authority [the Employer]. Just prior to her retirement, she had been working at Wascana Rehabilitation Centre in Regina. The Applicant had been disciplined in relation to four separate incidents which had taken place over a period of approximately five years and had resulted in a total of 44 days of suspension without pay. In each case a grievance was filed.

**[3]** The first incident took place in 2014. The incident was labelled "resident abuse", and as a result of this characterization, the related disciplinary letter was to remain on the Applicant's file for a period of five years, instead of the standard period of two years. The matter was still on her file at the time of the subsequent grievances, which took place in 2017 and 2018. The Applicant pushed the Union to investigate the incidents, including by interviewing other staff who were working the same shift, and could corroborate her version of events. She wanted the Union to review the common patterns of the grievances instead of treating the events that gave rise to the grievances as separate incidents. In her view, the patterns would reveal that she was a victim of a targeted campaign on the part of the Employer.

**[4]** According to the Applicant, there has been no resolution of any of the grievances other than a letter proposing a $2,000 settlement to close all of the files. The Union agreed to the settlement without proposing it to the Applicant. No explanation was provided for the quantum. The Applicant appealed the Union's decision, and a date was set for the appeal hearing. In the interim, the Applicant became frustrated by her attempts to gain access to her files. She chose not to attend the appeal hearing, opting instead to take her matter to this Board. This application was filed two days prior to the date scheduled for the hearing of the appeal.

**[5]** As a result of the allegations, the Applicant was reported to her regulatory body, the Saskatchewan Association of Licensed Practical Nurses (SALPN). The Applicant was advised by a lawyer that the Union was her representative for all related matters, including the discipline hearing that was being held by SALPN. Therefore, she approached the Union to represent her in relation to that hearing. The Union refused. It was because of the SALPN decision that the Union's actions (or inactions) had the most detrimental impact.

**[6]** The Applicant says that she was the victim of a campaign of unjust treatment at the hands of the Employer, and as a result of the stress of the resulting proceedings, which were marred by

the Union's failure of representation, she suffered psychologically, took a prolonged medical leave and then took an early retirement under duress.

**Evidence:**

**[7]** On May 6, 2014, the Applicant received a verbal warning for failure to administer medication to a resident.

**[8]** On May 19, 2014, the Applicant was alleged to have committed "resident abuse", for which she received a one-day unpaid suspension. The Employer commonly uses the label "resident abuse" to describe conduct which is deemed to be deserving of discipline. The Union views this type of discipline as "slightly" more serious than other categories of discipline. However, the discipline for resident abuse stays on a file for five years, as opposed to the standard two years that applies for discipline arising from other types of misconduct.

**[9]** Article 10 of the CBA includes the following provision:

> *10.02 (d) Documentation of disciplinary action shall be removed from the Employee's file provided there has been no further discipline of a similar nature rendered within two (2) years of the initial discipline.*
>
> *Documentation of disciplinary action concerning client abuse shall be subject to a five (5) year time limit.*

**[10]** It was in relation to the one-day suspension that the Applicant initially sought assistance from the Union. The Union filed a timely grievance in relation to the matter. The Applicant provided a written statement outlining her position (and continued to do so for each subsequent discipline). The grievance was advanced to Step 2 in July, 2014, and was denied. It was then referred to the provincial dispute resolution committee. By September 24, 2014, the grievance was referred to expedited arbitration. This referral appears to have been made by mistake. By October, 2014, it was referred to arbitration (not expedited).

**[11]** The facility representative understood that the Applicant wanted to grieve the one-day suspension and the use of the word "abuse".

**[12]** The facility representative reminded the Applicant that the grievance procedure can be a long process. On average it takes two years to proceed from filing a grievance to holding an arbitration hearing. CUPE has a large number of grievances each year. Among the categories of grievances, terminations are the top priority.

**[13]** On November 15, 2017, the Employer issued a three-day unpaid suspension for another matter, taking note of the previous one-day suspension from 2014. In this matter, the Employer's disciplinary letter was somewhat confusing. The matter was described as resident abuse/neglect, but it did not appear to have been officially labelled as such nor treated as such by the Employer in subsequent communications.

**[14]** On November 23, 2017, the Union filed a grievance in relation to this matter, alleging improper discipline, and stating that the previous discipline was grieved and awaiting decision and therefore remained outstanding. The grievance was ultimately referred to the provincial dispute resolution committee and sat idle at that stage due, in part, to the Union representatives' lack of familiarity with the process and resulting error. The provincial dispute resolution committee is a consent-based process. Despite this, after the file was referred to the committee, the Employer did not respond to indicate whether it consented or not. The Union did not follow up adequately, or at all, and therefore, the file languished.

