Saskatchewan
Labour Relations Board

JOHN KARMAZYN, Applicant v SASKATCHEWAN POLYTECHNIC FACULTY ASSOCIATION, Respondent and SASKATCHEWAN POLYTECHNIC, Respondent

LRB File No. 132-20; June 16, 2021
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Applicant, John Karmazyn:	Scott E. Hopley
Counsel for the Respondent, Saskatchewan Polytechnic Faculty Association:	Gordon D. Hamilton
For the Respondent, Saskatchewan Polytechnic:	Don Soanes

Duty of Fair Representation Application – Section 6-59 of *The Saskatchewan Employment Act* – Harassment Investigation – Third Party Investigation – Failure to Communicate Timelines until after Expiry – Investigator Edits Original Harassment Complaint – Failure to Consider Issues of Full Answer and Defense – Failure to Issue Decision on Appeal – Breach of Duty of Fair Representation – Order to Release Decision on Appeal.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to a duty of fair representation application. For the following reasons, the Board has decided to order the Union to release its decision on an appeal.

[2] On August 19, 2020, John Karmazyn [Karmazyn] filed an application alleging that the Saskatchewan Polytechnic Faculty Association [Union] had breached sections 6-4, 6-58, and 6-59 of *The Saskatchewan Employment Act* [Act]. Karmazyn is employed as an instructor with Saskatchewan Polytechnic [Employer].

[3] The application relates to a harassment allegation brought by a coworker [Complainant] against Karmazyn and to the subsequent investigation conducted by a third party investigator. As a result of the investigation, Karmazyn was found to have engaged in harassment in relation to three incidents that were alleged. The Employer issued a written reprimand. A written reprimand is the lowest possible discipline permitted by the harassment policy for a breach of that policy.

[4] In the application, Karmazyn cites Articles 24 and 25 of the Collective Agreement, which provide for the grievance procedure, as well as the SPFA Dispute and Grievance Policy. In short, he says that he has participated in the union grievance denial appeal, but the appeal panel has refused and/or failed to issue a decision with respect to that appeal. At the hearing, Karmazyn clarified that the primary remedy he seeks is an order that the Union and Employer proceed through the grievance procedure provided for in the CBA, pursuant to sections 6-60 and 6-104(2)(c) of the Act. In addition, if it is found that the Union acted in bad faith, he requests that the Board fix and determine the monetary cost incurred in hiring counsel to represent him on a solicitor-client basis, pursuant to clause 6-104(2)(e) of the Act.

[5] The Union filed its reply to the application on August 28, 2020. The Union acknowledges that it denied Karmazyn's requests to file a grievance in the related matter but that its denials were not arbitrary, discriminatory or in bad faith. The Union complied with its statutory obligations in its representation for Karmazyn at all times.

[6] The hearing of this matter took place on January 28 and 29, 2021, and on February 1 and 23, 2021. The focus of the hearing was on whether the Union had breached section 6-59 of the Act. A related application, which alleged an unfair labour practice, was withdrawn before the commencement of the hearing. The Employer attended but took no active role in this proceeding. At the conclusion of the hearing, Karmazyn and the Union filed helpful briefs and authorities, which the Board has reviewed in full in arriving at this decision.

Evidence:

[7] To begin, the CBA contains the following provisions, which are relevant to this dispute:

> *24.2 Time Limits*
>
> ***24.2.1*** *A grievance shall be deemed to have been initiated on the date a written statement of grievance has been received by the immediate out-of-scope supervisor. A grievance to be accepted must be initiated within thirty (30) calendar days from the date on which the employee became aware of the alleged infraction. Notwithstanding the thirty (30) calendar day time limit shall not apply to those items included in the agreement where the Employer has allegedly failed to apply a specific benefit, i.e. salary, vacation leave, sick leave, etc. In these latter instances the time limit shall be one (1) year after the date on which the alleged infraction occurred. The effective date of any necessary retroactive pay shall be the date on which the infraction first occurred or January 1, 1988 whichever is more recent.*
>
> *24.3 Procedure*
>
> *24.3.1 All workplace disagreements will be discussed with the appropriate out-of-scope manager (employee and group grievances) or the director, employee relations*

> *(policy grievances) before proceeding with the grievance procedure, except in cases where time lines will be exceeded as per article 24.2.1. Discussions that do not result in resolving the issue may be grieved within the timelines contained in article 24.2.1. Advancing and responding to grievances: Every effort should be made to resolve problems through dialogue at the local level prior to going to a grievance.*
>
> *24.3.1.1 The Association and its representatives shall have the right to originate a grievance on behalf of an employee, group of employees or on a policy matter and to seek adjustment with the employer in the manner provided in the grievance procedure. Such an employee, group grievance or policy matter shall be processed in the following manner:*
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> *…*

[8] The Union's Dispute and Grievance Policy, approved January 30, 2019, outlines the process by which the Union will authorize disputes to be raised to the grievance process:

> *In order to achieve the above two goals, the following process should be followed, where possible in light of applicable circumstances, for matters that are not appropriate or capable of being resolved through an informal collaborative process.*
>
> 1. *Faculty Relations Officer's [sic] will prepare a Briefing Paper (ideally limited to one page) defining the matter(s) in dispute and describing relevant facts and positions.*
> 2. *Faculty Relations Officer's will complete a Grievance Criteria Checklist to supplement and accompany the Briefing Paper.*
> 3. *The Briefing Paper and Checklist will be circulated to all Faculty Relations Officer's for review prior to a meeting at which the matter will be considered.*
> 4. *Faculty Relations Officer will speak to the matter at the review meeting.*
> 5. *After its consideration of the matter, a majority of the Faculty Relations Officer's may authorize a future course of action including, but not limited to:*
>   a. *Escalating to formal grievance procedure;*
>   b. *Directing further research and future consideration;*
>   c. *Referring the matter to a third party (e.g., Human Resources, an outside third party, such as an independent mediator, etc.);*
>   d. *Closing the matter; or*
>   e. *Authorizing any other course of action that, in the Faculty Relations Officer's view, may result in resolution.*
> 6. *The decision of the Faculty Relations Officers shall be recorded and become part of the dispute file.*
>
> *…*

[9] Where the Faculty Relations Officers [FROs] decide not to proceed to a grievance, the member has a right to appeal that decision to the Executive Council [E.C.]. Also included in the policy is a description of a pre-grievance procedure, as described by management.

[10] At the hearing, there was *viva voce* evidence from three witnesses. Karmazyn testified on his own behalf. At the outset of his testimony, he spoke at length about the history leading up to the current dispute. The Board will not attempt to recount that evidence in full, but will summarize

the central points, only. Ryan Tessier [Tessier] and Tracy Gall [Gall] testified on behalf of the Union.

[11] In 1996, Karmazyn, originally from Toronto, moved to Regina to take what was supposed to be a temporary position with SIAST for the purpose of developing a groundbreaking digital technology program. The launch, and the subsequent operation of that program, were by all accounts a great success.

[12] Karmazyn continues to work in an iteration of that original program to this day. He has also enjoyed a variety of professional roles, both directly within the program and associated with his work on the program. In 2012, he applied to be the program head for the Interactive School of Design and Technology [ISDT] in the School of Business. He was awarded the position, and then worked in this role from 2012 until June 30, 2019.

[13] Karmazyn also described in some detail the circumstances under which the Complainant was hired, and then remained, and then the various complexities of their working relationship, which he believes are relevant to the merits of the harassment complaint. The Board will not recount these details here.

[14] Eventually, Karmazyn says that he made his views known about a contentious policy issue and was given an ultimatum that required him to step down from his position as program head. For this reason, he returned to his FTE position which had the result of bumping the Complainant from her position. He had to give ten weeks' notice, which he did in March 2019.

[15] In April 2019, he found out that he was under investigation. In early May 2019, he was called to a meeting with human resources [HR]. Tessier was to be his representative. Present at the meeting were himself, Tessier, Bill Walsh (then Academic Chair) [Walsh], and Rudy Lackhan [Lackhan]. Karmazyn was informed that there was a harassment complaint filed against him and that he was being suspended with pay pending the investigation into the complaint. He was not informed of the Complainant's name at that time.

[16] Tessier testified about how he was chosen to act as Karmazyn's representative. The current VP, Erin Knuttila [Knuttila], was representing the Complainant. It was important to have separate representation for each. Gall, the FRO for the Regina Campus, was available as a resource to give advice to both Tessier and Knuttila. Tessier could not say for sure whether Gall provided advice to Knuttila.

[17] In mid-May Karmazyn heard from the investigator, who sent Karmazyn a copy of the complaint by email. When Karmazyn reviewed the complaint he was “gobsmacked”. He felt that the allegations were untrue and unfair and he found the whole thing hurtful. He was at the point in his career where he wanted to leave a legacy, not be painted as a villain.

[18] Karmazyn felt that he had insufficient time to review the complaint before the interview with the investigator. He met with Tessier prior to this interview. He said that he did not talk with Tessier about his responses. He did not receive detailed preparation. Tessier told him to be candid and address only the questions he was asked, and to be clear in his responses. Tessier attended the meeting with the investigator. He could not recall if he reviewed the complaint before he met with the investigator. Unfortunately, he was very busy at the time, and he was pulled into the file very close to when he received the complaint.

[19] During the two-hour interview, the investigator reviewed each allegation point by point, and Karmazyn provided a response to each, in turn. In his testimony, Karmazyn provided context for various allegations contained in the harassment complaint, explaining his view of why the allegations were unsubstantiated. Tessier also recalled that Karmazyn had provided the investigator with context for the facts underlying the allegations.

[20] When Karmazyn received the executive summary of the investigator’s finding, he was shocked. A meeting was scheduled with HR. Prior to the meeting, he met with Tessier. Tessier impressed upon him the importance of communicating that he would endeavor to do better, to admit to the harsh tone of the email communication, and to take the recommendations. Neither he nor Tessier knew what the Employer’s representatives were going to say in the meeting. Tessier’s advice was based on prior situations he had dealt with. Karmazyn was concerned with the report because it was clear that the investigator did not interview the appropriate persons.

[21] On June 5, the meeting was held with Karmazyn, Tessier, Lackhan, and Walsh. Tessier’s notes from the meeting were entered into evidence. These confirm that, at this point, Karmazyn continued to take issue with the accusations that were being made, but was willing to acknowledge that he could have handled things better, and that he contributed to the Complainant’s issues.

[22] In his cross examination, Tessier acknowledged that one of Karmazyn’s emails was harshly worded and he felt that it was “going to stick”; he also felt that it would be easier to prove the Complainant’s version of events. He has known Karmazyn a long time and he did not want

him to fight that battle. Tessier had suggested to Karmazyn that he should acknowledge that there was a misunderstanding, and advised him that it was best to be apologetic for the way that his actions were construed. He did not go through each of the allegations with Karmazyn or provide an assessment of the merits, one by one.

[23] Prior to the next meeting with HR, Karmazyn and Tessier met again. Tessier explained that he had observed harsh treatment of employees who contested detailed allegations of harassment, such as the allegations that were made against him. In fact, employees have been terminated for using the word “insubordinate” because the word can be viewed as “offensive”. For Karmazyn, a warning letter would be the best resolution.

[24] On June 7, 2019, Karmazyn attended a brief meeting with HR where he was presented with the written reprimand. According to Karmazyn, he explained his concerns inasmuch as he understood the circumstances. Tessier did not say very much at this meeting. He kept no notes of the meeting and had very little memory of the details. Tessier could not recall Karmazyn asking Walsh to change the letter, but he did recall Karmazyn talking about this in private meetings.

[25] The written reprimand, dated June 7, 2019, states:

> *…In this meeting you indicated you accepted that your actions constituted harassment. As such, you showed acceptance of, and remorse for your actions.*
> *…*
> *The JD Solutions investigator provided his opinion that three incidents considered to be substantiated harassment that violated the SaskPolytech Harassment Policy:*
> *1. Including a co-worker in emails*
> *2. Sending an inappropriate disciplinary email.*
> *3. Intimidated and humiliated [the Complainant] by comments made in front of her class regarding a survey.*
> *...*
> *This letter serves as a written reprimand. I have made this decision after reviewing the independent third party (JD Solutions) Investigation summary report. Specifically, this behavior involves your inappropriate interactions that violate the Harassment Policy # 601G…*
> *…*
> *A copy of this letter will be placed in your personnel file as per Article 23.4 of the collective agreement. I must advise you that any further display of inappropriate behaviours will result in further disciplinary action, including possible immediate termination of your employment with Saskatchewan Polytechnic.*

[26] After the meeting, and on the same day, Tessier asked if Karmazyn wanted to debrief. Gall was present at the debrief.

[27] At the debrief meeting, Karmazyn recalled asking how to remove the letter or redraft it to add context. He believed it to be inaccurate and he did not want to simply acquiesce on the basis that it was a lower form of discipline. Both Tessier and Gall were telling Karmazyn to accept the letter. He was the man, after all, and in the environment of the "Me Too" movement he would always be seen as the aggressor. At that time, no information was provided about the process for filing a grievance; no information was provided about the timelines. He was told to put the letter away, have a pleasant Summer and return fresh in the Fall.

[28] When Tessier testified, he described this meeting a little differently. He said that Karmazyn's concerns were not about the findings of the investigation "as much as it was [the Complainant's] performance". Tessier recommended cooling off before taking action to avoid the appearance of retaliation. It was not clear to Tessier whether Karmazyn wanted to bring a complaint about the Complainant's performance or about the harassment complaint, but either way, he felt it was better for Karmazyn to hold off. He could not recall Karmazyn suggesting that the letter should be changed.

[29] Tessier told Karmazyn that he could file a grievance but did not "specify any other terms". He did not do a "reality check", that is, he did not outline the timelines for filing a grievance. After that meeting, Tessier did not take any further active steps to represent Karmazyn. Karmazyn had expressed some concern with the case and so Tessier referred him to Peter Burke [Burke]. Tessier acknowledged that Karmazyn asked about a grievance but he did not do any formal analysis of whether a grievance was viable. Karmazyn's primary complaints were with the Complainant's behavior. At times, Tessier was confused about what Karmazyn wanted out of the process.

[30] Gall testified that he was surprised that Karmazyn received only a written reprimand for harassment; he felt that this was a favourable outcome, but he was very concerned that Karmazyn was going to retaliate. Karmazyn was upset with the Complainant and looking for ways to file a complaint about her. There was no formal request for a grievance. If there had been, Gall would have described the timeline.

[31] At one point in his cross, Gall explained that he did not provide the grievance timeline because he did not think that there was any basis to a grievance, but acknowledged that on June 7th he did not know much about the complaint. Based on Karmazyn's having owned his actions, and the discipline he received, there was no basis to pursue it further.

[32] In the Fall, there were three triggering events for Karmazyn. First, the Union had sent an email asking for feedback to its proposed changes to the harassment policy. Karmazyn wrote a six-page response. Second, a 0.5 FTE position opened in Graphic Communications. The Complainant was bumped into this position. Third, and perhaps most importantly, an unedited version of the complaint came to Karmazyn's attention.

[33] Tanis Wilder [Wilder], a colleague of Karmazyn, was in possession of the Complainant's laptop and password. On the laptop, Wilder found a different version of the complaint and an audio recording that was referenced in that complaint (but not in the version in Karmazyn's possession). Karmazyn testified that he had not asked Wilder to go looking for information or to provide him with these files. According to Karmazyn, the original complaint was highly derogatory and defamatory and he had not previously laid eyes on it.

[34] The investigator had provided Karmazyn with an edited version of the original complaint, and it was the investigator who had done the editing. Based on the emails in evidence, the fact that the complaint had been edited was not news to Karmazyn, but he had not previously viewed the original complaint. Karmazyn felt that the full version of the complaint demonstrated the Complainant's lack of good faith and that the editing demonstrated the investigator's lack of impartiality.

[35] On September 22, 2019, Karmazyn wrote to Gall explaining that he had just received a digital copy of the full complaint, including an admission that the Complainant was secretly recording conversations. He suggested that Gall was aware that she had been recording conversations and yet this issue had not been addressed. He then asked Gall to recuse himself from the file:

> *Based on this information, I would ask that you immediately recuse yourself from this and I will be filing a grievance again… and HR for not following the law and policy. I am formally requesting any transcripts or copies of the materials she provided to the investigator in support of her complaint. I want the letter which was placed on file with HR to be removed immediately, without prejudice, as Bill Walsh was named as a Witness in her complaint and therefore, he should have been recused from any disciplinary meetings on this matter.*

[36] Karmazyn was under the impression that Gall was the representative for the Complainant and that he would have had a copy of the original complaint. Gall proceeded to recuse himself from the file.

[37] There were multiple emails between Karmazyn and Burke throughout the month of September. On September 23, 2019, there was an exchange between Karmazyn and Burke in

which Karmazyn suggested that he was "requesting the full complaint, through proper channels, as part of my filing a complaint against [the Complainant] and this is not a 'retaliation of her complaint', rather that everyone follow due process[.]" In a later email that day, he explained: "Until I receive the full complaint which was filed, I do not know that what I was provided was submitted." Burke replied indicating that "we do not and have never had a copy of the complaint made" and invited Karmazyn to provide him with an opportunity to review the contents of the copy that he had discovered.

[38] On September 26, 2019, Karmazyn wrote to Burke explaining that the deletions from the report, in his view, demonstrated that the investigator was not impartial. Later that same day, Burke emailed Karmazyn, stating that he had read the newly discovered version of the complaint, would meet with HR the following week to view their copy of the original, and would then report back to him. Regardless of his opinion, Karmazyn would be entitled to apply for a grievance:

> *I would like to reassure you in the meantime that, in the event that the thirty day time limit is in danger of expiring, we have a procedure for securing more time. Accordingly, while I am grateful that you are being diligent about the timelines for this investigation, I want to reassure you that we will not allow them to run out.*

[39] On October 1, 2019, Burke wrote again confirming that Karmazyn's version and the version located at the Sask Poly office were the same document. He indicated that the time limit for grieving his letter of discipline had expired and therefore he was required to limit his grievance investigation to the new information arising from the original complaint.

[40] He acknowledged that the investigator had made several deletions from the original complaint. Deleted was the Complainant's reference to having recorded a conversation with a colleague. However, the original complaint would not "have changed the determination", and that "in most cases" Karmazyn benefited "because the deletions removed allegations for which you no longer required a defence". He concluded that there were no grounds for attempting to challenge the reprimand on the basis of the new information. Burke also reminded Karmazyn that the written reprimand was the lowest level of discipline and that if the matter were re-investigated unsuccessfully, then claiming remorse would no longer be an option.

[41] Burke also spoke with Karmazyn on the phone about what Karmazyn wanted. According to Karmazyn, he received similar advice from Burke as he did from Tessier and Gall during the debrief meeting, that is, that he should leave it alone and move on. Karmazyn testified that he

explained to Burke that he had asked HR to reconsider because his emails were sent as a supervisor.

[42] Finally, there was a fourth triggering event for Karmazyn. At some point during the Fall, 2019, Karmazyn decided to run as a candidate for Regina campus VP, and for this purpose, attended a "meet the candidates" session on October 28, 2019. It was in the context of this election, and in particular this session, that the issue of his recent disciplinary record was obscurely and indirectly mentioned in a public setting. Karmazyn has since filed a related Queen's Bench action citing privacy concerns arising from this incident as well as subsequent events.

[43] In relation to this incident, for the purpose of the current proceedings, the parties agreed to the following admission of facts:

> *Karmazyn ran for Regina campus VP and was unsuccessful. There was a concern raised that having a written reprimand for harassment on Karmazyn's file could have issues for his eligibility to be on E.C. There was no determination on his eligibility by E.C.*

[44] On October 29, 2019, with respect to the alleged breach of privacy, Adam Farion [Farion], another FRO, wrote an email to Karmazyn in which he explained the grievance process:

> *…The Executive Council serves at arms length from the investigative process as the FRO's make determinations as to whether or not a 'Request for a Grievance' from a member should be approved. If the FRO's deny the grievance, a member has the right to appeal to the Executive Council who are stationed in a neutral capacity (having not been aware of the initial discipline or facts of a file). As the EC was unaware of the 'Written Reprimand' [you] received in June, they did not have reason or cause to take action under the Code of Conduct. Once the concern or complaint is raised by a member, the EC is obligated to inquire and investigate the allegation.*
>
> *If you would still like to request a grievance be filed, you are within your right (I have attached the Policy and forms for your consideration)…*

[45] On the same date, Karmazyn wrote to Burke requesting copies of certain communications:

> *…I would request the emails that Tracy Gall sent and received from the Labour Relations Board regarding my request for the full complaint filed with HR. Also, his communications with you regarding any reason why I should not have received the full complaint (which he stated he sent). I need this to establish a timeline for why I am filing the grievance at this time.*
>
> *In order to regain my professional reputation that has been maligned and slandered, I have no choice but to file a grievance and if need be, having a new investigation conducted using the full complaint and a truly impartial investigator that is vetted by the SPFA (and not acting on behalf of Sask Polytech HR, as evidenced in my case).*
>
> *I thank you in advance for obtaining my requested documentation and emails. My grievance will be submitted as soon as I have received this.*

[46] Burke replied, clarifying some of the details that Karmazyn had apparently misunderstood, and confirming that Farion had provided the paperwork for filing a grievance.

[47] On October 29, 2019, and then again on October 31, 2019, Burke provided written clarification of the distinction between the various processes that may be engaged by the circumstances raised by Karmazyn. On October 31, 2019, Karmazyn wrote to both Burke and Farion with a number of questions about the receipt of the original complaint, and a question about the grievance process, among other matters.

[48] On October 31, 2019, and then again in November, 2019, Karmazyn made two requests for grievances with respect to issues related to, but not about, the harassment discipline.

[49] On November 1, 2019, Karmazyn requested a written statement from Burke confirming that he reviewed the original complaint and that it was identical with his copy "in addition to the chain of custody request". He also asked for further clarification of the grievance process. In response to this latter question, Burke suggested that he refrain from trying to explore every avenue at once and instead make a formal grievance setting out what he wants, and then the Union could advise him if he raised a matter that was better addressed by a different body. He also responded to his inquiries in point form, and provided additional clarification on the grievance process:

> *…Where it is believed that someone acting on behalf of Sask Poly has failed to comply with the terms of the CBA, the SPFA has the exclusive right to pursue such an issue. The process normally begins with a request from a member to the SPFA to file a grievance. This is probably the type of complaint that you have in mind. The easiest way to think about this is 'what remedy am I seeking?'. Assuming that the problem is "I was wrongly disciplined" and the remedy is "remove the discipline" then this is a grievance and you complete the request form to the SPFA….*

[50] On November 4, 2019, Burke wrote to Karmazyn thanking him for formalizing his requests, indicating that Burke and Farion had reviewed the requests, and then providing an explanation for denying them.

[51] Shortly after this, Karmazyn experienced a personal loss and took a pressing necessity leave. In November, he went on stress leave on the advice of doctor. In January, he returned on a limited basis, working two to three days per week.

[52] In early December, he retained counsel because he felt that he was not receiving good advice from the Union. He had to make a few attempts before he was able to retain a lawyer. On December 18, 2019, his counsel sent a letter to Burke, which included the following comments:

> *I understand John has requested that the SPFA grieve the discipline imposed against John arising from the harassment complaint…*
>
> *In my opinion, there appears to be a compelling case for the SPFA to pursue this course of action.*
>
> *As I understand the events, there appears to be a fundamental procedural and substantive [flaw] in the process undertaken by Joe Dosenberger. These were not discoverable until the entire initial complaint document was disclosed to John. I have reviewed your email to John dated October 1, 2019 and, with respect, I disagree with your conclusions that the edits apparently made were either appropriate or trifling.*
>
> *…*
>
> *John indicates that with respect to points one and two of the discipline letter, he recognized Mr. Dosenberger could draw conclusions about his actions. However, John does not believe it was accurate to state he acknowledged his actions as harassment. As to point three in his discipline letter, John states he has never agreed to nor admitted the events… as occurring in the manner described nor did he ever acknowledge his conduct during that event was inappropriate.*
>
> *…*
>
> *Next John states immediately following the discipline meeting and the delivery of the discipline letter, he asked Mr. Tessier to file a grievance… Given Mr. Gall's role as the staff rep assigned to… his presence and involvement in apparently actively pressuring John to accept the discipline, was at a minimum, unconventional.*

[53] On the same date, Burke confirmed receipt of the letter and stated that its contents would be carefully considered by the Union.

[54] Karmazyn testified that he did not understand how to initiate the grievance in this matter, and that he believed that his counsel's letter dated December 18, 2019, was a request for a grievance.

[55] On March 27, 2020, a grievance request denial appeal hearing was scheduled to be held. Karmazyn's counsel attended by phone, but was not allowed to address the committee. Karmazyn asked to deal with the discipline grievance. This request was refused on the basis that no request for a grievance had been submitted. On March 30, 2020, counsel for Karmazyn wrote to Burke, stating:

> *I also raised with John during the hearing that the dispute he had been trying to raise and wanted help with through his exclusive bargaining agent, was to proceed with a grievance*

> *over the harassment finding and we had thought my letter to you had put that question in issue at the appeal hearing.*
>
> *This turned out not to be the case. I believe John will provide the form requesting the finding of harassment and the discipline be grieved.*

[56] On March 31, 2020, Warren White [White], then President of the Union, wrote to Karmazyn providing reasons for denying the appeal, and confirming that during the meeting Karmazyn had "raised other concerns" which "have been heard and will be addressed in further correspondence to you in the near future".

[57] On April 1, 2020, Karmazyn filed a request for a grievance on the basis of the comments made by Burke and the committee on March 27, 2020. The grievance request form states:

> *The applicant the SPFA commence a grievance with respect to the findings of harassment made by the employer against the applicant, [as] those findings are contained in the discipline letter dated June 7, 2019.*
>
> *The applicant states the findings of the three incidents of harassment each independently and cumulatively were wrong and unreasonable and resulted from a misunderstanding of the facts and law and/or were a misapplication of the facts to the law. In addition and in the alternative, the investigation conducted by Joe Dosenberger was improperly carried out and the investigation and the conclusions he reached did not comport with requirements of natural or fundamental justice, including that the investigator was aware of and relied upon or appeared to rely upon facts not disclosed to the applicant and further the investigator participated with the complainant in editing factual allegations from the initial complaint, allegations the investigator apparently did not believe were true and yet the investigator did not disclose these to the applicant. These and other particulars result in a deprivation of the applicant's right to be apprised of the allegations he faced and to be subject to a fair process and further give rise to a reasonable apprehension of bias against him on the part of the investigator and in such circumstances the employer was not entitled to rely upon the results and recommendations of the investigator in concluding the applicant was responsible for harassment.*
>
> *Settlement Sought:*
>
> *The applicant seeks to have the finding of harassment against him overturned, the complaint made against him dismissed and to have the discipline letter dated June 7, 2019 removed from his file.*

[58] On the same date, White wrote to Karmazyn and requested a concise list of the specific concerns that he felt had not been addressed or responded to his satisfaction, stating that the objective was "to provide clear and definitive direction to Executive Council so that each concern can be addressed, responded to and resolved."

[59] A summary, dated April 2, 2020, purported to have been prepared by Burke was entered into evidence. In the summary, Burke states that, on September 23, 2019, he advised Karmazyn

of “the thirty day time limit but agreed that if new information came to light late then this could justify an extension of the time period.”

[60] On April 21, 2020, the grievance was denied due to the passage of time, and based on a brief analysis of the three incidents of harassment. On April 22, 2020, Karmazyn filed his request for an appeal of that decision. In the request, he observed that the denial letter was written as if Burke “had not received the December, 2019 correspondence … which addressed all the points upon which Mr. Burke based his decision.”

[61] The appeal was scheduled to be heard on May 19, 2020. Karmazyn attended and participated but was not entitled to be represented by counsel. Burke appeared for the Union. The following day White wrote to advise Karmazyn that it had become apparent that the Union would not be able to respond with a decision within the anticipated five days because there were “numerous ‘tentacles’ to this matter that we wish to study in order to provide an informed response.” White asked Karmazyn to be prepared for a delay of up to an additional 15 days.

[62] In the meantime, on May 15, 2020, Karmazyn commenced a civil action in the Court of Queen’s Bench listing as Defendants Gall, Burke, White, and Knuttila. The Union was not named, and apparently was not aware of the lawsuit on the date of the appeal hearing. On September 16, 2020, White emailed Karmazyn stating that the Union was postponing its decision on his appeal because it had determined that the appeal “lacked good faith”. The lawsuit was perceived as an “intimidation tactic, designed to force the EC to agree with your appeal or face the consequences of legal action on a personal level”.

[63] Burke moved back to the U.K. shortly before the hearing. Cristie Zyla is now in charge of Karmazyn’s file.

Argument of the Parties:

Karmazyn:

[64] Karmazyn states that none of the harassment findings made against him are correct or reasonable. These findings have had an enormous impact on him personally. He does not concede that his matter should be taken less seriously than a termination matter.

[65] Karmazyn believes that the Union has utterly failed to represent him. Ever since the discipline meeting, Karmazyn has consistently sought to address the unjustified finding of harassment, and the related discipline. The Union failed to provide him with crucial information

about the grievance process and actively encouraged him to forget about a matter that was causing him significant concern. Until he secured counsel, he was entirely reliant on the Union for advice with respect to the grievance process.

[66] In the first meeting after his discipline was imposed, the Union representatives decided that a grievance would lack merit and that Karmazyn should consider himself lucky. Despite Karmazyn's request and the emergence of additional information over the subsequent time period, the Union's actions seemed designed to reinforce this original position, and to ignore anything that might call for a reassessment.

[67] The Union decided that Karmazyn's appeal failed on the basis of delay. However, Karmazyn has provided a sufficient explanation for the delay, and besides, no aspect of the delay is attributable to him. The Union is the exclusive bargaining agent. Regardless of whether Karmazyn properly completed the grievance request form within the applicable timelines, it is not believable that the Union was unaware of Karmazyn's request for a grievance. The Union took the position that Karmazyn had not submitted a grievance, informed him that he could initiate the grievance process, and advised him that, once he did, his request would be considered. The Union denied his appeal and then refused to provide a decision in a subsequent appeal.

[68] There were numerous procedural flaws with the appeal process that raise issues of fairness in the adjudication of Karmazyn's requests. The Union also failed to properly address the serious issues that arose with the investigation process. The totality of the flaws suggest that the Union acted by design to create delay as a way of frustrating his desire to grieve the matter. Over time, the Union's approach to Karmazyn became adversarial, or worse than adversarial. What emerged was power struggle, especially between Karmazyn and Burke, in which Burke defended positions that were unjustifiable and not grounded in fact. There is no evidence that Burke ever gave any thought to the issues raised in relation to the investigation process. The Union's actions or inactions were motivated by ill-will or demonstrated a lack of truthfulness, and were in bad faith. In the least, the Union committed gross negligence.

[69] The Union's failure to produce every document in its possession, and its failure to call the FRO primarily responsible for the preparation of key documents relied upon by the Union, Burke, calls for an adverse inference to be drawn. Burke's relocation to the U.K. some days or weeks before the hearing is no excuse. Every witness testified remotely. Burke's failure to testify suggests that the Union's actions were intended to delay and to frustrate Karmazyn's desire to grieve. Finally, the Employer, at least, is in no position to suggest that the delay is prejudicial when

it was engaged in a process that involved the investigation of events that went as far back as Christmas of 2012.

[70] If the Union's position is upheld, it will amount to a total vindication of form over substance. It cannot be the case that if a member fails to complete the precise form, that the Union's duty of fair representation is spent. The Union's power over the grievance process creates a dependency and a vulnerability on the part of a member that needs to be taken into account. If the Union is inclined to prioritize the collective interest over the interest of the member, then there is a higher onus on the Union to demonstrate that it exercised care in discharging advice. A member is entitled to understand the process, the relative seriousness of the matter, and the various dispute resolution avenues that are available.

Union:

[71] The Union denies that there has been any breach of section 6-59 of the Act. The FROs took a reasonable view of the grievance request, the Union investigated the details of the request, and then provided reasons why the grievance was going to be denied. The Union conducted a thoughtful evaluation of the grievance request, including consideration of the impact of the delay, the lawyer's arguments, and the concerns around the investigator's process.

[72] This matter does not involve a critical interest that might justify a higher standard of conduct by the Union. Karmazyn admitted to the activities but simply disagreed with the investigator's interpretation of those activities. He received the lowest form of discipline allowable for a breach of the workplace harassment policy. There is no evidence of adverse consequences to Karmazyn from the discipline that he received. Even the possible impact on his right to hold an elected position with the Union is not in issue because no final decision has been made.

[73] In respect of this matter, Karmazyn was afforded the same due process he received in relation to other grievance requests. He was also subject to the same process imposed on every other union member. He was required to complete the request for a grievance form and submit it to an FRO. The request would then be evaluated. There was no discriminatory treatment, including in the evaluation of the grievance request. Nor was there any oppressive conduct.

[74] Without knowing of Karmazyn's breach of the Complainant's privacy, Burke performed an exhaustive review of the grievance and its chances for success. Karmazyn has interfered with the Union's investigation by failing to disclose the manner in which he obtained the original complaint and the recording. This is new evidence, and it raises questions about whether, if the grievance

request was again investigated, there could be any chance of a positive outcome. By April 1, 2020, the proposed grievance was frivolous and fraught with risks. Karmazyn was advised on multiple occasions that an arbitrator could determine that more serious discipline was warranted.

[75] The Union's attempt to follow due process was unduly interrupted by Karmazyn's intimidation tactics, and its action in suspending its decision was reasonable under the circumstances. It was not motivated by hostility, revenge, or dishonesty. The timing and content of Karmazyn's lawsuit should be viewed critically. It was not as though Karmazyn had no choice in how he proceeded. The statement of claim was subject to a two-year time limit and the service of that claim was subject to a six-month time limit after it was issued. If the E.C. had denied his grievance appeal, Karmazyn could have argued that the decision to deny had been made in bad faith due to the lawsuit he had filed. Alternatively, if the E.C. had agreed to proceed with the grievance, then Karmazyn would have accomplished his objective. Either outcome would have been tainted.

[76] Lastly, there is no basis for a costs award, and none were requested by the Union.

Analysis:

[77] The applicable statutory provision is section 6-59 of the Act, which reads:

> ***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.*

[78] The applicant bears the onus to prove a breach of the duty, on a balance of probabilities.

[79] The Board in *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB) [*Roy*] described the test to be applied in duty of fair representation applications, and this description has been cited on numerous occasions:

> *[15] … Numerous decisions of this Board have demonstrated that this Board's supervisory responsibility pursuant to [s.6-59] is not to ensure that a particular member achieves a desired result or avoids an undesirable outcome; rather the purpose of the provision is to ensure that, in exercising its representative duty, a trade union does not act in a manner that is arbitrary, discriminatory or in bad faith. As a consequence, to sustain a violation of 6-59 of the Act, an applicant must allege and then satisfy this Board through evidence that his/her trade union has acted in a manner that is "arbitrary", "discriminatory" or in "bad*

> *faith". … these terms are not mere chalices into which applicants may pour their criticisms of their trade union for presentation to the Board. These terms have specific meanings that define the threshold for this Board to exercise its supervisory authority. Simply put, this Board does not sit on appeal of each and every decision made by a trade union; rather, very specific behavior/conduct on the part of a trade union is required to sustain a violation of the Act; that conduct being arbitrariness, discrimination or bad faith. …*
>
> *[citations omitted]*

[80] The description in *Berry v SGEU*, 1993 CarswellSask 518 provides guidance on the meaning of the terms "arbitrary", "discriminatory" and "bad faith", as they are used in duty of fair representation applications:

> *21 This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:*
>
> > *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 favouritism. 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.*
>
> *22 In the case of Gilbert Radke v. Canadian Paperworkers Union, LRB File No. 262-92, this Board observed that, unlike the question of whether there has been bad faith or discrimination, the concept of arbitrariness connotes an inquiry into the quality of union representation. The Board also alluded to a number of decisions from other jurisdictions which suggest that the expectations with respect to the quality of the representation which will be provided may vary with the seriousness of the interest of the employee which is at stake. They went on to make this comment:*
>
> > *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*

[81] In *Owl v Saskatchewan Government and General Employees' Union*, 2014 CanLII 42401 (SK LRB) [*Owl*], the Board adopted the descriptions used *in Toronto Transit Commission*, [1997] OLRD No 3148:

> *[28] In Toronto Transit Commission, [1997] OLRD No. 3148, at paragraph 9, the Ontario Labour Relations Board cited with approval the following succinct explanation of the concepts provided by that Board in a previous unreported decision:*
>
> *. . . a complainant must demonstrate that the union's actions were:*
>
> *(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
> *(2) "Discriminatory – that is, based on invidious distinctions without reasonable justification or*
> *(3) "in Bad Faith" – that is, motivated by ill-will, malice hostility or dishonesty.*

[82] The Canada Labour Relations Board has described the term "arbitrary" in *Rousseau v International Brotherhood of Locomotive Engineers et al*., 1995 CarswellNat 1622, 95 CLLC 220-064 at paragraph 107:

> *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.*

[83] The Union makes reference to the description of discrimination contained in *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*, 2017 CanLII 20060 (SK LRB) [*Hartmier*]:

> *[180] The consensus emerging from the decisions of this Board as well as other Canadian labour relations boards is that for purposes of duty of fair representation claims the prohibition against discriminatory treatment by the Union of one its members means there "can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favouritism". See: Rayonier Canada (B.C.) Ltd, supra, at p. 201. See also: Glynna Ward v Saskatchewan Union of Nurses, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at p. 47 ["Ward"], and most recently, Coppins, supra, at para. 35. As the proscribed grounds of discrimination have been enlarged over the years by subsequent revisions to provincial and federal human rights legislation as well as the proclamation of section 15 (1) of the Canadian Charter of Rights and Freedoms ["Charter"], the ability of a complainant to base a duty of fair representation claim on other enumerated and analogous grounds of discrimination – sexual orientation, being a good example – has increased greatly.*

[84] The Board in *Hartmier* explained that it will scrutinize the circumstances to ascertain whether a union has fulfilled its obligation:

> *[213]…These include evidence which would demonstrate the union (a) conducted a proper investigation into the full details of the grievance; (b) clearly turned its mind to merits of the grievance; (c) made a reasoned judgment about its success or failure, and, (d) in*

> *circumstances where it decided not to proceed with the member's grievance, provided clear reasons for its decision.*

[85] The Union argues that *Hartmier* and *Rattray* provide a roadmap for the Union to follow – not aspirations but required minimums. In *Rattray*, the Board listed criteria, outlined in *Hartmier*, that a union must fulfill to meet its duty of fair representation:

> *[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.*

[86] With respect to the category of "bad faith", the Union relies on *Canadian Merchant Service Guild v Gagnon et al.*, 1984 CanLII 18 (SCC), [1984] 1 SCR 509, for the principle that good faith is to be presumed. The Board also takes note of the reminder in *Hartmier* that a finding of bad faith requires evidence of "intentionality" (para 220).

[87] Taking into account these principles, the Board will now consider whether Karmazyn has proven that the Union has breached its duty of fair representation.

[88] To begin, when Karmazyn met with Tessier and Gall following the discipline meeting on June 7, there was no discussion of the thirty-day timeline for filing a grievance. Gall testified that Karmazyn did not seem unhappy at the time. Even if this were an accurate interpretation of Karmazyn's mood, the purpose of the discussion was to debrief following a discipline meeting, during the debrief Karmazyn continued to take issue with the conduct of the Complainant, and the discussion ensued with respect to certain steps that Karmazyn wished to take as a result of the surrounding circumstances.

[89] It seems that Tessier and Gall had made up their minds about the merits of a grievance and, perhaps for that reason, had decided that it was not necessary to have more detailed discussions with Karmazyn about the grievance procedure. Instead, they focused their efforts on persuading Karmazyn to walk away. They were not entirely wrong to do this. Nor did they do this in the absence of information. They had identified a number of serious risks with the various avenues that Karmazyn was contemplating and proposing. They had previous experiences with harassment files and had made a judgment call on the basis of those past experiences. It is

therefore not fair to characterize their actions as a failure to turn their minds to the merits of a grievance; it is, however, fair to say that they did not perform a systematic analysis.

[90] For Tessier and Gall, the matter was straightforward; they genuinely believed that Karmazyn had made out pretty well. Gall testified that he had decided that a grievance would have no merit; Tessier seemed to have concluded the same, given his testimony that the allegations would likely stick. This was not a complicated case. Karmazyn had been found guilty of harassment in relation to three incidents. He was subject to the lowest form of discipline. They considered what they understood to be the merits. In considering the merits, it was appropriate to rely on the investigator's findings, the text of the emails in issue, and the content of the meeting with HR, in which Karmazyn took some responsibility for his actions. Obviously, Karmazyn disagrees with these assessments, but even if these assessments were flawed, that does not necessarily mean that Tessier and Gall failed in their duty of fair representation.

[91] The Board does not believe that these actions were motivated by any malicious intent. Tessier and Gall genuinely and reasonably believed that Karmazyn was on a self-destructive path, and they were attempting to protect him from his immediate inclinations following the disciplinary meeting. They were attempting to de-escalate a situation which they had assessed, based on their experience, as likely to result in worse consequences for Karmazyn. It is also the case that both Tessier and Gall were genuinely confused about what Karmazyn wanted to do. Understood within this context, their actions do not reflect an indifferent or summary attitude to Karmazyn's circumstances, nor bad faith. Nor were they indicative of discriminatory conduct.

[92] On the other hand, by taking this approach, they bore some responsibility for partially pre-determining the outcome of a potential grievance request. It was the Union's responsibility to provide Karmazyn with the information that he needed to make any decisions about a potential grievance, especially any decisions that were time sensitive. The timeline for bringing a grievance should have been an obvious point of discussion. Tessier admitted in his testimony that he had private conversations with Karmazyn, at some point, about his issues with the written reprimand.

[93] By failing to provide information about the timeline while advising Karmazyn to take the summer to cool off, Tessier and Gall effectively sent the message that Karmazyn should take no further action. This is true even if they did not specifically discourage him from making a grievance request, and even if he did not specifically ask to file a grievance. At this point, Karmazyn was not sufficiently versed in the process to understand his options.

[94] Although the timeline was set out in the CBA, Karmazyn was relying on his representatives to provide him with advice. Thirty days is a short timeframe. The Union should have provided this information to Karmazyn at the debrief meeting, or shortly thereafter.

[95] Instead, the first time Karmazyn was advised of the timeline was in the Fall, 2019, after it had already expired. And then in the email dated September 26, 2019, Burke made a promise: "Irrespective of that opinion, you will be entitled to apply to the SPFA for a grievance and to make use of our internal appeal procedures should they be required."

[96] Karmazyn suggests that Burke was communicating, on September 26, that the timelines for filing a grievance of the letter of discipline had not expired. However, understood in context, it is clear that Burke is referring to a grievance that might arise in relation to the latest concerns, being that an original version of the complaint had been discovered and had not been disclosed. In this letter, Burke is reassuring Karmazyn that he will review the Employer's copy of the original complaint and that the Union will not allow the timelines to run out with respect to a grievance that might arise in that context.

[97] When Burke emailed Karmazyn after that review, on October 1, he provided more clarity with respect to the timelines. In this respect, the October 1 letter is not inconsistent with the September 26 letter. Burke made clear that he believed that he was required to "limit this investigation to the new information arising from the complete report" because the time limit for grieving the letter of discipline had expired "some time ago".

[98] During the Fall of 2019, Karmazyn was provided with detailed information on how to make a grievance request. He proceeded to make two. The requests were not perfect. The Union suggests that Karmazyn knew how to make a request, and had every opportunity to do so, but did not. Therefore, it is entirely reasonable for the Union to deny the current request on the basis of delay.

[99] Before Karmazyn made those requests, Burke communicated to him that the Union would not allow the timelines to run out. Those requests were promptly denied (on November 4) for substantive reasons. In the denial letter, Burke thanks Karmazyn for having formalized his requests, and therefore having brought "a great deal of focus that was otherwise hard to achieve through email conversation". Based on this communication, it seems that Burke was under the impression that these two requests fully captured Karmazyn's concerns.

[100] Obviously, there comes a point in any case where the avenues for recourse have been exhausted. But Burke had left the impression that the Union had a process for securing more time if the timelines were in danger of expiring, and that the Union would not allow the timelines to run out. At no point did he suggest that, by making these two requests Karmazyn had used up all of his chances. Burke, at times, seemed to overlook the fact that he had communicated to Karmazyn that there was a process for securing more time.

[101] It is understandable that Karmazyn became increasingly frustrated with the Union's handling of his file. He likely did not feel heard when he voiced his concerns with the investigator's impartiality, and then when the Union relied on delay as a reason to deny his request, this made things worse. It is possible that Burke assumed that there would not be yet another attempt, and so then when there was, was surprised by it. But this does not explain the subsequent events.

[102] On December 18, Karmazyn's lawyer wrote to the Union outlining very clearly his impression that Karmazyn had made a request to grieve the discipline imposed upon him. A majority of the four-page letter deals with his concerns with the harassment investigation. Burke replied that the correspondence would be carefully considered. The Union did not clarify with counsel that, in its view, it was under a different impression, and that Karmazyn did not make a request for a grievance.

[103] Months later, the Union ultimately dealt with the request for a grievance of the discipline, denied it, heard an appeal, and then chose not to issue a decision. The Union was concerned about the optics and impact of any decision issued while the lawsuit was outstanding. Clearly, the timing of the lawsuit was very poor, but the Union had a duty to represent its member. It was unlikely that such a lawsuit would be resolved quickly. White's email announcing the suspension of the Union's due process only aggravated the existing tension between the parties. The lawsuit was a separate action and the merits of that action were to be addressed through that separate process. The Union should have been able to find a way to proceed to issue its decision in an objective manner. Its decision to suspend its due process was unnecessarily reactive.

[104] Meanwhile, the central issue raised in the December 18, 2019 letter, the investigator's impartiality, was not directly addressed until months later. After reviewing the original version of the complaint, Karmazyn made it clear that he was questioning the investigator's impartiality. Unfortunately, Burke either did not understand this specific concern or chose not to address it directly, at least not initially. On October 1, 2019, Burke turned his mind to the impact of the deletions on the investigation, but did not speak to the issue of impartiality. He suggested that it

was to Karmazyn's advantage that the investigator chose to disregard certain allegations, and found that the additional information in the original complaint could not have changed the outcome.

[105] And then, in the April 2, 2020 summary, Burke wrote about the investigator's impartiality in the context of the deletions made. It is unclear why he did not previously put this analysis in writing. Burke was absent from the hearing and therefore he did not provide a reason to the Board. The only likely (and available) reason is that he had not previously considered this specific issue, at least not with any degree of seriousness. However, a representative is entitled to make mistakes without being found to have breached the duty of fair representation. This mistake, in the context of the many emails exchanged in the Fall, is not evidence of a breach. The issue, though, is that Karmazyn put the question before the Union again, through the December letter, and the Union made no apparent attempt to respond to the letter until many months later.

[106] The Board also finds Gall's initial role surprising. There was no satisfactory explanation for why he would be providing assistance to both of the FROs assigned to the file, FROs who were obviously in an adversarial relationship. A point was made that Gall never provided advice to Knuttila; however, it is unclear why Gall was ever put in that position to begin with, especially when he was engaged in providing advice directly to Karmazyn. Furthermore, Burke's own summary states that Gall had meetings with both parties at different times. Whether or not Burke was mistaken, Gall was still in a conflict of interest, or at least, an apparent conflict of interest. The Board does note, however, that when Gall was asked to recuse himself, he appears to have done so. This mitigates the Board's concern with respect to this issue.

[107] The foregoing concern suggests that the specific procedure outlined in the Dispute and Grievance Policy is not a perfect fit for this particular matter. It was not followed, but the Board would not have expected it to be.

[108] And then there was the issue of Karmazyn's representation at the appeal. The Union has not provided a satisfactory explanation for the limits placed on his representation. Burke was not advocating for Karmazyn; he was advocating against Karmazyn's interests in pursuing the matter further. Obviously, the Union enjoys the exclusive right and obligation to represent employees in matters concerning their terms and conditions of employment, and this restricts the role to be played by private counsel. Furthermore, the Board has not overlooked the occasions when Karmazyn's counsel emailed the Union without copying its counsel. The Board has not received

an adequate explanation for this practice, either, but this practice does not justify the Union's approach at the appeal meetings.

[109] The Board would be remiss not to consider Karmazyn's role in all of this. In short, he is not free of blame for the manner in which the events unfolded. His communications were scattered and, at times, difficult to follow. It is likely that the number of emails from Karmazyn was at times overwhelming. He seemed to expect perfection; he certainly did not allow very much room for error. His exacting approach made it more difficult for the Union to act as his representative.

[110] And then, Karmazyn did not file a formal grievance request despite having been given clear direction about the process for doing same. Karmazyn has provided the Board with no satisfactory explanation for failing to take this simple step in the Fall of 2019, around the same time as he filed the other grievance requests. Although the Board might be able to hypothesize as to the reasons, it is concerned about Karmazyn's lack of insight into this issue.

[111] On the topic of Karmazyn's own conduct, the Union argues that the manner by which Karmazyn obtained the original opinion undermines the potential success of any grievance. However, this is a matter better left to the Union for consideration in determining the merits of a grievance, if at all.

[112] In summary, the Union breached its duty of fair representation to Karmazyn through the following actions:

a. The Union failed to communicate the thirty-day timeline until after it had already expired.
b. The Union suggested that the expiry of the timeline could be remedied, but then failed to respond to the December 18 letter, and in turn, failed to address Karmazyn's expressed desire for a grievance, creating more delay.
c. Burke took a position in direct conflict with Karmazyn's expressed interests, and in essence, Karmazyn was left without an advocate at the appeal hearing.
d. The Union then refused to render a decision on the appeal.

[113] Next, the Board must consider whether the Union's actions, after Burke assumed carriage of the file, were in bad faith. The Board has already concluded that the conduct of the Union prior to Burke's assumption of the file was not.

[114] The Board is not persuaded that the Union's actions were intentional in the sense that they were motivated by ill-will, hostility, or malice. It is apparent that the Union, as a whole, had taken the approach that it knew what was best for Karmazyn, but by doing this, it narrowed its focus and limited its ability to be responsive. Over time, there was progressively less understanding, and the conflict increased. The Board may infer from Burke's absence from the hearing that he did not have a good explanation for what has been found to be arbitrary conduct, but the Board is not persuaded that there is a sufficient foundation to make an inference of bad faith.

[115] Finally, the issues engaged by this application are not comparable to a termination. Karmazyn has not experienced a loss of employment, and he received the lowest possible discipline for a breach of the applicable policy. Karmazyn does not fully appreciate the relevance of these facts. On the other hand, it is important not to underestimate the negative impact that a finding of harassment can have on a person's morale, confidence, and sense of identity. The Union, through its actions, appears not to fully appreciate this fact.

Remedy:

[116] Next, the Board will consider the appropriate remedy for the breach of the Union's duty. In fashioning an appropriate remedy, the Board has significant discretion. The goal is to place the applicant in the same position as he would have been in had it not been for the breach. A remedy is to be compensatory, not punitive.

[117] The parties' submissions were very far apart with respect to the appropriate remedy, in the event that a breach were found. The Union suggests that the most the Board could order is that the Union render its decision on appeal. This is because the grievance procedure has not been exhausted. By contrast, Karmazyn asks the Board to order the parties to proceed to the grievance process and, related to this, waive the time limits pursuant to section 6-60 of the Act.

[118] The Board agrees with the Union that it would be inappropriate to order the parties to proceed to a grievance or to waive the time limits. Doing so would be premature, at least. The grievance procedure has not yet been exhausted. However, it is necessary for the Union to move forward with the appeal of the grievance request denial. The difficulty is that there is likely a continuing concern about the Union's inclination to account for its share of responsibility for the delay. Even so, the Board is not persuaded that ordering the parties to proceed to the grievance process is a measured response to this particular concern.

[119] For these reasons, the Board will issue a declaration that the Union has breached its duty of fair representation to Karmazyn in this matter, will order that the Union refrain from contravening section 6-59, and will order that the Union release its decision on the appeal of the grievance request denial. The parties are strongly encouraged to negotiate whether there are, and if so, the content of any safeguards that could assist in alleviating the concern outlined in paragraph 118, and to negotiate a deadline for the release of the decision. If they are unable to reach an agreement, either party may return to the Board within 30 days of the date of these Reasons. The Board will remain seized for that purpose.

[120] Related to this, the Board encourages the parties to take a step back and re-evaluate their respective approaches to this matter. At various points, both the Union and Karmazyn have exacerbated the existing conflict between them. It is time to take personal responsibility and refrain from continuing to assign blame for matters that are within their control. It is for this reason that the Board is strongly encouraging the parties to attempt to negotiate a resolution to the aforementioned outstanding issue.

[121] Finally, Karmazyn states that if it is determined that the Union acted in bad faith, the Board should fix and determine the monetary cost of retaining counsel on an actual solicitor-client basis. As explained, the Board has not made a finding of bad faith against the Union. Therefore, this request is denied.

[122] In the event that there is no finding of bad faith, Karmazyn asks for costs on "the tariff typically awarded where an award of costs to the member is found to be appropriate". At the hearing, it was explained that there is no tariff of costs for matters that come before the Board. Counsel clarified that, in asking for these costs, he was referring to the category of costs awarded in *Hartmier*. In *Hartmier*, the Board relied on the reasoning in *Johnson v Amalgamated Transit Union, Local 588 and City of Regina,* LRB File No. 091-96 dated February 17, 1998, a portion of which is reproduced below:

> *With respect to the claim for monetary loss related to legal fees incurred by Mr. Johnson in bringing this application for an unfair labour practice under section 25.1 of [The Trade Union Act, RSS 1978, cT-17], the Board addressed this issue in [K.H. v Communications, Energy and Paperworkers Union, Local 1-S et al., LRB File No. 015-97] and held that in exceptional circumstances such claims will be allowed. In that instance, the applicant was suffering from a mental illness which impaired his ability to represent himself in relation to his employment problems. However, the Board generally adopts a cautious approach to claims for damages of this nature. In Stewart v Saskatchewan Brewers' Bottle & Keg Workers, Local Union No. 340, [1996] Sask LRBR 386, LRB File No. 025-95,[7] the Board reviewed the practice in other jurisdictions and concluded as follows, at 395:*

We are of the view that, like the legislation which is the basis of the decisions of the Canada Labour Relations Board and the British Columbia Labour Relations Board, [The Trade Union Act] confers upon this Board broad powers to fashion remedies like the "make whole" remedies described in those decisions. The powers granted to the Board in ss. 5(e) and (g) of the Act, along with the general remedial power under s. 42 of the Act, permit us a wide latitude in devising remedies which will address the losses suffered by applicants in the context of the objectives of the Act.

In this connection, it is perhaps helpful to think of legal expenses in terms other than the notion of "costs" as it is understood in connection with proceedings in civil courts. For reasons which have been alluded to earlier, this Board has never considered it appropriate to award costs in that sense of the term as part of the determination of applications under the Act. This does not mean that there are not circumstances in which the expense of obtaining legal advice might not be part of an extraordinary "make-whole" remedy. In some cases, the essence of the infraction which is alleged by an applicant concerns the representation to which an employee is entitled under the Act. In this sense, granting some compensation for the use by an application of the services of a solicitor is more akin to compensation for a breach of fiduciary duty than to costs in their traditional sense.

As counsel for the Union pointed out, this Board has expressed some reservations about the use of private counsel by employees in their dealings with a trade union. In Brent Liick v Canadian Union of Public Employees, [1995] 3rd Quarter Sask. Labour Rep. 78, LRB File No. 237-93, the Board made the following comment at 102-103:

> *As we indicated in the Berry decision, it is not unusual for an individual employee to seek the advice of private counsel, and it may in some circumstances be appropriate for a trade union to accept assistance from that source. As we have indicated above, however, it is the trade union which enjoys the exclusive right and obligation to represent employees in matters which concern their terms and conditions of employment, including issues related to disciplinary action. This severely restricts the role which may be play by private counsel. It is the trade union which retains control over decision concerning whether and how grievances should be pursued, not the individual employee or his counsel. The employee is bound by the decisions reached by the trade union or settlements reached with an employer; neither the employee nor counsel can exercise a veto over such actions or insist that the trade union comply with their demands.*

We would reiterate our view that an employee is not entitled to retain legal counsel to make representations every time the employee has a disagreement or difference of opinion with the trade union, or to present the bill for those legal services to the trade union as a matter of course.

We must also admit to a concern that we not encourage the view that proceedings before this Board can only be undertaken effectively when an applicant is represented by legal counsel. The Board makes considerable efforts to remain accessible to parties who are not represented by lawyer and to conduct hearings in which a lay person can participate.

Nonetheless, there are, in our opinion, circumstances in which it is justifiable to consider a remedial order to assist an applicant with the expenses associated with legal representation. We expressed our view in our earlier Reasons for Decision that the circumstances which gave rise to this application are exceedingly unusual. As the British Columbia Board point out in the Kelland case, supra, not all cases in which a trade union has committed a breach of the duty of fair representation are cases in which that union has completely disqualified itself from further representation of the

> *complainant. Similarly, not all cases in which an applicant wishes to raise complaints about defects in the procedures followed by a trade union are cases in which the applicant should be permitted to make use of legal services as the expense of the trade union.*
> *…*

[123] The Board notes that such orders are exceedingly rare. The Board is not persuaded that this is one of those rare circumstances in which damages of this kind should be ordered. This is not an egregious case of arbitrary conduct on the part of the Union, as in *Hartmier*. This is not a case in which the Union utterly failed to investigate the circumstances giving rise to Karmazyn's complaints, nor was it entirely the fault of the Union that aspects of the grievance request were not fully investigated or that the grievance request was filed late. Therefore, the request for these costs is denied.

[124] An appropriate Order will accompany these Reasons.

DATED at Regina, Saskatchewan, this 16th day of **June, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson