TIM NEISH, Applicant v INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2067, Respondent and SASKPOWER, Respondent

LRB File No. 008-20; March 21, 2022
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

The Applicant, Tim Neish:	Self-Represented
Counsel for the Respondent, International Brotherhood of Electrical Workers, Local 2067:	Andrea C. Johnson
Counsel for the Respondent, SaskPower:	No one appearing

Duty of Fair Representation – Section 6-59 of *The Saskatchewan Employment Act* – Termination – Grievance Filed – Transition of Power to new Business Manager – Grievance Withdrawn – Grievor Not Asked for Explanation or Provided Reasons for Withdrawal – Arbitrary Conduct – Breach of Duty – Third Party to Provide Assessment.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an employee-union dispute brought by Tim Neish against the Union, International Brotherhood of Electrical Workers, Local 2067. Mr. Neish alleges that the Union breached its duty of fair representation, pursuant to section 6-59 of *The Saskatchewan Employment Act* [Act]. Mr. Neish worked at SaskPower [Employer] as a Process Operator in Carbon Capture & Storage at the Boundary Dam location from 2017 until the date of his termination on May 23, 2019.

[2] On or about May 30, 2019, the Union filed a grievance with respect to Mr. Neish's termination. In June 2019, the Union held an election for the Union's Business Manager position. As a result of the election, William P. Campbell became the Business Manager, effective July 24, 2019. Upon taking office, Mr. Campbell appointed four Assistant Business Managers.[1]

[3] In the application, Mr. Neish alleges that Grievance 19-SPC-016, which was the grievance filed in relation to his termination, was withdrawn by Mr. Campbell without discussion or consultation with the grievance committee or with himself, the grievor. Mr. Neish states that there

[1] One of these was a six-month interim placement.

was no communication by the Union after the new leadership took over. He was given no reason for the decision. According to Mr. Neish, the Union does not have a formal internal appeal process but the practice has been to contact the grievor prior to settlement or withdrawal to afford the grievor the opportunity to provide input to be taken into consideration by the committee.

[4] The Union's reply states that, following Mr. Neish's termination, the Union had difficulty reaching Mr. Neish to discuss the grievance. Assistant Business Manager, Phillip Alan Murray had made multiple attempts to contact Mr. Neish, only a few of which were successful. Based on Mr. Murray's discussions with Mr. Neish, he had determined that the grievance would not be successful. Nonetheless, the Union decided to proceed with the steps outlined in Article 8.02 of the CBA to determine whether the matter could be resolved. A Step 2 hearing was scheduled to be held on July 12, 2019. When Mr. Murray contacted Mr. Neish to advise him of the date, Mr. Neish advised that he was unavailable.

[5] The Union explains that after making multiple attempts to find a date that was suitable, none were found, and so the hearing was not rescheduled. Mr. Campbell discussed the grievance with the grievance committee, and there was agreement that the grievance was not likely to be successful. On or about September 9, 2019, Mr. Campbell sent a letter on behalf of the Union to the Employer withdrawing the grievance. A copy of the letter was sent to Mr. Neish by registered mail but was returned as undelivered.

[6] The hearing of this matter was held over three days in December 2021 and February 2022. The Board heard testimony from two witnesses on behalf of Mr. Neish: Jason Tibbs and Mr. Neish himself.

[7] Following the close of Mr. Neish's case, the Union made an application for non-suit without election. The Board dismissed the application, providing oral reasons. The Union proceeded to open its case. The Board heard from two witnesses on behalf of the Union: Mr. Murray and Mr. Campbell.

Evidence:

[8] Mr. Neish was terminated on May 23, 2019, for cause, following an Employer investigation for a failure to report to work for a shift that was scheduled to occur on May 3 to May 5, 2019. In communicating the termination to Mr. Neish, the Employer cited past, similar behaviours, beginning in 2016, including separate 1-day and 5-day suspensions for culpable absenteeism and failure to communicate when absent from work.

[9] Mr. Neish believes that he was unfairly required to comply with a mandatory process for submitting specific documentation to the Employer to justify medical absences [the P-148 process]. In 2016, Mr. Neish received a written reprimand for being absent for purported medical reasons without providing supporting documentation. By that point, he had already been involved in the P-148 process for some time and had been made aware of the requirements. The Employer discussed its concerns with Mr. Neish's absenteeism on multiple occasions in 2015 and 2016. Later in 2016, he received a 1-day suspension for a failure to show up to a shift. A similar incident occurred early in 2017, resulting in a 5-day suspension. The Employer repeatedly and continuously directed Mr. Neish to the employee family assistance plan [EFAP].