**[15]** When Rebecca Noble [Noble] assumed the role of Regional Vice-President of the Union, she conducted a review of a large number of grievances arising from Wascana Rehabilitation Centre, and through this review, learned that the 2017 grievance was sitting at the committee stage. She noted that the Employer was not consenting to the dispute resolution process, and so decided to refer it to arbitration to protect the grievance. The grievance was referred to arbitration on January 7, 2019.

**[16]** Noble reviewed the related file and found that there was a failure to document on the part of the Applicant. Noble understood the Applicant's arguments but there was no documentation to support them.

**[17]** The third grievance involved an alleged medication administration error which was reported to have occurred on March 4, 2018. The Applicant was given a ten-day suspension for this incident. Noble attended a meeting with the Employer about this matter and about the previous grievance. After the meeting she filed a grievance. The Applicant was sent a letter notifying her of the grievance. In its grievance, the Union indicated that the Applicant's previous discipline was not similar in nature and therefore the Employer did not follow progressive discipline when issuing the ten-day suspension. Noble took issue with the language used in the discipline letter, stating that it was designed to stack discipline.

**[18]** Relevant to this matter was the potential application of a non-punitive medication occurrence reporting policy. The Applicant claimed that the policy applied to her situation and that, because of the application of the policy, the disciplinary action taken by the Employer was wrongful.

**[19]** Noble investigated the relevance of the non-punitive policy. She had to make a number of phone calls both to find out if the policy was still valid and to obtain an interpretation of the policy. She finally had a lengthy discussion with the right person. What she understood from that conversation is that the policy applies when the employee has followed the steps of the complementary medication administration policy and when it was a systemic issue that caused the error in administering the medication. Also, if an employee has not followed the medication administration policy, then the Employer gives the employee one chance under the non-punitive policy. On subsequent occurrences the non-punitive policy will not apply. Based on her review, Noble had determined that the Applicant had failed to follow the medication administration policy. There is no allowance to free pour medication into a Dixie cup. Therefore, the non-punitive policy could not apply.

**[20]** The fourth incident pertained to an alleged failure to administer pain medication and to assess a patient on May 22, 2018. This incident resulted in a 30-day unpaid suspension. Noble was involved in the investigation of this incident. She attended the investigation meeting held by the Employer. When she was in the meeting, she looked at the Medication Administration Record [MAR]. According to Noble, there was insufficient documentation to support some of the tasks that the Applicant had claimed to have done and which formed the bases for her defense to the disciplinary action.

**[21]** Noble passed on her notes to the facility representatives and they filed the grievance. She explained that the Union files grievances in cases involving a 30-day suspension because of the severity of the discipline, whether or not the discipline is warranted. After a 30-day suspension, the next step in the progression of discipline is termination. The grievance proceeded to Step 2 and the Applicant was informed of its progress.

**[22]** In 2018 and 2019, the grievances were taken to the regional grievance committee, which is a committee charged with reviewing grievances before they proceed to arbitration. Included within the files before the committee were the non-punitive policy and the medication administration policy. The committee reviewed the files and determined that the Union would not be successful at arbitration. Noble explained that when the committee is not satisfied with the

information that has been provided on a given file, it will ask the representatives to take further action, and the file will be set aside for discussion at a later date. There was no request for further action in this case. The members of the committee were satisfied with the information they had received and with the actions that the Union had taken.

**[23]** While it was clear that, in 2018, the regional grievance committee reviewed and considered all four grievances, it was unclear whether the committee, prior to 2018, had previously reviewed and considered the 2014 grievance.

**[24]** Following the committee's review, there was a recommendation to refer the grievances to the grievance task team. The grievance task team is an employer/union committee that reviews grievances with the aim of achieving a settlement. The grievances were taken to the task team twice. There was an exchange of proposals to settle the grievances as a group. The Union's proposal was that the Employer pay the Applicant for thirty days. The Employer made a counter-offer of $2,000. The Employer rarely makes counter-offers in matters arising from Wascana Rehabilitation Centre. A couple of weeks after the task team meeting, in the Fall of 2019, a meeting of the regional grievance committee was held. The committee decided to accept the offer.

**[25]** Of all of the grievances, it is the 2014 grievance that appears to have received the least attention from the Union, especially after it had begun to proceed through the various stages of the grievance process. Noble acknowledged the lengthy period of delay with respect to this grievance. She explained that the Union has a large membership and a significant backlog of grievances. But she acknowledged that if the 2014 grievance had been settled the Employer would not have been able to rely on it in its disciplinary letter in 2017. The average time lapse from filing a grievance to arbitration is approximately two years.

**[26]** It is apparent that the Union had considered the merits of the 2014 grievance, especially in the early stages. According to Noble, the Union had decided that the facts as outlined by the Employer in relation to the 2014 incident were accurate. However, the Union believed that the label of "resident abuse" was unnecessary. In this latter respect the Union's position aligned with that of the Applicant. Both were hoping to have "resident abuse" removed from the discipline letter. The grievance was referred to the grievance task team to see that this happened. When the four grievances were bundled together to achieve a settlement, this goal was abandoned. The new, collective goal was to settle all of the grievances, and so, according to Noble, the former goal was no longer relevant.

**[27]** Bashir Jalloh [Jalloh] assumed carriage of the files in 2019 and contacted the Applicant in October, 2019 to advise her of the status of the grievances. They met in person in November, possibly in January, and then in February. After the decision was made with respect to the $2,000 settlement, he advised her right away. Jalloh sent to the Applicant a letter dated November 8, 2019, which stated:

> *Dear Elizabeth,*
>
> *In regard to the above-noted grievances and further to our conversation on October 31, 2019. This is to inform you that CUPE Local 5430, after extensive negotiation with the employer, has reached a $2,000 settlement for all your grievances.*
>
> *The Union has conducted a thorough investigation and we have considered all the facts and evidence that have been provided by you and the employer.*
>
> *The Union also reviewed the language of our collective agreement and how similar cases have been handled in the past. We have also consulted with our CUPE National Representative.*
>
> *Based on the above, the grievance committee has concluded that your grievance would not be successful at arbitration and recommends your acceptance of the $2000 offered by the employer for the resolution of all the above grievances*
>
> *As a Union member you have the right to appeal this decision. If you would like to appeal, please contact Bashir Jalloh in writing at … by November 29, 2019. A meeting will then be scheduled where you will have the opportunity to provide information including any additional evidence which would assist the Executive Board in their decision.*
>
> *The decision of the Executive Board is final and binding, and therefore not subject to further review. Should the Union not hear from you by the above deadline, we will withdraw the grievance and close the file.*
>
> *In Solidarity,*
>
> *Bashir Jalloh*
> *…*

**[28]** The Applicant sought an appeal of this decision. A date for the appeal was scheduled.

**[29]** The Applicant suggested that she had attempted to access her file on multiple occasions, but to no avail. There does appear to have been a misunderstanding between Jalloh and the Applicant which occurred the week prior to her appeal. Jalloh was out of the office at the time, and the two exchanged a number of text messages in which the Applicant explained that she had been turned away by the office staff when she had attended to view her files. It is unclear whether Jalloh attempted to understand this issue, or whether he attempted to intervene with the staff, if that was deemed necessary. He testified, however, that the Applicant had had access to her file

at the office, and had attended in the past to meet with him, but had not fully taken advantage of the opportunity. It is clear that Jalloh had the file at the office and would permit the Applicant to view the contents when she attended the office for meetings.

**[30]** There was some back and forth between the Applicant and Jalloh about viewing the documentation on the Monday prior to the appeal hearing. The Applicant ultimately gave up on that, and then suggested that it would be sufficient to meet with Jalloh on the Tuesday. But she then refused to attend the office after Jalloh had explained that he would not be able to remove the file from the office. She stated that she had been treated badly when she attended the office to look at her file the week before.

**[31]** By that point, the Applicant had already filed this application, but had not informed Jalloh that she had done so.

**[32]** At that last meeting, the Applicant asked Jalloh to provide a letter to SALPN requesting a stay of their proceedings. He refused, stating that he had already passed the file on and it was out of his hands. He reminded her to attend her appeal the next day, which was February 12.

**[33]** The next day the executive board was gathered from across the province for the appeal meeting. Prior to this, the Applicant had sent Jalloh a letter, which he received that morning. In the letter, the Applicant indicated that she was not going to be attending the appeal. After receiving the letter, Jalloh reached out to the Applicant to try to convince her to attend. He explained that everyone would be gathered, waiting for her, until noon. Despite these attempts, she did not attend.

**[34]** Throughout all of this time, the Applicant has been particularly distraught with how little she has heard from the Union. The substantial turnover in Union representatives dealing with the Applicant's files has only compounded the difficulties with communication. The Applicant testified that it all started in 2014, when she was told not to contact the Union – the Union would contact her. She did not reach out to the Union until after the 2017 incident.

**[35]** The Applicant testified that, after all this time, she repeatedly reached out to the Union to request updates on the progress of her files, and that, outside of the resulting exchanges, the Union failed to provide her with any updates. It is clear that, at least one of the representatives, who was serving as General Vice-President in 2018, even failed to respond to the Applicant's inquiries. On the other hand, when the Applicant requested a meeting with then President, Sandra

Seitz, she received a prompt response and the meeting occurred. Certain representatives who assisted the Applicant in the latter timeframe, including Noble and Jalloh, were responsive to the Applicant's inquiries if not always forthcoming.

**[36]** Randy dos Santos [dos Santos] was a facility representative directly involved in the last of the grievances. He has worked on the unit with the Applicant. He made a point of describing the Applicant as an excellent, dedicated worker. He advocated broadly for the Applicant, speaking with anyone who came to mind about the necessity of prioritizing her grievances. Although he understood that the Union had a significant grievance backlog, the Applicant was close to termination. He had asked for information from the Employer but the Employer was not cooperative with the requests. The CBA allows for investigation after Step 2 but the Employer was suggesting that the Union's opportunity to investigate was over. He felt that the Union should have prioritized the Applicant's grievances. Furthermore, the alleged performance issues should have been addressed in a non-punitive way, in accordance with the policy. Instead, the Employer was acting as though the Applicant was guilty of gross misconduct.

**Arguments:**

Applicant:

**[37]** The Applicant retained counsel after filing the application in this case. Her counsel confirmed that she is alleging a breach on the basis of section 6-59 of the Act, and not section 6-58, and clarified that the Applicant is not pursuing the issue of the Union's representation in relation to the SALPN hearing. Other matters mentioned in the application, related to the failure to file any grievances on return to work or sick leave requests, were not pursued at the hearing.

**[38]** The Applicant helpfully conceded that the Union's conduct does not establish that it acted discriminatorily or in bad faith, and instead took the position that the Union's conduct was arbitrary. Arbitrary conduct has been described as a failure to direct one's mind to a matter or a failure to act on available evidence or to conduct any meaningful investigation to obtain the data to justify a decision. Gross negligence is that conduct which is so arbitrary that it reflects a disregard for the consequences.

**[39]** The Union's conduct was arbitrary primarily because it failed to demonstrate that it had conducted meaningful investigations following each incident. Several Vice-Presidents who were involved with these files continuously deferred to the findings of the Employer instead of

conducting a meaningful investigation of their own. They then failed to keep the Applicant informed after each step in the process.

**[40]** If the Union had been more involved from the outset and had directed its mind to the matters, especially to the first matter, it is likely that the Applicant would have received lesser cumulative penalties. Instead, the Union waited until the Applicant was on the brink of termination and then acted by bundling all of the grievances together. The case was complicated by the sheer number of Union representatives who were involved. The Applicant was unsuccessful in receiving meaningful responses to her many inquiries of these representatives.

**[41]** The Union failed to comply with the standards outlined by this Board in *Lucyshyn v Amalgamated Transit Union, Local 615*, 2010 CanLII 15756 (SK LRB) [*Lucyshyn*]. It failed to meaningfully investigate, it failed to produce a report of any findings, it failed to communicate its reasons for choosing not to proceed to arbitration in a timely manner, and it failed to provide any reasons until 2019 when it lumped the grievances together and concluded that they would all be unsuccessful if taken to arbitration. The Union's failure to investigate and to arbitrate is indicative of a non-caring attitude and is reflective of its dismissiveness towards the Applicant. Furthermore, by bundling the grievances in the manner as done by the Union, the Union failed to assess each of the grievances on their own merits. All of the grievances were equated with the same weight as the weakest grievance.

**[42]** The Applicant needed access to her file to prepare for the appeal. She continuously attended the Union's office and was repeatedly denied access to that information. For this reason, she decided to come to the Board instead of proceeding with the appeal.

**[43]** The Applicant requests that the Board compensate her for the substantial losses she has incurred as a result of the Union's failure to fairly represent her. She acknowledges that she elected to retire but suggests that she was compelled to retire in light of the health problems she was experiencing as a result of the Employer having targeted her with cumulative discipline. As well, she was told by her manager that she was going to be terminated. She seeks monetary losses in accordance with Article 26 of the CBA, which provides for entitlement to severance pay for employees who have been laid off or have been informed that their job has been abolished.

**[44]** In addition, the Applicant seeks damages representing lost wages, including the 44 days of work during which she was suspended without pay and including the lost income for the years that she would have continued working.

The Union:

**[45]** The Union confirms that the grievances are still active, the settlement remains open, and the appeal process remains available to the Applicant. It was the Applicant's decision not to attend the appeal. Given the current state of affairs, the Union asks the Board to make a decision on the question of arbitrariness in relation to the events that occurred until the appeal date and to leave the completion of the appeal process to the parties.

**[46]** According to the Union, arbitrariness is a high threshold and it is a threshold that the Applicant has failed to meet. Ideally, the Board should show deference to unions and to their internal processes. Simple errors, such as the Union's delay in providing progress on a file, fall short of the high threshold for arbitrariness.

**[47]** With respect to the first grievance, and for a period of almost three years, there was no communication from either the Union or the Applicant. There is no general duty for the Union to proceed with a grievance where the grievor is uninterested in the matter.

**[48]** The Union owns the grievance and owes a duty to the bargaining unit at large. In considering the Union's conduct, it is important to take into account the context, including the nature of the grievance and the characteristics of the bargaining unit and the workplace. The first grievance was a minor matter involving a one-day suspension. The bargaining unit is a large unit with many grievances filed each year. Had the subsequent disciplines not occurred, there would have been no issue with how this grievance had been handled. It should not be available to the Applicant to second guess the Union's actions because of events that occurred after the fact.

**[49]** In response to the Applicant's argument, the Union says that the *Lucyshyn* standards are aspirational and dependent on context. In some cases, a full investigation report might be needed, but in this case, Noble indicated that it did not take her very long to realize that there were serious deficiencies in the evidence and that those deficiencies would be barriers to success at arbitration. If it is clear on the file that there is a deficiency in the evidence, then there is no point in manufacturing an unnecessary investigation just to check it off a list. Along the same lines, it is not necessary in every case to issue a formal report identifying the reasons for a decision that has been made.

**[50]** In some cases, there is more that needs to be done. In this case, when it became clear that certain steps needed to be taken, the Union followed through and took those steps. For

instance, dos Santos raised a potentially applicable policy in relation to a near miss medication error and Noble followed up to determine whether the policy applied to that particular grievance.

**[51]** On the issue of whether the Applicant had access to her files, the Board should prefer the testimony of Jalloh. His testimony is consistent with the positive tone of the correspondence between Jalloh and the Applicant.

**[52]** Lastly, the damages sought have no connection with the Union's conduct. There is no concept of constructive dismissal in the union context. There is no basis for the damages sought.

**Analysis:**

**[53]** The Applicant has the onus to prove, on a balance of probabilities, that the Union has breached its duty pursuant to section 6-59 of the Act. Section 6-59 provides:

> ***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.*

**[54]** The main issue is whether the Union acted in a manner that was arbitrary in representing the Applicant and therefore breached the duty set out in section 6-59.

**[55]** It is important to remember that the union assumes carriage of a grievance, and is afforded significant latitude in processing the grievance, including by withdrawing or settling against the grievor's wishes: *McRae-Jackson v CAW-Canada*, 2004 CIRB No 290, at para 8. The union is not required to take direction from the grievor. This latitude allows the union to make difficult decisions about the allocation of its resources in line with its priorities and its assessment of its chances of success.

**[56]** In assessing an alleged breach of the duty, it is not the role of the Board to sit on appeal of the Union's decisions: *Prebushewski v Canadian Union of Public Employees, Local No. 4777*, 2010 CanLII 20515 (SK LRB), at para 55. Similarly, it is not the role of the Board to rule on the merits of the grievance, but instead to assess the Union's decision-making process and the Union's conduct in handling the grievance.

**[57]** A union is not held to a standard of perfection. This was explained by the Canada Board in *Haley v C.A.L.E.A. (No. 1) (1981)*, 1981 CarswellNat 602:

> *30 …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.*
>
> *31 But the law does not condone all good faith action. Some action or inaction is such a total abdication of responsibility it is no longer mere incompetence – it is a total failure to represent [.] Some conduct is so arbitrary or seriously (or grossly) negligent it cannot be viewed as fair. This is especially so when a critical job interest of an individual is at stake.*

**[58]** The experience of the union representative and the available resources are factors to be considered in assessing the alleged breach. As the Board outlined in *Hargrave v Canadian Union of Public Employees, Local 3833*, 2003 CanLII 62883 (SK LRB):

> *[41] However, in Haley, supra, a case involving the missing of a time limit for referral to arbitration, the Canada Board also recognized that the experience of the union representative and available resources are relevant factors to be considered in assessing whether negligence is assumed to be of a seriousness that constitutes arbitrariness, stating as follows:*
>
> > *…The level of expertise of the union representative and the resources the union makes available to perform the function are also relevant factual considerations. These and other relevant facts of the case will form the foundation in each case to decide whether there was seriously negligent, arbitrary, discriminatory or bad faith, and therefore unfair, representation.*
>
> *[42] In Chrispen, supra, the Board approved of this position also, stating, at 150, as follows:*
>
> > *The reason why cases involving allegations of arbitrariness are the most vexing and difficult is because they require the Board to set standards of quality in the context of a statutory scheme which contemplates that employees will frequently be represented in grievance proceedings by part-time union representatives or even other co-workers. Even when the union representatives are full-time employees of the union, they are rarely lawyers and may have few qualifications for the responsibilities which this statutory scheme can place upon them.*
> >
> > *In order to make this system work, the legislature recognized that union representatives must be permitted considerable latitude. If their decisions are reversed too often, they will be hesitant to settle any grievance short of arbitration. Moreover, the employer will be hesitant to rely upon any settlement achieved with the union if labour boards are going to interfere whenever they take a view different from that of a union. The damage this would do to union credibility and the resulting uncertainty would adversely affect the entire relationship.However, at the same time, by voluntarily applying for exclusive representative status, the union must be prepared to accept a significant degree of responsibility for employees, especially if an employee's employment depends upon the grievance.*

**[59]** In recent case law from this Board, the steps set out in *Lucyshyn* have been treated, not as rigid requirements, but as guidance for a union processing a request for a grievance: *BP v Administrative and Supervisory Personnel Association and University of Saskatchewan*, 2012 CanLII 9617 (SK LRB); *University of Saskatchewan Faculty Association v R.J.*, 2020 CanLII 57443 (SK LRB), at para 79. Not all cases will require strict compliance with the steps set out in *Lucyshyn*.

**[60]** What is necessary is that a union fulfill four basic criteria, as summarized by the Board in *Rattray v Unifor National*, 2020 CanLII 6405 (SK LRB) [*Rattray*]:

> *[90] Hartmier set out four criteria that a union must fulfill to meet its duty of fair representation:*
>
> - *conduct a proper investigation into the full details of the grievance;*
> - *clearly turn its mind to the merits of the grievance;*
> - *make a reasoned judgment about its success or failure; and*
> - *if it decides not to proceed with the member's grievance, provide clear reasons for its decision.*

**[61]** For the following reasons, the Board has found that the Union has satisfied these four criteria in all but one of the four grievances. In respect of the first grievance, the Union failed to turn its mind to the merits of pursuing the removal of the resident abuse label or to provide clear reasons for abandoning that goal.

**[62]** The first question is whether the Union conducted a proper investigation into the full details of the grievance. The Union relies on the finding made in *Makuch v CUPE*, *Local 21*, 2019 CanLII 86847 (SK LRB):

> *[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.*

**[63]** The Board has found that this particular criterion has been fulfilled in relation to each of the four incidents. In arriving at this conclusion, the Board takes into account the critical nature of the cumulative grievances. The Applicant's interests became increasingly critical with each successive discipline. While the Applicant was concerned that the Union had failed to interview the witnesses to the various incidents, a union is not required to conduct the exact investigation requested by the grievor. In some cases, it will be appropriate for the union to rely on the investigation conducted by the Employer, or on aspects of that investigation.

**[64]** Article 11.07 of the CBA states:

> *At any stage of the grievance procedure, the parties may have the assistance of Employees concerned as witnesses. All reasonable arrangements will be made to permit the parties access to the Employer(s)' premises to view any working conditions relevant to settlement of the grievance. The Local of the Union and Employer(s) agree that, on request, appropriate information relevant to settlement of the grievance will be made available.*

**[65]** Article 11.07 is a permissive provision which facilitates the investigation at any stage of the grievance procedure. It does not suggest that the Union is required to conduct the investigation in a particular way, or at the direction of the grievor, as suggested by the Applicant.

**[66]** In this case, the Union attended every investigation meeting held by the Employer, received statements from the Applicant, reviewed the documentation provided by the Employer, brought the matters to the appropriate committee for further consideration, and decided that there was insufficient documentation to support the arguments made by the Applicant. Under the circumstances, the facts were relatively clear to the Union. It formed a part of the Applicant's responsibilities to provide documentation to support the work that she had done on the shifts, which documentation the Union had found to be lacking. It was not necessary for the Union to interview the staff present on the shifts for every incident reported by the Employer, nor was the Union's approach to the investigation arbitrary. The bundling of the grievances did not detract from the Union's investigation into each of the incidents.

**[67]** The Board in *Lucyshyn* set the expectation that an investigation report should be provided to the appropriate body charged with the conduct of the grievance process and to the complainant. There is no evidence that the Union completed an investigation report in this case. By extension, the Union did not provide an investigation report to the Applicant or ask for the Applicant's feedback. Depending on the circumstances, this alone does not necessarily amount to a breach of the duty. On the other hand, completing a written report is a good practice, and the absence of

such a report may make it more difficult to assess whether a union made a reasoned judgment with respect to the success or failure of a grievance.

**[68]** The remaining, related criteria require the Union to turn its mind to the merits of the grievances, make a reasoned judgment about their success or failure, and provide clear reasons for its decision not to proceed. For the number of grievances and the ultimate seriousness of the cumulative grievances, the lack of documentation outlining the Union's reasoning is disappointing. No doubt this deficiency, along with the significant delay following the filing of the first grievance, contributed to the Applicant's loss of trust in the process.

**[69]** However, the Board accepts that the Union's stated reasons for deciding not to proceed to arbitration are legitimate, and not simply an attempt to distract from its procedural shortcomings. In Jalloh's letter outlining the settlement reached, he indicates that the Union reviewed the language of the CBA, reviewed how similar cases had been handled, and consulted with the national representative. Furthermore, the Union received a written statement from the Applicant in relation to each grievance. The Union was aware of the Applicant's position with respect to each matter.

**[70]** The Union did not consult with the Applicant with respect to the details of the settlement it negotiated with the Employer. As mentioned, the right to decide whether to take a grievance to arbitration is reserved to the Union. Bearing this in mind, this Board has found that a union is not obliged "to obtain the views or preferences of a grievor prior to a determination by its grievance committee…whether or not to refer a grievance to arbitration": *Zalopski v Canadian Union of Public Employees, Local 21*, 2017 CanLII 68784 (SK LRB), at para 64. To do so is a good practice, however, what is legally necessary depends on the circumstances.

**[71]** It is unfortunate that the Applicant was not provided a further opportunity to make submissions to the committee, as in *Coppins v United Steelworkers, Local 7689*, 2016 CanLII 79633 (SK LRB). But where, as here, the Union has communicated with the grievor such that it has reached a reasonable understanding of the grievor's position, then it may not be necessary to take yet another consultative step. The question is whether the grievor has been prejudiced by that approach because the Union was not aware of her position or the related facts. There is no evidence that this was the case.

**[72]** Furthermore, this is not a case involving a delegation of the decision to another process or body. The Union had a process in place for making the decision whether to proceed to

arbitration or to settle the grievances. The grievances were considered by the regional grievance committee. The grievance task team allowed for settlement discussions but the ultimate decision-making authority with respect to the withdrawal of a grievance rested with the grievance committee. The settlement remained available but the decision whether to accept the settlement was subject to an appeal.

**[73]** As restated in *R.R. v Canadian Union of Public Employees, Local 4777*, 2011 CanLII 100994 (SK LRB), at para 45, "this Board has held that there is no breach of the duty of fair representation where a trade union withdraws a grievance, if it took a reasonable view of the circumstances and if it made a 'thoughtful decision' not to advance that particular grievance to arbitration." The grievance committee made the decision whether to proceed to arbitration on the basis that the Union would not be successful. At arbitration, the Union would have sought full redress for the unpaid days, totaling 44. Having decided that it would not be successful at arbitration, the Union began its negotiations with the Employer at compensation for the equivalent of 30 days. When it made the initial proposal it did not expect a counter-offer from the Employer.

**[74]** The next issue pertains to the Applicant's allegation that she did not have access to necessary documentation. The Board does not find this allegation credible. Jalloh and the Applicant met in person on at least two, possibly three occasions. The Applicant had access to her files. Jalloh had explained that her files would be at the office when she attended, she was able to photocopy what she wanted, and make notes. On one occasion she was given a notepad and a pen to take notes from her file and she refused. On one occasion she brought an Ipad to take photos. On February 11, they met at Tim Horton's but this was the Applicant's decision, and she had already filed this application by that date. Jalloh did not deny the Applicant access to her files.

**[75]** Furthermore, the Applicant had explained to Jalloh that she had information to help her case. He had told her that she could bring any additional information forward. The appeal hearing was one opportunity to bring such documentation forward and she chose to forego that opportunity.

**[76]** As mentioned, the first grievance is more problematic than the latter three. The Union's position is that the one-day suspension was not a priority, in particular, given the large number of grievances filed by the Union. Further, the Applicant failed to communicate with the Union about the first grievance until the latter incidents arose. It also states that the Union should not be held to task after the succeeding incidents for conduct that was acceptable prior to those incidents.

Granted, the Union followed the process for filing a grievance, maintaining the timelines, and referring the grievance to the committee for further consideration. However, the delay that was occasioned was not only substandard; it had the potential to have substantive consequences by way of progressive discipline.

**[77]** The Union had determined that, in relation to the first matter, the facts were true but the label of resident abuse was unnecessary. The grievance had been referred to the task team to have the label removed. However, when the grievances were bundled that goal was abandoned. Now, the Union's goal was to settle all of the grievances. The Applicant's lack of communication in the early stages of the first grievance cannot be taken as acquiescence with respect to this later decision.

**[78]** There is no question whether the Union conducted a proper investigation into the first incident. It did. The problem is that, either the Union did not turn its mind to the merits of pursuing the removal of the resident abuse label, or it did not provide clear reasons for choosing not to do so. It certainly did not articulate those reasons to the Board. As a result, it appears that the matter was simply abandoned when the four grievances were bundled. In this respect, the Union has acted arbitrarily and breached its duty of fair representation.

**[79]** Finally, the Applicant has suggested that she was forced to retire due to the Union's misconduct. The Board does not agree with this characterization. The Applicant retired in 2018 before the Union could be found to have breached its duty. As of January 8, 2019, the first grievance had only been referred to the task team, and the meeting was yet to occur.

**[80]** Lastly, the Applicant appears to have resiled, to some extent, from the constructive dismissal argument that was contained in the application. To be sure, it is well established that the concept of constructive dismissal does not apply to employees who are governed by collective agreements. This was explained by the Alberta Board in *Shortt v the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local Union No. 6034*, 2018 CanLII 32032 (AB LRB):

> *[12] With respect to the constructive dismissal grievance, this claim does not arise under the collective agreement. Employees who are covered by collective agreements have a right to claim they have been terminated without just cause. If they are successful in their grievance, they are entitled to be reinstated to their employment and reimbursed for their lost wages. However, the concept of "constructive dismissal", which arises in common law when the employer breaches fundamental terms of the employment contract, does not apply to employees who are governed by collective agreements. The reasons for this rule*

*were explained by arbitrator Brent in Toronto Star Newspapers Ltd. v. Southern Ontario Newspaper Guild (1990), 12 L.A.C. (4th) 273 at pp. 291-2:*

> *Having reached that conclusion, I confess to being troubled by the concept of constructive dismissal in a collective bargaining situation, and by the notion that a bargaining unit employee represented by a bargaining agent with a collective agreement to govern working conditions and terms of employment can claim constructive dismissal which forces her to leave the job. The cases cited to me which set out the common-law principles of constructive dismissal, such as the Moore (No. 11 on the union list and No. 3 on the company list) and Reber (No. 4 on the company list) cases, for example, all deal with non-collective bargaining situations. As I understand the law, as set out in the authorities cited to me, in order for a constructive dismissal to occur there must be a fundamental breach of the employment contract by the employer which allows the employee to treat the contract as being at an end. At common law there can be no specific enforcement of employment contracts, so the only remedy available where an employee has been wrongfully dismissed, whether constructively or directly, is damages. In a collective bargaining milieu, employees who have been wrongfully dismissed can be reinstated. Further, where a collective agreement has been breached by an employer, whether fundamentally or otherwise, bargaining unit employees can invoke grievance and arbitration to have the terms of the collective agreement enforced. The common law as it relates to employment contracts has been replaced by a new regime when there is collective bargaining.*

*[13] It is possible, in some circumstances, to challenge the voluntariness of a resignation but that requires an assessment of the true intentions of the employee: did the employee really intend to resign his or her employment?: see Brown and Beatty, Canadian Labour Arbitration, 4th ed. (Looseleaf: Canada Law Book: 2006) at §7:7100. In the present case, as set out above, the Complainant was clear he did not intend to return to work.*

**Remedy:**

**[81]** The goal of a remedy is to place the Applicant, as much as possible, in the position she would have been in had it not been for the breach. The remedy in a duty of fair representation case is to be compensatory rather than punitive.

**[82]** The Applicant has sought damages in this matter. The requested damages are divided into two categories: severance pay and lost wages.

**[83]** With respect to severance pay, the Applicant relies on Article 26.01 of the CBA:

> *(a) An Employee who has been laid off, or who has been informed in writing that his/her job has been abolished and who elects to retire on immediate pension, or resign, shall be entitled to severance pay on the following basis:*
>
> | | | | | |
> |---|---|---|---|---|
> | *5 days* | *x* | *the number of years of service* | *x* | *the Employee's current daily rate of earnings* |

**[84]** This provision does not apply in the circumstances of this case. The Applicant's job was not abolished, nor was she informed in writing that her job was abolished. She was not laid off. Therefore, this request for damages must fail.

**[85]** The second category is lost wages. The appeal with respect to the Union's decision remains outstanding. The Board expects employees, wherever possible, to exhaust all internal remedies available to them. The Applicant has not done so. There was nothing preventing the Applicant from attending her appeal. The appeal was her opportunity to make her final pitch to the executive. The Board's process should not be used as a substitute for that process. Due to her failure to attend her appeal, the Applicant has forfeited any potential claim for lost wages. Furthermore, the Board disagrees with the notion that the Applicant was forced to retire due to the Union's misconduct.

**[86]** For all of these reasons, the Board makes the following orders:

a. A declaration that CUPE, Local 5430 contravened section 6-59 of the Act by acting in an arbitrary manner in failing to fairly represent Elizabeth Emeka-Okere;
b. An order that CUPE, Local 5430 refrain from contravening section 6-59 of the Act.

**DATED** at Regina, Saskatchewan, this **21st** day of **September, 2021.**

**LABOUR RELATIONS BOARD**

Barbara Mysko
Vice-Chairperson