[10] Mr. Murray assisted Mr. Neish with his corrective discipline path for absenteeism. In each case Mr. Murray thought the discipline was appropriate and agreed both with the corrective discipline policy that was applied and with the Employer's application of the policy. At no point along the path of corrective discipline were any health concerns raised, either by Mr. Neish or by the Employer. For the most part, Mr. Neish owned the incidents, took responsibility, and accepted the discipline. When Mr. Murray met with Mr. Neish he would raise the availability of EFAP as a matter of course. Mr. Murray testified that he had no reason to suspect that there was a medical condition.

[11] On one occasion, the Union filed a grievance, not to object to the discipline that was imposed but to the calculation of the time. That grievance was ultimately resolved. With respect to the five-day suspension, Mr. Murray had found the scheduling error made by Mr. Neish puzzling given his years of service. Mr. Neish seemed to believe that he was scheduled to begin a shift on a Thursday, which was not the first day of any of the shift rotations. Mr. Murray observed, again, that the 5-day suspension was appropriate.

[12] The 5-day suspension was to remain on Mr. Neish's file for a period of 24 months. That period was interrupted by way of the usual policy when Mr. Neish took parental leave. Given that interruption, the letter would still have been on Mr. Neish's file when he failed to report to work in May 2019. At the time, Mr. Neish was in Ecuador visiting family. He had arranged his flights to allow for flight delays. Unfortunately, he missed his flight departing Ecuador and had to arrange for another flight. He reached out to his father to contact the Employer, who did so, but not until the first day of Mr. Neish's shift, which was a Friday. By that point, the Employer had to incur extra costs to cover the shift. Mr. Neish did not contact the Employer personally and then showed up at the workplace on the following Monday.

[13] The Employer's corrective discipline policy outlines "the principle disciplinary responses" to be applied for incidents of culpable behavior: a written reprimand, a 1-day suspension without pay, a 5-day suspension without pay, and dismissal with cause. Management uses discretion in the application of the corrective discipline policy:

> *Using corrective discipline, the manager selects the disciplinary response appropriate to the behavior in question. Subject to the severity of the offence, the use of disciplinary action is progressive – stronger disciplinary action is used when lesser measures prove ineffective.*
>
> *A severe offence may warrant dismissal for cause even if it is a first offence. The question to ask is "Is the behavior of such a serious nature it irreparably destroys the employment relationship or the trust necessary in the employment relationship."*

[14] The policy explains the role of the employee in assisting the Employer to understand the cause of the behaviour:

> *Only the employee can help the employer distinguish between incompetence, incapacity, personal problems and culpable behavior by providing explanations and reasons for unacceptable performance. The manager will fully investigate and, based on the result of the investigation, decide whether culpable or non-culpable behavior has occurred.*

[15] A termination meeting was held on May 23, 2019. Mr. Murray was present at the meeting with Mr. Neish. The Employer gave Mr. Neish an opportunity to explain what had happened. The Employer was dissatisfied with Mr. Neish's explanations. In particular, the Employer was concerned that Mr. Neish's issues had arisen on the Tuesday and there was no contact with the Employer at all until the Friday. Mr. Neish had not provided a satisfactory explanation for this delay.

[16] After the termination meeting, Mr. Murray told Mr. Neish that there was not much that he could do for him. If he was to have any hope, he would have to explain himself. He never did provide any further justification.

[17] Article 8 of the CBA sets out the procedures to be followed for grievances and disputes. The procedures are available if employees "feel that any provision [of the CBA] has been violated, or that disciplinary actions taken are unjust".

[18] After he was terminated, Mr. Neish asked the Union to submit a grievance in relation to his termination. Mr. Tibbs was the Union's Business Manager at the time. The Business Manager has discretion to develop policies with respect to the Union's filing and handling of grievances.

Mr. Tibbs had a policy of filing grievances in relation to termination matters without regard for merit. Mr. Tibbs testified that, while the Employer had followed its corrective discipline policy and the facts known to the Union were not suggestive of a meritorious grievance, he thought that Mr. Neish's history of absenteeism could have been indicative of an underlying personal issue. Mr. Tibbs believed that more information could be revealed as the grievance proceeded through the usual steps.

[19] Mr. Murray was assigned to Mr. Neish's file. Mr. Tibbs advised Mr. Murray that the grievance did not have merit and Mr. Murray agreed. Still, Mr. Murray drafted and filed a grievance. Although Mr. Neish testified that he did not see the grievance form, he agreed that the explanation provided in the form was accurate. Mr. Neish had provided Mr. Murray with proof of the change of flights. There was no evidence of the phone call he had made to his father.

[20] Mr. Murray told Mr. Neish that there was only a "slight chance" he would be successful. Mr. Neish admitted in his testimony that he did not expect the grievance to go to arbitration.

[21] Article 8 of the CBA provides that in the matter of a dismissal on which a grievance is filed, the grievance procedure shall commence at Step 2. On June 28, 2019, Mr. Murray wrote to the Employer requesting that arrangements be made for a Step 2 hearing. The Employer got back to him with two dates. In July, Mr. Murray contacted Mr. Neish, asking for his availability for the purpose of attending a Step 2 hearing. Mr. Neish explained that he was not available on the dates provided. Mr. Murray told Mr. Neish that he would reach out to the Employer to obtain more dates. He proceeded to do so, specifying to the Employer that he would have to avoid July 24, which was the day scheduled for the transition of power. Unfortunately, he did not receive any dates before July 24, and as of that date his appointment as Assistant Business Manager had come to an end.

[22] Mr. Campbell testified that he ran on a platform to change the grievance committee structure, and specifically to transfer the responsibility for grievances from the executive committee to the business office. After he was elected he intended to follow through on this plan, which is what he did. He also appointed four new Assistant Business Managers.

[23] On July 24, there was an executive committee transition meeting. The former executive committee met in the morning and the newly elected committee met in the afternoon. There was discussion about outstanding grievances, which included the Neish grievance. Notes of the meeting were taken. The notes from the Neish grievance discussion indicate that "[d]ates have

been scheduled twice and Grievor has failed to make the meetings. Third meeting will be scheduled."

[24] Following the transition, Mr. Campbell formed a grievance committee consisting of the new Assistant Business Managers. The Assistant Business Managers would make recommendations about actions to be taken on grievances to Mr. Campbell but he would retain the authority to make the final decisions.

[25] Two Assistant Business Managers, Guy Rideau and Jonathon Snowden, were sharing responsibility for the grievances arising within the power production area, which included the Neish grievance. On August 6 and August 19, 2019, the grievance committee, with Mr. Campbell, discussed the Neish grievance. According to Mr. Campbell, the committee went through the various letters on Mr. Neish's file, which included those which purported to apply the corrective discipline policy.

[26] It was decided that the grievance would be discussed with the Employer's Director of Labour Relations at an upcoming meeting. The committee members wanted to know if they were missing anything. They believed that the Employer had followed the corrective discipline policy and had been clear in its communications with Mr. Neish about the consequences for future, similar conduct.

[27] The meeting with the Director of Labour Relations was held. No further information was provided. The grievance committee made a recommendation not to proceed with the grievance. Mr. Campbell took some time to review the file and think about it and, finding no support for a grievance, decided to implement the recommendation. He drafted a letter, dated September 9, 2019, to the Employer communicating that the grievance was being withdrawn. He asked that the letter be forwarded to Mr. Neish by registered mail. It was returned to sender undelivered. The letter, on its face, does not indicate that it was copied to Mr. Neish.

[28] Mr. Campbell testified that he believed that the Employer had not breached the CBA. He commented on the P-148s filed as evidence and indicated that they did not correspond with any dates for which Mr. Neish was disciplined.

[29] When asked, Mr. Campbell stated that he was not aware that Mr. Neish's father had called in to report his expected absence at work. He did not recall ever seeing notes from Mr. Murray on the file and was not able to locate them. He made a request to meet with Mr. Tibbs, which was

denied; and he tried to meet with Mr. Murray but he was on vacation in August and the meeting did not occur.

[30] Mr. Neish was surprised to learn that the grievance was withdrawn. He had expected the Union to assess the merits and then make a rational decision.

Argument:

Mr. Neish:

[31] Mr. Neish claims that the P-148 program was improperly used; there were only a few times that he missed work for other reasons and both times he was disciplined in writing and was eventually fired. He says that he has not exceeded paid leave allotments except for when he was absent for treatments that he was made to attend. There was legitimate cause for his absences. He was punished for taking off days that he was forced to take off.

[32] Mr. Murray and Mr. Campbell said they were unaware of an underlying condition, so they must have been unaware of any of this. Instead of completing his due diligence to obtain information from Mr. Murray or anyone else, or even better, to contact Mr. Neish directly, Mr. Campbell simply withdrew his grievance.

[33] Mr. Neish was only ever contacted once, by Mr. Murray with a promise to arrange another date for the Step 2 hearing. This promise was never fulfilled. This was the last contact from the Union. As far as he could tell, the Union never sent him a letter to inform him of their decision.

[34] The fact that he was not ever heard on the matter, or worse, that he was not even contacted to voice his concerns or account of events, clearly disclose a failure on the part of the Union to represent him fairly in relation to the termination grievance.

Union:

[35] The Union points out that Mr. Neish had accepted responsibility for previous attendance incidents, that Mr. Murray had thoroughly investigated the grievance and had concluded that it was not meritorious, and that the new grievance committee was not bound by the policy of the previous grievance committee to file a grievance in every termination case. It would have been legitimate for the new grievance committee to have decided not to file a grievance at all, and by extension, it would have been equally legitimate for the grievance committee to decide not to proceed with the grievance on review of its merits.

[36] The Union owns the grievance. As the owner of the grievance, the Union is responsible for the progress of the file and does not have a duty to consult with the grievor prior to withdrawing the grievance. An absence of communication with the grievor does not equate to a breach of the duty of fair representation. The Union closely followed the relevant events leading up to the termination and was well informed of the facts. The Union should be entitled to rely on the documentation on the file. Those documents left a clear picture of the merits of the grievance, or the lack thereof.

[37] The Union asks that the Board dismiss the application in its entirety. In the alternative, if the Board finds a minor breach of the duty, it asks that the Board restrict any remedy to one in which the grievor is placed in the position he would have been in had it not been for the breach. In other words, the Board should go no further than to order the Union to proceed to the next stage of the grievance process and to make a decision on the merits.

[38] The Union acknowledges that the evidence is unclear as to how and when there was communication between Mr. Neish and the Union following the election of the new Business Manager.

Statutory Provisions:

[39] The following statutory provisions are applicable to this matter:

> ***6-59****(1) An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.*
>
> *(2) Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee.*
>
> ***6-60****(1) Subject to subsection (2), on an application by an employee or former employee to the board alleging that the union has breached its duty of fair representation, in addition to any other remedies the board may grant, the board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of that time, if the board is satisfied that:*
>
> > *(a) the denial of fair representation has resulted in loss of employment or substantial amounts of work by the employee or former employee;*
> >
> > *(b) there are reasonable grounds for the extension; and*
> >
> > *(c) the employer will not be substantially prejudiced by the extension, either as a result of an order thatthe union compensate the employer for any financial loss or otherwise.*

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

Analysis and Decision:

[40] 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. The evidence before the Board must be sufficiently clear, convincing, and cogent.

[41] The nature of the Union's duty is well established. The starting point is section 6-59, which prohibits a union from acting in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee. The Board in *Berry v SGEU*, 1993 CarswellSask 518 provided helpful guidance on the meaning of the terms "arbitrary", "discriminatory" and "bad faith". The Board continues to rely on this guidance:

> *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:*
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> > *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.*
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> *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.*

[42] The Board also relies on the following succinct descriptions cited by the Ontario Board in *Toronto Transit Commission*, [1997] OLRD No 3148, at paragraph 9:

> *. . . a complainant must demonstrate that the union's actions were:*
>
> *(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
>
> *(2) "Discriminatory – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
>
> *(3) "in Bad Faith" – that is, motivated by ill-will, malice[,] hostility or dishonesty.*

[43] In the application, Mr. Neish did not clearly specify which one or more of these categories accurately depict the Union's impugned conduct, but he did focus on arbitrariness:

> *…that the decision had been made in both an unjust and an arbitrary manner…*
>
> *…Newly elected Business Manager William Campbell arbitrarily withdrew this grievance at the second level request without proper consideration that took into whether the grievance was to be summarily dismissed without first determining if the matter was arbitrary, discriminatory or in bad faith.*

[44] Mr. Neish has not raised any "invidious distinctions" as required for an allegation of discriminatory conduct. Nor is there any evidence of the Union having made any decisions or taken any actions based on such distinctions. Therefore, there is no basis to consider whether the Union has acted in a manner that was discriminatory.

[45] Mr. Neish has not suggested that the Union has acted in a manner that was motivated by ill-will, malice, hostility or dishonesty. Nor is there any evidence of the intent required to establish bad faith conduct on the part of the Union. Therefore, there is no basis to consider whether the Union has engaged in any bad faith conduct.

[46] Given these conclusions, the Board will focus on whether the Union has breached its duty by acting in an arbitrary manner in considering whether to represent or in representing Mr. Neish.

[47] It is well established that a union is the owner of a grievance. As the owner, the Union is responsible for the progress of the file and has authority to decide whether to advance the grievance to a subsequent step, including an arbitration.

[48] A union assumes carriage of a grievance as the exclusive bargaining agent on behalf of its employees. As the exclusive bargaining agent, it is afforded a certain latitude in its handling of a grievance: *Hargrave v Canadian Union of Public Employees, Local 3833*, 2003 CanLII 62883

(SK LRB) [*Hargrave*]*,* at paragraph 42. This latitude extends to the withdrawal or settlement of a grievance: *McRae-Jackson v CAW-Canada*, 2004 CIRB No 290, at paragraph 8. There is no free-standing duty to take direction from a grievor. As the Board explained in *Elizabeth Emeka-Okere v Canadian Union of Public Employees*, 2021 CanLII 89513 (SK LRB) [*Emeka-Okere*], at paragraph 55, "[t]his 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."

[49] To be sure, the latitude that is extended to a union is not a free pass; nor does it absolve the Board from its obligation to rule on whether a union breached its duty of fair representation.

[50] Furthermore, in a case involving critical job interests, the union may be held to a higher standard.

[51] 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 paragraph 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.

[52] In considering whether to represent or in representing an employee, a union is expected to act honestly, conscientiously and without prejudgment or favoritism. Arbitrary conduct may be found to have occurred if a union representative has failed to direct one's mind to the merits of the matter, to inquire into or to act on available evidence, or to conduct any meaningful investigation, or if a union representative has acted based on irrelevant factors or displayed an indifferent attitude. To constitute arbitrary conduct, the union's actions must be found to have been flagrant, capricious, totally unreasonable, or grossly negligent. A breach is not made out where a union has committed only simple mistakes, honest errors or "mere negligence", with nothing more: *Hargrave*, at paragraphs 25 to 48.

[53] A union is expected to fulfill four basic criteria to meet its duty of fair representation, 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:*
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> - *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.*

[54] In *Zalopski v Canadian Union of Public Employees, Local 21*, 2017 CanLII 68784 (SK LRB) [*Zalopski*], at paragraph 40, the Board relied on similar principles, which it adopted from the Alberta Board's case law:

> • *The Union need not take every grievance to arbitration. It need not take a grievance to arbitration just because the grievor asks the Union to do so. The Union is entitled to assess the merits of the grievance, the chances of success at arbitration, the costs of the arbitration process and other factors when deciding whether or not to advance a grievance to arbitration.*
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> • *The Board focuses its examination on the Union's conduct and considerations while the Union represented the employee and in making its decision, rather than on the merits of the grievance, which is the question an arbitrator would answer.*
>
> • *The Union is entitled to make a wrong decision, as long as it fairly and reasonably investigates the grievance and comes to an informed decision.*
>
> • *The Union must give the employee a fair opportunity to present the employee's own case to the Union and to provide input on the result of the Union's investigation.*
>
> • *The Union should communicate fairly with the employee about all aspects of its representation. Communication with the employee can play a significant role in representation, but the union need not take direction from the employee or answer all questions to the employee's satisfaction nor must it act within the employee's time limits.*
>
> • *A Union does not breach its duty of fair representation just because it reaches a conclusion with which the employee does not agree.*[2]

[55] The question is whether the Union fulfilled these criteria in the present case. The Board has decided that it has not.

[56] It is true that the Union closely followed the relevant events leading up to Mr. Neish's termination. Past Union representatives supported Mr. Neish at meetings with the Employer and brought a grievance when they identified an issue with the Employer's calculation of time. Past Union representatives have knowledge of the history of Mr. Neish's absences, the Employer's responses, the Employer's application of the progressive discipline policy, Mr. Neish's responses and his admissions, and his explanation for his conduct leading up to the termination. To some extent, this knowledge was documented in the various correspondence maintained on Mr. Neish's file and transferred to the new Business Manager upon his election.

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[2] Relied upon in *Rattray*, at para 97.

[57] When Mr. Campbell was elected as Business Manager he was entitled to develop new policies and practices related to the handling of member grievances. He was not necessarily bound by all the previous policies and practices, including in relation to the grievances that had been initiated prior to Mr. Campbell's election.

[58] However, the B.C. Labour Relations Board in *Rayonier Canada (B.C.) Ltd*. observed that it is necessary to consider several questions in duty of fair representation applications. Among these is a question about the employee's reasonable expectations:

> • *How critical is the subject matter of the grievance to the interest of the employee concerned?*
>
> • *How much validity does his claim appear to have, either under the language of the agreement or the available evidence of what occurred, and how carefully has the union investigated these?*
>
> • *What has been the previous practice respecting this type of case and what expectations does the employee reasonably have from the treatment of earlier grievances?*
>
> • *What contrary interests of other employees or of the bargaining unit as a whole have led the union to take a position against the grievor and how much weight should be attached to them?*[3]

[59] The previous practice with respect to terminations was to file a grievance. Furthermore, Mr. Tibbs had filed a grievance in relation to Mr. Neish's termination, not because it was thought to be meritorious based on the facts known to the Union, but to allow for the possibility of new facts being discovered and to determine whether there was an underlying cause for Mr. Neish's conduct.

[60] The person who would most likely have been in possession of such facts was Mr. Neish. The expected Step 2 meeting, or the preparation for that meeting, would have presented an opportunity to attempt to gather said information. Mr. Murray had set an expectation with Mr. Neish that he would obtain new dates for a meeting with the Employer. Mr. Murray attempted to set up the meeting but ran out of time. After July 24, the Union made no more attempts to set up a meeting or to obtain additional information from Mr. Neish.

[61] The Union acknowledges that the evidence is unclear as to the precise level of communication between the business office and Mr. Neish following the transition of power. Mr. Neish testified about two occasions in which he spoke with Mr. Snowden about his situation. First,

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[3] (1975), 2 CLRBR 196; (1975) CarswellBC 1238 at para 25 (BCLRB), as cited in *Rattray* at para 82.

he referenced a conversation in or around January 2020, in which he learned that his grievance had been withdrawn. He also suggested that Tyler Holman advised him that the grievance had been withdrawn. Second, he referenced a conversation with Mr. Snowden that occurred on an earlier occasion – a discussion about Mr. Neish's personal items that were left in the locker in the control room. Although Mr. Neish's recall was imperfect, none of these descriptions disclose any likely discussion about Mr. Neish's explanation for the events leading up to the termination.

[62] Mr. Campbell suggested in his testimony that the Assistant Business Managers would have done their due diligence and would have contacted Mr. Neish. However, his testimony on this point was speculative and imprecise. He provided no concrete evidence that the Union representatives made any attempt to obtain additional information from Mr. Neish. By contrast, Mr. Campbell provided a detailed list of the documents reviewed by the grievance committee in discussing the grievance. Had there been any contact or attempt to contact Mr. Neish for this purpose, Mr. Campbell should have been prepared to address this in his testimony. He would have been aware of Mr. Neish's insistence to the contrary. It is not sufficient to suggest, as the Union does, that the individuals with whom Mr. Neish had spoken were no longer members of the business office. As such, the whole of the evidence leads the Board to conclude that the Assistant Business Managers did not follow up with Mr. Neish for the purpose of obtaining an explanation after they took over the file.

[63] While the Union does not have an obligation to consult with a grievor as to next steps, it does have an obligation to conduct a proper investigation into the full details of the grievance. To be clear, an employee is not entitled to the most thorough investigation possible: *Zalopski* at paragraph 53.[4] 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: *Emeka-Okere* at paragraph 63. Here, this would have, at least, included an investigation of the grievor's version of and explanation for the relevant events.

[64] The Board understands and acknowledges that the past Union representatives had significant experience with and knowledge of Mr. Neish's cumulative file. Mr. Murray was not satisfied with the explanation that Mr. Neish had provided in the termination meeting. However, the Union then set an expectation with Mr. Neish that it would file a grievance, which by extension, would have provided Mr. Neish an opportunity to provide any additional explanation that might be

[4] See, also, *Zalopski*, at para 64, confirming that a union is not obliged to obtain the views of a grievor prior to next steps.

forthcoming. At the time, the Union's rationale for proceeding in this fashion was that the matter involved a termination and that there might have been an underlying issue that would be discovered through the course of the grievance. If the new Union representatives were expected to account for the undertakings made by the previous representatives, then it follows that they should have, at least, provided an explanation for the decision to abandon the Step 2 meeting, an explanation that was rationally connected to the original decision to hold the Step 2 meeting.

[65] Even if the new Union representatives were not expected to account for the undertakings of previous representatives, they were still required to fully investigate the merits of the grievance. It was not sufficient to simply rely on the Employer's description of the relevant events. To be sure, the Board has found that in some cases it will be appropriate to rely on the employer's investigation. However, this is not a case like *Alexander v CUPE*, 2020 CanLII 69948 (SK LRB), where the Union had engaged in significant direct communication with the grievor, considered the grievor's objections to the employer's investigation, and then provided an opportunity to appeal. Nor is this a case like *Emeka-Okere*, where the Union had assessed the merits of the grievances based, in part, on the written statements prepared by the grievor.[5] Whether it is legitimate to rely on an employer's investigation will depend on the circumstances. However, in every case a union must take reasonable measures to ensure it is aware of the relevant information.[6]

[66] The new Union representatives investigated the grievance based on the information that they had on the file and based on the information that they received by meeting with the Employer's representative. However, there is no evidence that they were in possession of Mr. Murray's notes, or met with Mr. Murray. There is no evidence that the new Assistant Business Managers or Mr. Campbell sought or obtained an explanation directly from Mr. Neish or obtained a description of his explanation from Mr. Murray.

[67] Nor is this a case, as in *Nichols v Construction Workers Union (CLAC), Local 151*, 2017 CanLII 72971, where the grievor had effectively removed himself from the process. Mr. Murray had to obtain an alternate phone number for Mr. Neish, a number that the Employer had. Mr. Neish was not available for the two dates set aside for the Step 2 process. These facts do not demonstrate an abandonment of the grievance procedure.

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[5] *Emeka-Okere*, at para 66.
[6] *University of Saskatchewan Faculty Association v R.J.*, 2020 CanLII 57443 (SK LRB), at para 78, citing *Judd v Communications, Energy and Paperworkers' Union of Canada, Local 2000* [2003] BCLRBD No 63.

[68] The Union has argued that it had the right, based on the information that it had received, to choose not to file a grievance at all; therefore, there should be no obligation on the Union to proceed with the grievance after it has been filed. However, there is no evidence that the new Union representatives made reasonable attempts to obtain or were in possession of Mr. Neish's explanation.

[69] Furthermore, Mr. Campbell's testimony suggested that he did not fully understand the events leading up to the termination. In particular, he did not understand that the Employer had had an opportunity to obtain coverage for Mr. Neish's shift prior to its commencement, raising questions about the extent to which the new Union representatives understood all of the relevant facts. To be clear, the Board's conclusion does not turn on this observation. Even if Mr. Campbell has just since forgotten, the failure to make reasonable efforts to obtain an explanation are sufficiently problematic.

[70] It also appears that there was a misunderstanding about the events that had occurred leading up to the power transition on July 24. There is no evidence to support the statement recorded in the transition meeting minutes that "[d]ates have been scheduled twice and Grievor has failed to make the meetings. Third meeting will be scheduled". Instead, two dates were provided to Mr. Neish – dates for which he was not available. Another attempt to schedule the meeting was to be made. It is unclear whether the Union acted on this faulty understanding. If so, this is problematic. If not, the Board stands behind its conclusion that the investigation was inadequate.

[71] The Union argues that the merits of the grievance are low, as demonstrated by Mr. Neish's attempt to explain the events at this hearing, and the Board should take this into consideration in making its decision. However, the Board "focuses its examination on the Union's conduct and considerations while the Union represented the employee and in making a decision, rather than on the merits of the grievance, which is the question an arbitrator would answer".[7]

[72] To be sure, the *Rayonier* decision lists as a relevant factor the validity of the claim and how carefully the Union has investigated it. However, the cumulative effect of all the *Rayonier* factors is that the Union has breached its duty. The subject matter is critical. Whether or not the claim is valid, the Union has missed a critical step in its investigation. The Union did not meet the employee's reasonable expectations. Although the Union argues that the claim was not valid and

[7] *Zalopski*, at para 40.

that its resources are better allocated elsewhere, the totality of these factors supports a finding that the Union contravened its duty.

[73] Having failed to fairly and reasonably investigate the merits of the grievance, it follows that the Union could not have clearly turned its mind to the merits or made a reasoned judgment about its success or failure. The Union acted in a manner that was totally unreasonable. Through this conduct the Union contravened its duty set out at section 6-59 of the Act.

[74] Lastly, the Union, if it decides not to proceed with a member's grievance, is required to provide clear reasons for its decision. There was no attempt to communicate its reasons with Mr. Neish directly either before the decision was made or to provide reasons for the decision once made. The Union simply wrote a letter to the Employer indicating that it had decided to withdraw the grievance and then attempted to provide a copy of the letter to Mr. Neish. The Union argues that Mr. Neish should have known that the Union had assessed the grievance as having no merit. However, the grievance process had taken a turn that was completely unexpected given the original plan to proceed to a Step 2 hearing. When the decision was made to change course, reasons should have been provided to Mr. Neish. In addition, there was no practical opportunity for Mr. Neish to challenge the decision once made.

[75] In conclusion, the Union has acted towards Mr. Neish in a manner that was arbitrary, and has, therefore, not met its duty of fair representation.

Remedy:

[76] The goal of a remedy is to place Mr. Neish as far as possible in the same position he would be in had the Union not contravened its duty. A remedy should be compensatory rather than punitive. It should support and promote healthy collective bargaining: *Amalgamated Transit Union, Local 588 v Firstbus Canada Limited,* 2007 CanLII 68764 (SK LRB), at paragraph 9. The Board has a broad discretion in determining the appropriate remedy, as demonstrated by the wording of subclause 6-104(2)(c)(ii) of the Act:

> *(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*
>
> *…*
> *(c) requiring any person to do any of the following:*
>
> *(i) to refrain from contravening this Part, the regulations made pursuant to this Part or an order or decision of the board or from engaging in any unfair labour practice;*

> *(ii) to do any thing for the purpose of rectifying a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board;*

[77] The most obvious and necessary remedy is a declaration that the Union has breached its duty. This declaration will be made.

[78] Next, at various times, Mr. Neish has requested compensation, arbitration, and/or reinstatement. None of these is appropriate.

[79] First, pursuant to clause 6-104(2)(e) of the Act, the Board may fix and determine the monetary loss suffered by an employee as a result of a contravention of Part VI. Again, the purpose of this provision, as described in *Hartmier v SJRWDSU, Local 955*, 2017 CanLII 20060 (SK LRB) [*Hartmier*], is to "place the wronged party in the position he or she would have been in but for the breach".[8] If the Board seeks to accomplish this it is necessary to consider the actions of the Union that were found to have constituted arbitrary conduct and the effect that those actions have had on Mr. Neish. In this case, the Union has not fully investigated the grievor's complaint. It is necessary to start there. Compensation would not place Mr. Neish in the same position he would be in had it not been for the breach. In addition, as in *Hartmier*, there is absolutely no evidence of monetary loss. For these reasons, it would be inappropriate for the Board to make an order for compensation.

[80] The Union says, in its alternative argument, that the Board should go no further than to order the Union to proceed to the next stage of the grievance process and to make a decision on the merits. However, given the Union's decision to abruptly withdraw the grievance, any trust between the parties has been lost. Therefore, if this matter were returned to the Union for consideration of the merits, it is unlikely that Mr. Neish would have much trust in that process and he is unlikely to accept all possible outcomes.

[81] For this reason, the Board will order that, within 30 days of the date of the issuance of these Reasons the Union retain an independent third party to provide an assessment of the merits of the grievance (which assessment will include consideration of Mr. Neish's explanation), and within 60 days of the date of the issuance of these Reasons the Union provide a copy of that assessment to Mr. Neish, and to proceed based on the conclusions of the assessment (or provide a rational explanation as to why the assessment is in error), and communicate clearly with Mr.

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[8] *Hartmier*, at para 233.

Neish about any decision that is made. This should ensure that the Union retains ultimate responsibility for making the decision while increasing the likelihood that the decision will be fair and the communications transparent.

[82] For a period of 30 days after the issuance of these Reasons, the Board will remain seized of this matter to address any issues that may arise from those orders.

[83] If necessary, at a future date, the Board will remain seized to hear further submissions with respect to the waiving of deadlines, pursuant to section 6-60 of the Act.

[84] Finally, the Board will order, pursuant to clause 6-111(1)(s) of the Act that within three days of the receipt of these Reasons for Decision and the Board's Order, the Union shall post a copy of those documents in a conspicuous location in the workplace for a period of 30 days.

[85] An appropriate Order will accompany these Reasons.

[86] The Board is grateful for the excellent advocacy demonstrated by counsel for the Union and for the helpful submissions made by Mr. Neish.

DATED at Regina, Saskatchewan, this **21st** day of **March, 2022.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson