Saskatchewan
Labour Relations Board

BYRON FRASER, Applicant v SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent and GOVERNMENT OF SASKATCHEWAN, Respondent

LRB File No. 117-21; February 8, 2023
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Applicant, Byron Fraser:	W. Timothy Stodalka
Counsel for the Respondent, Saskatchewan Government and General Employees' Union:	Samuel I. Schonhoffer
Counsel for the Respondent, Government of Saskatchewan:	No one appearing

Duty of Fair Representation Application – Section 6-59 of *The Saskatchewan Employment Act* – Arbitration Award – Parties Directed to Negotiate Remedy – Alleged Breach of Duty in Settling Remedy.

Timeliness – Application Filed 22 Months Late – Exceptional Circumstances – Justice Can be Achieved – Matter Decided on Merits.

Conduct in Negotiations – Arbitrariness – Duty to Turn Mind to Merits – Failing to Consider Central Issue – Existing Income – Failing to Provide Reasonable Opportunity to Grievor – Private Health Insurance – Failing to Return to Arbitrator – Union Liability Issue.

Unfounded Claims – Mitigation of Higher Income Earnings – Overall Calculation – Estimation of Earnings – Timeframe of Settlement – Business Deductions – Pension Contributions – Employment Insurance Deductions – Discrepancy in Payment.

Allegation of Bad Faith – Union Motivation – Review of Past Conduct – Conduct Related to Liability – Bad Faith Not Established.

Claims for Counsel Costs and Prejudgment Interest – Claims Dismissed – Apportionment – Union Bears Liability for Loss.

REASONS FOR DECISION

Introduction:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an employee-union dispute filed by Byron Fraser against Saskatchewan Government and General Employees' Union [Union], alleging a breach of section 6-59 of *The Saskatchewan Employment Act* [Act]. Fraser had been employed with the Government of Saskatchewan for

approximately 15 years, most recently as a Senior Business Analyst/Internal Auditor, until his employment was terminated effective April 18, 2017 for allegedly abandoning his position.

[2] At the time of this termination, Fraser was employed in the Human Resource Services Centre [HRSC] in the Government of Saskatchewan. He had been on sick leave since December 13, 2016 until the date of his termination. While he was on sick leave, the Employer had expressed concerns about the sufficiency of the medical documentation submitted to substantiate his leave of absence and had refused to pay him. On April 7, 2017, he received a letter from the Employer indicating that if he did not return to work on April 10, 2017, he would be considered absent without approved leave, and, if he continued to be absent without approval for a week or more, he would be deemed to have abandoned his position. After consulting with the Union, he was told that he did not need to be concerned about returning to work on that date. On April 17, 2017, the Employer sent him a letter indicating that his employment was terminated.

[3] The Union filed multiple grievances on Fraser's behalf. Two grievances, which were filed on February 2, 2017 and April 24, 2017, proceeded to arbitration. The first grievance alleged improper refusal to pay sick leave benefits. The second claimed wrongful termination. The Arbitrator upheld both grievances in an award dated November 14, 2018, finding that Fraser had been entitled to be on paid sick leave between December 13, 2016 and at least May 13, 2017, and was entitled to reinstatement.

[4] By the time that Fraser was able to return to work around February 28, 2019, his position was no longer in existence. The Employer began searching for an appropriate replacement position. A position was found and a start date was set for July 8, 2019. Fraser did not show up to work on that date, or on the following date after the Employer extended the start date. Fraser felt that the position was not a good fit. His failure to report to work was deemed by the Employer to be a resignation.

[5] In the meantime, the Union and the Employer were negotiating back pay amounts owing to Fraser. A settlement was reached on November 15, 2019 and Fraser was informed that his files were closed.

[6] In the application that is before the Board, Fraser says that the Union failed to comply with the employment reinstatement provisions of the arbitration award and/or wrongfully settled the claim against the Employer for the period of time from May 14, 2017 to July 6, 2019. The Union failed to obtain his consent to the settlement, wrongfully calculated the manner in which his

mitigation efforts reduced the Employer's monetary obligations to him and limited the claim to the period of time from May 13, 2017 to December 31, 2017. The Union also erred in its calculation of his sick leave payments for the period of time from December 13, 2016 to May 13, 2017, wrongfully deducted Employment Insurance [EI] benefits, and erred in its calculation of payments to be made to his pension.

[7] Fraser later withdrew the claim for income loss for the period from December 13, 2016 to May 13, 2017 and the claim for damages in relation to the alleged failure to reinstate.

[8] The Union filed a Reply to the Application on October 12, 2021. It says that it fulfilled its duty of fair representation to Fraser in respect of the accommodation and sick leave issues leading to his termination, and in filing and prosecuting his grievances. The Union says that it negotiated the back pay owing to Fraser. Fraser provided financial information that supported the Employer's position that he had mostly mitigated his damages. The settlement reached was reasonable.

[9] The Union also argues that the Application should be dismissed for delay. The events complained of took place in July and November 2019. Fraser retained a lawyer in December 2019. In March 2020, the lawyer warned of legal action. Despite this timeline, Fraser waited until September 2021 to file this Application.

[10] At the beginning of the hearing, Fraser's counsel clarified that the claim did not put in issue the events that occurred prior to the issuance of the Arbitrator's award, except to the extent that those events revealed the Union's motivation to cover up its poor job of representing its member and its motivation to "deep six" the grievances.

[11] Therefore, the matters in issue relate primarily to the timeframe after the issuance of the Arbitrator's award and to the question of whether the Union has breached its duty of fair representation in relation to the settlement of the remedy portion of the award.

[12] The hearing with respect to this matter was held over a period of seven days in June, July, and September 2022.

Evidence:

[13] Three witnesses testified at the hearing. Fraser testified on his own behalf. Rod McCorriston and Kelly Hardy testified on behalf of the Union. McCorriston was the Director of the Union's Department of Labour Relations during the material times. Hardy filled in as Acting Director during McCorriston's absence from around April 2018 to July or August 2019. Larry

Buchinski was the Labour Relations Officer (LRO) assigned to Fraser's file at the time that the arbitration award was issued. He was not called to testify.

[14] Although the Board heard evidence about the events leading up to the Arbitration hearing, the Board will refrain from reciting those facts here, but will address them as necessary in the course of the analysis.

[15] Fraser also accepts the findings of facts made by the Arbitrator in his award. The remedies are outlined in that award at page 55:

> *From the evidence, I am satisfied that had the Union contacted the Employer on April 17, 2017, the letter of termination would not have been sent on that date. While it is impossible to say with any certainty what might have transpired if the termination had been delayed, it is possible, even likely, that some of the constructive discussions that had been occurring in the two weeks prior to the termination would have re-started. Whether this would have led to a return to work or merely resulted in a short delay to the letter of termination is unknown. Any compensation for the Grievor's losses between his termination and reinstatement should take into account that the termination could have been postponed had the Union responded to the Grievor's email on April 17, 2017.*
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> *Accordingly, for all the reasons indicated above, the grievance dated April 26, 2017 challenging the Grievor's termination is sustained. I find that: 1) on April 18, 2017, the date the Grievor was dismissed for allegedly abandoning his position, the Grievor should have been on paid sick leave; 2) the Grievor is entitled to reinstatement and to be placed on paid sick leave from December 13, 2016 to at least May 13, 2017 and compensated for wages and benefits he would have received while on paid sick leave; and 3) if his sick leave credits are exhausted prior to May 13, 2017, the Grievor's status is to be changed to a leave of absence without pay for prolonged illness under article 18.1.3(A).*
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> *Efforts must be made forthwith to enable the Grievor to return to work in his previous position in the HRSC or, if that position no longer exists, to find a position at the same (Level 10) classification that is commensurate with his skills and experience. Alternatively, the Employer, Union, and Grievor may mutually agree on an alternative acceptable placement. Because of the length of time that has passed, and to protect the interests of both the Grievor and the Employer, prior to his return to work the Grievor must be declared fit for duty by a medical professional mutually agreed to by the Union and Employer.*
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> *In terms of back pay to which the Grievor may be entitled, that issue cannot be determined before knowing when the Grievor would have been medically fit to return to the workplace had he not been terminated. The Grievor is entitled to any benefits that would have been available to him during the time he was [sic] sick leave pay and leave without pay under article 18.1.3(A). Finally, for the reasons expressed earlier with respect to the sick leave grievance, this is not a case that calls for any punitive damages.*
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> *I will leave to the parties to resolve the return-to-work issues and remedial questions. I retain jurisdiction should any questions arise on remedy and with respect to this award.*

[16] After the arbitration award was issued, the Employer began looking for a replacement position for Fraser.

[17] Fraser had started actively looking for work after his termination. Despite this, he had no employment income from April 19, 2017 until April 11, 2018.

[18] In or around April 11, Fraser's business, Fraser & Fraser Consulting Inc., signed a consulting contract with a First Nation located near Kamsack, Saskatchewan. Through the consulting contract, Fraser was to provide services to the First Nation in the role of its Recipient Appointed Advisor. While he was doing this, his schedule was hectic. He was working long hours, living in Kamsack during week, driving back to Regina on Thursday evenings, and doing his job at a distance on Fridays and weekends. He continued to do this job throughout the implementation of the arbitration award.

[19] In the meantime, the Union and the Employer had begun to discuss the issue of back pay. There was quite a bit of back and forth about Fraser's mitigation income. Fraser continuously questioned the requirement to provide mitigation information to the Employer. There was also discussion about whether the amount of back pay should take into account any culpability the Union might have had for the termination, and if so, how much. The Union and the Employer did not agree on this issue.

[20] On November 30, Buchinski wrote to the Employer about the payment of sick leave, stating that Fraser had already been paid for the first four weeks of the five-month period that was ordered by the Arbitrator and requesting payment for the additional 18 weeks as soon as possible.

[21] In December, Fraser received a lump sum payment of $18,762.88 as compensation for lost sick leave for the five-month period from December 13, 2016 to May 13, 2017. A couple of weeks later, Fraser reached out to Buchinski, indicating that the amount did not seem correct and asking for screen prints from MIDAS and a written explanation. He also asked Buchinski to ask the Employer when they were going to contact PEBA about reinstating his two-week pension payments.

[22] Two days later, Buchinski wrote to the Employer asking for a follow up to Fraser's request and then emailed Fraser to check whether the Employer had followed up with him.

[23] On January 24, 2019, the Employer contacted Fraser to advise that his pension and disability payments had not been calculated correctly for the payment he had received in December. The Employer sought that, to make up the pension contributions, Fraser could send a cheque in the amount of $1,219.80 and then the Employer would generate the payment for the Employer's matching amount and would forward the payments to be deposited into the pension

account. The Employer also noted that the LTD deductions that were missed were owing and that he would need to provide a separate cheque in the amount of $240.75. The following day, on January 25, Buchinski advised Fraser to pay the amounts to move forward and avoid complicating the settlement.

[24] On February 11, in response to a request from the Employer, Buchinski confirmed that the mitigation information had not yet been forwarded.

[25] On February 28, the Employer indicated that it had received medical clearance for return to work and asked for Fraser's employment income from the period of May 14, 2017 until present. The Employer was taking the position that each of the Employer and the Union were responsible for half of the back pay owing; the Union, on the other hand, was taking the position that they were not each responsible for half, and that if the Employer continued to take that position, it would be requesting to return to the Arbitrator. Buchinski forwarded the exchange to Fraser.

[26] On March 6, Fraser said that he wanted to know whether the Arbitrator agreed with the request for employment income, asking, "why does it matter what employment income I made?" He also asked for direction from the Arbitrator on whether the Employer could structure the settlement in a manner that had more favourable tax implications.

[27] On March 11, Buchinski provided the Employer with an income tax form for 2017 and bank statements disclosing EI and other income in 2017. Buchinski advised that the 2018 amount would be forwarded as soon as the income tax filing was complete for that year.

[28] In the meantime, Hardy had been supervising Buchinski in the implementation of the arbitration award. According to Hardy, in most cases implementation should take one to three months. At some point, Hardy and Buchinski met to discuss the file, and in particular, the reasons for the lengthy delay. Buchinski explained that Fraser had not been providing the financial information needed to calculate the back pay, that the Employer was taking the position that Fraser was not being cooperative with the reinstatement process, and that the Employer was claiming that the Union was 50% liable for the termination. Hardy directed Buchinski to return to the Arbitrator to seek direction on these issues.

[29] On March 13, Buchinski wrote to the Employer to suggest that they obtain dates from the Arbitrator, which "will cause the parties to remain focused on finalizing a settlement". The Employer replied that it would prefer to have the final back pay calculation prior to determining whether to return to the Arbitrator and would need to consult internally before making that

decision. Buchinski pushed the Arbitrator issue on April 9, to which the Employer replied that it still did not have the information needed to do the back pay calculation. On April 15, Buchinski wrote to the Arbitrator directly to obtain dates. On April 17, the Employer provided the Union with an initial estimate of back pay owing in the absence of Fraser's employment income for 2018 and 2019.

[30] On April 26, an appearance was held with the Arbitrator, who provided direction that was later summarized in an email from Buchinski, dated April 29, 2019:

> 1) *Regarding compensation Mr. Fraser has/does receive for his services to Fraser and Fraser consulting. Mr. Ponak was very firm on this and requires Mr. Fraser to identify his compensation and provide it to the PSC as soon as he is able. Mr. Ponak was clear when he indicated, "Mr. Fraser is not working for free". (This would be unreasonable on Mr. Fraser's part, implying that he has been working for nothing) This needs to be done in the very near future (indicate an amount so the PSC can do a reasonable mitigation calculation).*
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> 2) *The PSC began looking for positions beginning February 25, 2019. Mr. Fraser has been unable to attend a previously scheduled date due to a commitment to Fraser and Fraser. Mr. Ponak made it very clear, that a reasonable amount of notice is required, however, Mr. Fraser MUST make himself available, on a going forward basis. Not showing up for interviews will be deemed tantamount to job abandonment (Ponak strongly recommended a "3 strikes and you're out" rule). Obviously, there will be a "within reason" allowance, however, given a "few days' notice", Mr. Fraser is expected to be at any interview set up by the PSC.*
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> 3) *Arbitrator wants the parties to work at getting Mr. Fraser back to work in as timely a fashion as possible.*
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> 4) *Regarding mitigation, payment, responsibility for loss of earnings, Mr. Ponak made it clear this liability does not rest solely with the employer (due to the April 17th, email between Byron and his Union representatives). We know we cannot turn back to the clock in respect to "what ifs".*
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> 5) *Get Mr. Fraser back to work or if Mr. Fraser wants to consider a "Package – Pay out and Go Away" … Ponak's words were "Work to get him (Fraser) back".*

[31] In May, the Employer advised that it had found a position with a start date of July 8. When Fraser did not attend work on that date, the Employer gave him a second chance to start work on the next day, July 9. Fraser did not respond or attend work on that date either. On July 9, the Employer wrote to Fraser, indicating that he had demonstrated a continuing intention to resign and that the Employer had accepted his resignation effective July 8.

[32] It was likely around this time that McCorriston came back into the picture. McCorriston explained that he felt that a grievance about the deemed resignation or termination would not be successful. No grievance was initiated.

[33] In mid-August, the Employer proposed an offer to settle the matter. McCorriston testified that the Employer later removed this offer but he could not recall why. (However, on September 13, Linnea Olson, on behalf of the Employer, sent an email to McCorriston asking when the Union would be responding to "the offer".) The Union did not discuss whether to accept it but instead was focused on whether to return to the Arbitrator.

[34] On August 29, Fraser sent an email to the Employer advising that his accountant had almost completed his 2018 corporate tax return and that he would be able to send it in the next week.

[35] On August 30, Buchinski went on leave from his employment with the Union. After he went on leave, McCorriston assigned the file to Hardy as LRO. Hardy explained that her assignment was only "technical" and that McCorriston was the true lead, but that at the time, there was a lot of concern about management doing bargaining unit work.

[36] Also on August 30, McCorriston sent Fraser a letter (by email) advising that his deemed "voluntarily resignation" in "breach" of the arbitration award jeopardized the "monetary settlement thereof". He also advised that Fraser had been uncooperative in providing the necessary salary information but that the Union was willing to continue to negotiate a reasonable settlement. He demanded that Fraser provide the mitigation employment information for the period between December 31, 2017 and July 8, 2019 within 21 calendar days upon receipt of the letter. He provided additional detail about the request:

> *In order that SGEU can negotiate a reasonable settlement, please provide copies of all employment income including copies of any service contract(s) for 2018 and 2019, T4s, self-employment income, and copies of Notice of Assessments from Canada Revenue Agency for the years covered within the arbitration award, any additional documentation that details your employment income would also be helpful.*

[37] McCorriston explained that the Employer was pressuring the Union to reach a settlement. The Union was also under pressure from the bargaining unit to deal with old grievances.

[38] The email with the attached letter, dated August 30 went unopened. On September 6, the letter was sent by registered mail.

[39] On September 30, Fraser provided to the Union:

a. Corporate tax returns and summaries for 2017 and 2018;

b. Personal notices of assessment for 2017 and 2018;
c. T4s for 2017 and 2018;
d. Contracts with University of Regina and Amending Agreement with the First Nation; and
e. A financial impact opinion from Kurtis Krug of London Life Freedom 55 Financial.

[40] In his covering letter, dated September 26, Fraser indicated that he had been waiting for his accountant to provide his corporate income tax records for 2018, those were due on June 30, 2019, and the accountant had been late in responding to him. He confirmed that his corporate tax information for 2019 would not be completed by his accountant until it was due, on June 30, 2020. In light of the timeline, he asked for clarification about what he should provide for that period. In relation to the mitigation question, he made the following comments:

> *But I am still waiting for the employer's, union and arbitrator's legal justification of why my personal settlement for wrongfully not being paid and ultimately fired by the employer has anything to do with the financial information of a separate legal corporate entity I work for. What money I make outside of working for the government should have no bearing on my personal settlement.*

[41] In a handwritten note included with the package, Fraser directed the Union to "email me how you are going to factor in other required items like pension compensation, & health coverage we had to purchase etc."

[42] McCorriston testified that he skimmed the documents included in the package. He did not know the specifics of certain entries that were made in relation to corporate expenses, in particular, entries identified as "trades and sub-contracts" and "development expenses".

[43] While noting that Fraser had not provided copies of current contracts with the First Nation, Hardy indicated that the Union had enough information to "calculate and discuss the question of mitigation and remedy with the employer".

[44] In any event, the Union's next responsibility was to prepare for a meeting with Olson, held in or around October 11. The purpose of the meeting, according to McCorriston, was to work out the salary and mitigation numbers and determine whether any money was owed to Fraser. Hardy attended the first ten or twenty minutes of the meeting and then was called out to deal with another matter.

[45] According to McCorriston, the Employer was not willing to enter into a structured settlement and was convinced that Fraser had fully mitigated his losses. McCorriston seems to have agreed with the Employer (after reviewing the calculations) but told Olson that the Union

had to come out with something – at least the cost of the arbitration. McCorriston testified that after the meeting, she was going to go away and do some number crunching. The Union was going to wait for the Employer to come back with an offer and then consult with Fraser about it.

[46] McCorriston testified about Fraser's claimed business expenses. McCorriston believed that the Union had no argument with respect to the donations he had made and had claimed as business expenses. As for the other expenses, McCorriston did not really know what they entailed. He believes that he had pushed the Employer to agree to include health and welfare expenses if receipts were provided, but he did not have anything in writing to this effect.

[47] After the meeting on October 11, Olson sent to the Union a copy of its proposal which eventually became the signed agreement, indicating, "Further to our discussion, I have updated the proposal offered in August without the grievor's signatory line. This offer remains on the table."

[48] On October 17, Hardy replied to Fraser's covering letter, stating that the duty to mitigate is well established in law and that it includes investing time in a business that the grievor owns.

[49] On October 28, Hardy reached out to Fraser to set up a meeting to go over the Employer's calculations. She wanted to meet with him face-to-face. She was mainly concerned with the reasonable deductions from his business income and she felt that the Employer was not considering them properly. The meeting occurred on November 13. Hardy drove to Kamsack where they met in a restaurant. Hardy explained that she had expected them to sit down and go through the package together.

[50] Hardy and Fraser had different recollections about what happened at that meeting. According to Hardy, Fraser was still claiming that he did not have to mitigate. That was his first statement after the exchange of pleasantries came to a close. At some point she provided him with the documents which disclosed the amount of the offer. She asked for his input on the settlement. He said nothing. He just closed down, changed the topic, and started talking about his employment with the First Nation. She tried to raise the settlement again and he told her that she would be hearing from him in writing. She replied that if that was his position, she would provide him with the package to review, and that she would be signing the settlement agreement the following day if she did not hear from him.

[51] According to Fraser, he asked if he could provide feedback on the settlement, but Hardy told him that it was a done deal and that she was just there to notify him. Really, the purpose of the meeting was for Hardy to do her due diligence. He testified that he had said (paraphrased),

"so you are saying that it is a done deal so it doesn't matter what my questions are?". He told her there was no point talking about it because the Union had already made a decision. In his recollection, Hardy had agreed with his characterization of the settlement as a "done deal".

[52] Either way, the meeting ended without any review of the calculations or the business expenses. Hardy did not hear from Fraser again. The next day, November 14, Hardy signed the Employer's offer. Olson signed it on November 15.

[53] The settlement agreement states:

> *Pursuant to the Arbitrator's award:*
>
> 1. *The grievor's termination of employment effective April 18, 2017 has been rescinded.*
> 2. *The grievor was placed on sick leave for the period of January 10, 2017 to May 13, 2017.*
> 3. *The grievor was placed on a definite leave of absence without pay for the period of May 14, 2017 to July 6, 2019, inclusive.*
> 4. *The grievor was to be placed in a level 10 position that was commensurate with his skills and experience. He was to commence in the Financial and Contract Analyst position with the Ministry of Education effective July 7, 2019. The Grievor failed to commence in this role and was deemed to have resigned.*
> 5. *The following payments have or will be issued and are inclusive of all outstanding amounts owing to the grievor:*
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> a. *The grievor was issued payment for sick leave for the period of January 10, 2017 to May 13, 2017 on December 28, 2018;*
>
> b. *The grievor will be issued a lump sum payment in the amount of $10,822.11 representing 50% of:*
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> i. *Salary that the grievor would have been earned as a Business Analyst during the period of May 13, 2017 to December 31, 2017 less the grievor's mitigation efforts. Salary is inclusive of vacation entitlements the grievor would have earned and taken.*
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> ii. *Pension contributions the Employer would have made during the period of May 13, 2017 to December 31, 2017.*
>
> c. *For clarity, no other payments as a result of this arbitration award have been nor will be issued to the grievor for the period of January 1, 2018 to July 7, 2019.*
>
> *[…]*

[54] Fraser admitted at the hearing that he did not review the documents or follow up with Hardy.

[55] In November, Fraser received a lump sum payment of $8,657.69. In the application, at paragraph 4(v), Fraser states “I only received a lump sum payment of $10,822.11 in December 2019”. The specific discrepancy between the amount included in the settlement award and the amount received was not mentioned.

[56] According to Hardy, union dues were not deducted from the settlement amount because of the alleged culpability of the Union for the termination. However, she reiterated that the Union had consistently taken the position that its culpability was not as much as 50%.

[57] Fraser testified that the Union had promised that his grievances were a sure thing, that the Union would make an example of the Employer, and that he would be receiving a big payout.

[58] On December 16, Fraser’s lawyer wrote to the Union to advise that he was in possession of the arbitration award and correspondence up to October 25, 2019 and was hoping to discuss the legal issues. On December 23, he wrote to the Union again, referring to an email exchange on December 16, alluding to a request for proof that the Union had “settled his grievance on terms which it did not provide or disclose” to his client, and demanding that the matter related to Fraser’s reinstatement be remitted to the Arbitrator, “[a]ssuming you did not settle this grievance on terms which were not disclosed to … Fraser”.

[59] On March 16, 2020, he wrote to the Union demanding that two matters be remitted to the Arbitrator – the reinstatement and the appropriate damages for the 13-month period that he was unemployed thereafter. On March 18, the Union refused these requests in writing and stated its position with respect to back pay:

> *Mr. Fraser provided financial information for most of the relative time. Conservatively his financial information demonstrated his ability to fully mitigate his financial losses from May 14, 2017 until July 7, 2019. Despite that ability the November 2019 settlement agreement references a lump sum payment, which included vacation entitlements he would have earned if employed and pension contributions, for the year ending 2017.*
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> *You may not be aware that the parties did return to the Arbitrator at one point, via conference call, to argue some, if not all of the points you raise in your letter of … and was provided Mr. Ponak’s clarification on his direction and received additional instruction. Accordingly, SGEU will not remit any issues to the Arbitrator nor do we consent to you appearing on Mr. Fraser’s behalf before Mr. Ponak.*

Arguments - Issues:

[60] The following primary issues were identified in the parties’ submissions:

1. Whether the application should be dismissed on the basis of delay; and

2. Whether the Union breached its duty of fair representation, in particular, in relation to the settlement of lost income;

3. Appropriate Remedy, if any.

[61] What follows is a summary of the parties' arguments. Given the extensive nature of the arguments, they are covered in more detail in the analysis section.

Arguments - Fraser:

Delay:

[62] In arguing that delay is not an issue in this case, Fraser relies on the five factors set out in *Hartmier v SJRWDSU, Local 955*, 2017 CanLII 20060 (SK LRB) [*Hartmier*].

[63] Fraser's claim relates to the manner in which the Union settled his grievances after having been found to have been contributorily negligent in representing him. The settlement was signed on November 15, 2019. On March 18, 2020, the Union refused Fraser's request to have the reinstatement and damages issues brought back to the Arbitrator. The present application was filed on September 21, 2021. This is not inordinate delay. In any event, the Board should consider the two-year limitation period for civil actions as an indicator of inordinate delay. The two-year period has not been surpassed and so the delay is not inordinate.

[64] The Union has not been prejudiced by the delay. The Union has not presented any evidence of the actual prejudice that it suffered as a result of any delay. Although Buchinski is no longer a Union employee, Hardy took over the file and was available to testify. The Union contributed to the delay by failing to respond to Fraser's questions about how it was handling his file.

[65] Fraser is an unsophisticated applicant who was working a 60 to 70 hour work week during the material times.

[66] There is no doubt that the Board can achieve justice by deciding the substantive issues in this application.

Breach of Duty of Fair Representation:

[67] Fraser is alleging that the Union acted in a manner that was arbitrary and in bad faith. When the Arbitrator found that the Union was partially culpable for the termination, this raised a conflict of interest that the Union failed to recognize. The evidence shows that the Union was afraid to bring the matter back to the Arbitrator. Instead of bringing the matter back to the Arbitrator, the Union agreed to a settlement that compromised Fraser's interests.

[68] The Union failed to represent Fraser in negotiating a settlement of his income loss. The related allegations include several components, including specific problems with the settlement exacerbated by the Union's failure to provide a suitable explanation for these problems. The problems with the settlement include:

a. the reduction in income amounts owing for the period from May of 2017 to April of 2018 despite Fraser having been unemployed during that entire period;
b. incomprehensible overall calculations, including estimation of 2019 income;
c. incomprehensible timeframe, that is, compensation for the timeframe ending December 31, 2017 despite the facts that Fraser was unemployed from May 13, 2017 to April 2018, the arbitration award was issued on November 14, 2018, and Fraser was a Union member until July 2019;
d. exclusion of business expenses from calculation of loss;
e. the deduction of business income related to the contract held by Fraser & Fraser Consulting Ltd. since 2013;
f. the 50% reduction in the lump sum owing to Fraser;
g. missing pension contributions;
h. exclusion of private health insurance costs;
i. the deduction of EI from the settlement with no related obligation on the Employer to repay EI to Service Canada;
j. discrepancy in the lump sum payment, which was supposed to be $10,822.13, but was $8,657.69.

[69] Specifically with respect to point (a), the Union used gross business income that Fraser's company had earned after April 2018 to reduce his entitlement to compensation for the period from May of 2017 to April of 2018 even though he was unemployed during that entire period. All of the binding case law suggests that Fraser's income earned after he secured the contract with the First Nation should have been excluded from the calculations. The Union did not research this

issue. Instead, it simply accepted that Fraser had mitigated his damages for the period from May 2017 to July 2019.

[70] In suggesting that the Union erred in its approach to mitigation, Fraser relies on *LeBlanc v Eurodata Support Services Inc*., 1998 CanLII 19470 (NB CA) [*LeBlanc*], *Shaw Communications Inc. v Lum*, 2004 NBCA 35 (CanLII) [*Shaw Communications*], and *R.W.D.S.U. v Loraas Disposal Ltd*., 1999 CarswellSask 961, [1999] Sask LRBR 205 [*Loraas*].

Remedy:

[71] Fraser asks for a monetary award to compensate for the losses caused by the Union's breach of its duty.

[72] Fraser states that he is entitled to prejudgment interest. In this respect, he relies on *Meroniuk v Rural Municipality of Preeceville No. 334*, 2003 CanLII 62873 (SK LRB) [*Preeceville*]. There, the Board made an order of prejudgment interest as part of its remedial order against an employer who had committed an unfair labour practice by terminating an employee. He also relies on *Jasnoch v Provincial Plating Ltd*., 2000 SKQB 44 (CanLII).

[73] Fraser asks the Board to award legal costs, which is an allowable claim based on *Rattray v United Steel*, 2021 CanLII 63721 (SK LRB) [*Rattray*] and *Hartmier*.

Arguments - Union:

Delay:

[74] This application should be dismissed for delay. Both the specific factors and the general considerations described in *Hartmier* support dismissing the application.

[75] The length of the delay is inordinate. The application was filed 22 months after Fraser received notice of the settlement and over 18 months after the last interaction between the applicant's lawyer and the Union.

[76] The delay has resulted in substantial presumed prejudice. In addition, there is actual prejudice based upon "the likely unavailability of the Labour Relations Officer responsible for contested interactions" with Fraser. All three of the Union representatives no longer work for the Union. During the hearing, the witnesses on behalf of both parties had difficulty recalling events.

[77] The applicant is an experienced union member who benefited from the representation by counsel. Fraser's lawyer warned the Union of an impending application by letter in December 2019 and then again in March 2020. The Union responded to the second letter two days after it was received and communicated its position.

[78] There is no employment interest at stake. Fraser seeks only a financial remedy. In reality, however, the damages sought originate in the claim to back pay owing by the Employer. In this type of situation labour relations boards often order that the agreements be set aside to permit the parties to negotiate the issues. However, if the passage of time renders this type of remedy unfair, then the Union could be ordered to pay any amounts owing. Therefore, due to the delay, there is a potential that the liability would transfer from the Employer to the Union.

Breach of Duty of Fair Representation:

[79] There is no evidence that the Union represented Fraser in a manner that was arbitrary or in bad faith. To the contrary, it represented Fraser in a diligent and thoughtful manner. The quality of the Union's representation should be considered against the extent of Fraser's cooperation with their efforts, including his significant resistance to the use of his corporate income to determine the appropriate amount of the settlement. When asked to provide feedback on the settlement amount, Fraser did not engage.

[80] Fraser did not have the right to the exact outcome he desired, nor the most favourable outcome. Bringing the matter back to the Arbitrator carried risks, which Fraser refuses to recognize. It is not appropriate to review the Union's conduct on a standard of correctness, which is what Fraser is asking the Board to do. Fraser is not entitled to his "best day" damages. Post-facto evidence about the numbers is not determinative. The focus should be on the Union's representation of the grievor.

[81] The Union's duty does not require it to bear the consequences of Fraser's failure to take the Union's advice.

[82] Fraser was extremely and repeatedly resistant to providing mitigation income to the Union to assist in reaching a settlement. When he did provide financial information, he provided no assistance to the Union to interpret that information. He did not want to facilitate the Union's evaluation of his corporate expenses. In meeting with the Employer, the Union relied on the exact numbers that Fraser had provided. It was the Employer that started the conversation around the deductions.

[83] Fraser made no effort to provide income information for 2019. It is a red herring that his net income for 2019 was different from past years. Under the circumstances, the Union should have been allowed to settle the matter based on an estimate of his income. It was not required to wait for the 2019 income tax return. Fraser was asked to provide an estimate and did not.

[84] The settlement was reached following extensive negotiations and a careful review of the respective positions of the parties. The Union concluded that returning the matter to the Arbitrator would be unproductive compared to the settlement offered. The Union arranged a meeting with Fraser, offered him an opportunity to provide feedback, and he refused.

[85] Fraser is wrong to suggest that the law is clear with respect to the proper approach to the calculation of mitigation income involving higher paying positions. The Union could easily have been unsuccessful on this point before an Arbitrator. The conclusion that there was full mitigation was reasonable and defensible, especially considering the significant room for error. The Employer calculations show that Fraser benefited from the termination by $49,000. The question is not whether the Union was wrong but whether it was "$49,000 wrong" and whether it was grossly negligent for the Union not to have understood that.

Remedy:

[86] If the Board finds that the Union breached its duty and that a compensatory award is appropriate, then it should determine that the Employer is responsible for compensating the portion of the loss that is attributable to its breach of the collective agreement.

[87] As for costs, this is an extraordinary remedy that was not included in the application. Fraser presented no evidence of the costs that have been incurred. If necessary, the Union asks for leave to file additional submissions on this issue.

[88] The Union did not make an argument specific to prejudgment interest but instead implied that this issue should be addressed in a manner similar to costs.

Applicable Statutory Provisions:

[89] 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.

6-103*(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*

(2) Without limiting the generality of subsection (1), the board may do all or any of the following:

> *(a) conduct any investigation, inquiry or hearing that the board considers appropriate;*
>
> *(b) make orders requiring compliance with:*
> *(i) this Part;*
> *(ii) any regulations made pursuant to this Part; or*
> *(iii) any board decision respecting any matter before the board;*
>
> *(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act;*
>
> *(d) make an interim order or decision pending the making of a final order or decision.*

6-104*(1) In this section:*

…

(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:
…

> *(b) determining whether an unfair labour practice or a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board is being or has been engaged in;*
>
> *(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;*

…
(e) fixing and determining the monetary loss suffered by an employee, an employer or a union as a result of a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;

Analysis:

Preliminary Issue – Delay:

[90] In considering this issue, the Board will first review the relevant law with respect to delay in employee-union disputes.

[91] In *Hartmier*, the Board considered the case law and summarized the factors that are used in deciding whether to dismiss an application on the basis of delay:

> *[120] This survey of relevant Board Decisions reveals that while each decision turned on the particular facts of the case, nevertheless a number of factors figure prominently in the Board's analysis of undue delay applications in duty of fair representation claims. The more prominent factors include:*
>
> > *• Length of Delay: The length of delay is critical. An applicant will bear the burden to explain the reasons for any delay and the longer the delay, the more compelling must be the reasons for the delay in filing the application. Now that the Legislature has mandated a statutorily prescribed time limit for the filing of unfair labour practice applications, the Board's tolerance for exceptionally long delays has decreased significantly.*
> >
> > *• Prejudice: Labour relations prejudice is presumed in cases of delay; however, if the delay is extensive or inordinate this factor will weigh more heavily in the analysis. The longer the delay, the greater the prejudice to a respondent. Evidence of actual prejudice to a respondent likely will result in the main application being dismissed.*
> >
> > *• Sophistication of Applicant: An applicant's knowledge of labour law and labour relations matters, generally is an important consideration when assessing the veracity of the reasons for the delay.*
> >
> > *• The Nature of the Claim: The issues at stake for an applicant will be weighed in the balance. If the consequences of dismissing an application for reasons of delay are significant to an applicant, this will weigh in favour of permitting the application to proceed despite a lengthy delay in its initiation.*
> >
> > *• The Applicable Standard: When adjudicating delay applications, the standard which has been applied consistently is: can justice be achieved in the matter despite a lengthy delay in commencing it?*

[92] Among the cases reviewed by the Board in *Hartmier* was an early decision of this Board, which provides some insight into the meaning of an inordinate delay, generally. The decision was *Saskatchewan Union of Nurses v South Central District Health Board*, LRB File No. 016-95, [1995] 2nd Quarter, Saskatchewan Labour Report, 281 [*SUN v South Central*], a case involving an unfair labour practice application:

> *In McKenly Daley v Amalgamated Transit Union and Corporation of the City of Mississauga, [1982] O.L.R.B. Rep. Mar. 420, the Ontario Labour Relations Board*

> *commented on some of the factors which may be relevant in considering whether a delay in initiation or pursuing proceedings is excessive:*
>
> > *22. A perusal of the Board cases reveals that there has not been a [mechanical] response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial [liability] or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.*
> > *[…]*

[93] In *SUN v South Central*, the Board considered an approximately 18-month delay by the union in commencing an unfair labour practice application under *The Trade Union Act*. Although the Board decided to refer the dispute to the grievance arbitration process, it found that it could hear the application if any issues remained undecided by the arbitrator.

[94] Also considered in *Hartmier* was *Kinaschuk v Saskatchewan Insurance Office and Professional Employees' Union, Local 397 and Saskatchewan Government Insurance*, [1998] Sask LRBR 528 [*Kinaschuk*]. There, the applicant had waited almost three years before bringing a duty of fair representation claim. The Board dismissed the application due to the delay. The Board observed that in cases involving extreme delay there is a rebuttable presumption of prejudice to the respondents. To rebut the presumption, the applicant must provide a credible explanation for the delay and demonstrate that there is no "material prejudice" to the respondents.

[95] In *Nistor v United Steelworkers of America*, [2003] Sask LRBR 15 [*Nistor*], the application was filed 16 months after discipline was imposed and eight months after the arbitration award. The Board did not indicate whether the delay resulted in a rebuttable presumption of prejudice. Instead, it considered whether the union had been actually prejudiced. It found that the intervening events, that is, the termination of the applicant's employment after a second incident and the arbitration award that upheld the termination, made it impossible for the union to grieve his earlier suspension, which was the subject of his complaint. The only possible remedy was damages. The Board noted that, although in some cases a damages remedy is appropriate, the applicant had provided no explanation for his failure to bring an application after the incident that culminated in his termination. He was an experienced union member and should have known better.

[96] In *Leedahl v United Food and Commercial Workers International Union, Local 248-P*, 2003 CanLII 62856 (SK LRB), the relevant delay was approximately one year. The union and employer reached a settlement in December 2001. The applicant was dissatisfied, attempts at a resolution were made, and the application was filed in March 2003. The lawyer for the applicant assumed personal responsibility for the delay and asked the Board not to penalize his client. Some attempts were made at settlement. The Board took into account the delay that occurred only after the period for which the lawyer took responsibility. The Board found that justice could be done, especially given that damages against the union and not the employer were being sought.

[97] These foregoing authorities pre-date the addition of s. 12.1 to *The Trade Union Act* in 2008, which was similar to subsection 6-111(3) of the Act. Subsection 6-111(3) permits the Board to refuse to hear an allegation of an unfair labour practice that is made more than 90 days after the discovery date.

[98] In *Dishaw v Canadian Office & Professional Employees Union, Local 397*, 2009 CanLII 507 (SK LRB), the applicant had brought the application over 23 months after he knew or ought to have known of the actions or circumstances. The Board found that this delay was excessive and that the union had suffered prejudice. The detrimental effect on witness memories was presumed prejudice. Additional prejudice was demonstrated by the fact that the union was no longer the bargaining agent for the bargaining unit: "the fact that the Union is no longer the bargaining agent for the workplace directly impacts its ability to respond to the […] application and/or to further prosecute any grievance on his behalf".[1] The change in bargaining agents had taken place approximately eight months after the discovery date.

[99] In *Dishaw*, although the Board declined to rule on whether section 12.1 was applicable, it noted that the introduction of section 12.1 to *The Trade Union Act* signaled that time was of the essence in labour relations disputes, generally. This interpretation has been carried forward in subsequent case law, however, to the extent that it is used to abbreviate timelines in employee-union disputes it seems to conflict with the presumption of consistent expression,[2] or more simply, with the notable absence of a statutory time period in relation to employee-union disputes. It is an interpretation that is not adopted in the current case.

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[1] *Dishaw* at para 33.
[2] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at § 8.32.

[100] In *Peterson v Canadian Union of Public Employees, Local 1975-01 and University of Regina*, 2009 CanLII 13052 (SK LRB) [*Peterson*], the application was filed 56 months after the applicant's employment had ceased and 43 months after he had last had contact with the union. There was no explanation for the delay. The prejudice to the union was presumed. The Board found that it was appropriate to dismiss the application due to delay.

[101] On the other hand, in *Prebushewski v Canadian Union of Public Employees, Local No. 4777 and Prince Albert Parkland Health Region*, 2010 CanLII 20515 (SK LRB) [*Prebushewski*], the Board found that a delay of approximately two years in bringing the application, while excessive, did not impair the Board's authority to grant the remedy. The union and the employer should have been aware that the applicant had disputed her termination and the decision to abandon the grievance when she filed a claim with the court. The remedy granted was not monetary but was to allow the applicant to apply to the Union for reconsideration of her grievance.

[102] In *Hartmier*, the length of the delay was 13 months. The Board noted that the delay was "not so excessive or inordinate as occurred in other cases", but it still required "a satisfactory explanation…as to why she postponed filing her formal application for so many months."[3] Although characterized as a sophisticated applicant, the Board accepted the applicant's explanation for the delay, being that she had held off on filing the application against the union because she was relying on the union to resolve outstanding grievances. The Board observed that the applicant had not kept hidden her concern with the union's conduct, there was no evidence that any of the witnesses had difficulty recalling events, and there was no evidence of prejudice (as opposed to presumed prejudice).

[103] In summary, although other Boards have set policies imposing specific time limits on employee-union applications, this Board has not.[4] Instead, this Board's approach is to determine whether justice can be achieved in hearing the dispute with consideration given to the five factors that are outlined in *Hartmier*. There is no specific timeline that will result in a rebuttable presumption or that will result in the Board refusing to hear the application. The consequence is some variability in the timelines that will be found to be acceptable, depending on the facts as presented to the Board.

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[3] *Hartmier v SJRWDSU, Local 955*, 2017 CanLII 20060 (SK LRB) [*Hartmier*] at para 123.
[4] George W. Adams, *Canadian Labour Law*, loose-leaf (11/2022 - Rel 4) 2nd ed (Toronto: Thomson Reuters, 2022), at 13-105 to 13-109.

[104] Next, the Board will review the facts in the current case that are relevant to the question of delay:

- The arbitration hearing occurred in August and September 2018;
- The arbitration award was issued on November 14, 2018;
- Fraser was medically cleared to return to work on February 28, 2019;
- The later appearance before the Arbitrator occurred on April 26, 2019;
- Fraser was to report to work on July 8, 2019 and was given a second chance on July 9, 2019;
- His employment was terminated on July 9, 2019;
- On November 13, 2019, Fraser met with Hardy to discuss the settlement of the back pay issue;
- On November 14, 2019, the Union signed the offer. On November 15, 2019, the Union communicated to Fraser that it considered the grievances resolved and his file closed;
- In December 2019, Fraser's lawyer communicated with the Union about the settlement;
- On March 16, 2020, the lawyer demanded that the Union remit matters back to the Arbitrator, specifically "his reinstatement and the appropriate damages for the 13 months period he was unemployed as detailed hereafter";
- On March 18, 2020, Hardy provided the lawyer with a written reply and refused to remit the matters;
- This application was filed on September 21, 2021.

[105] Fraser says that after April 2018 his attention was focused on working his 60 to 70-hour work week with the First Nation and that he lived in Kamsack which made it difficult for him to prepare a claim against the Union. He worked for the First Nation until March 31, 2021.

[106] He also states that the Union was put on notice that he was taking issue with its actions, and specifically, that his lawyer had instructions to bring an application pursuant to section 6-59 of the Act.

[107] As of March 18, 2020, Fraser was aware that, not only were the grievance files closed, but the Union was refusing to remit the matters to the Arbitrator. After March 18, 2020, 18 months had passed before Fraser filed this Application. It is unclear what, realistically, Fraser thought he could accomplish by seeking to remit the matters to the Arbitrator after the settlement agreement had been concluded. On the date that the Union told Fraser that the files were closed, Fraser had

all of the information he needed to decide whether to proceed with a duty of fair representation application. He knew or ought to have known of the action or circumstances giving rise to the allegation by November 15, 2019. This means that the length of the delay in question was 22 months.

[108] The Board has drawn the following conclusions with respect to each of the factors listed in *Hartmier*:

> 1. *Length of Delay: The longer the delay, the more compelling must be the reasons for the delay in filing the application.*

[109] A delay of 22 months is excessive. To be sure, it does not present the unmistakable affront to justice that comes with a delay such as those that were considered in *Peterson* or *Kinaschuk*. Rather, *Dishaw* and *Prebushewski* are the most comparable cases in terms of the length of the delays in issue.

[110] Fraser explains that, until March 31, 2021, he was working 60 to 70-hour weeks as a Recipient Appointed Advisor on the First Nation, away from his home, and commuting to and from Kamsack on weekends.

[111] "Being busy" cannot other than in exceptional cases be considered a sufficient justification for failing to bring an application alleging a failure to fairly represent. However, Fraser's circumstances were exceptional.

[112] This extremely hectic period occurred after Fraser was wrongfully terminated, and then after he had unsuccessfully sought out alternative employment and finally settled on a working arrangement under contract on a First Nation that required him to commute once a week. He was not only "busy" but was completely overwhelmed. In his testimony, he recalled that around the time of the lawyer's letter in March 2020 the Covid-19 pandemic was declared in Saskatchewan. There was nothing normal about the pandemic. Understandably, there was a great deal of concern about the impact of Covid-19 on the First Nation. Against this backdrop, Fraser was in charge of determining who was and was not eligible for certain types of financial support. His circumstances became chaotic as a result of various emergencies that were arising on the First Nation.

[113] To be clear, this explanation does not account for the time period from April to September 2021 except to suggest that Fraser may have turned his mind to the application in earnest only after his position with the First Nation was over.

[114] Lastly, the letters from his lawyer did put the Union on notice that Fraser was taking issue with the settlement and was contemplating bringing an application to the Board pursuant to section 6-59. However, the letter on March 16, 2020 indicated that, "[i]f we do not receive a satisfactory response from you within two weeks, it will be our intention to apply for appropriate relief to [the Board]". Obviously, the language of the letter was not helpful. When considered against the backdrop of the start of the Covid-19 pandemic, however, it is not difficult to understand how other particularly pressing matters would have taken priority, at least for a while.

> 2. *Prejudice: Labour relations prejudice is presumed in cases of delay; however, if the delay is extensive or inordinate this factor will weigh more heavily in the analysis. The longer the delay, the greater the prejudice to a respondent. Evidence of actual prejudice to a respondent likely will result in the main application being dismissed.*

[115] At the hearing, there were some issues with the witnesses' memories, but primarily with Fraser's memory. To the extent that the impact on witnesses' memories is material to whether justice can be achieved, it is "actual" prejudice. The Board will address this issue in more detail in the following sections.

[116] There is no other actual prejudice. Although Buchinski is no longer an employee of the Union, neither are Hardy or McCorriston, and each of the two latter individuals testified at the hearing. The Union argues that it was not necessary to call Buchinski to testify because he was not present when the settlement was concluded and because any testimony he could provide is clearly covered by the documents. Certainly, if it was not necessary to call Buchinski then his absence did not cause the Union prejudice. Nor is it clear that Buchinski's absence was related to the delay that had occurred.

[117] There is no other prejudice such as that which was considered in *Dishaw* (change in bargaining agent).

[118] The remedy that is being sought is financial. In *Leedahl*, the Board found that the nature of the remedy sought by the applicant – namely a damage award against the union – minimized any prejudice that the union may have suffered as a consequence of the delay in commencing the application. As long as the delay does not cause the responsibility for the financial remedy to shift from one party to another, it is inherently less prejudicial than a remedy involving a renewed grievance or settlement process or a reinstatement.

3. *Sophistication of Applicant: An applicant's knowledge of labour law and labour relations matters, generally, is an important consideration when assessing the veracity of the reasons for the delay.*

[119] This was the first time that Fraser was involved in a Labour Relations Board matter. There is no evidence that he was particularly active in the union or that he should have possessed special skills or knowledge related to union affairs. However, he hired a lawyer who represented him in the filing of his application before the Board.

4. *The Nature of the Claim: The issues at stake for an applicant will be weighed in the balance. If the consequences of dismissing an application for reasons of delay are significant to an applicant, this will weigh in favour of permitting the application to proceed despite a lengthy delay in its initiation.*

[120] The issues at stake are financial in nature. There are no critical job interests at stake anymore. That is not to suggest that the interests are entirely insignificant. The dispute arose as a result of negotiations to settle an award arising from a wrongful termination. Although Fraser is not now asking for his job back, the settlement represented what was intended to be the final resolution of his termination and sick leave grievances.

5. *The Applicable Standard: When adjudicating delay applications, the standard which has been applied consistently is: can justice be achieved in the matter despite a lengthy delay in commencing it?*

[121] The central issue before the Board is whether justice can be achieved in the matter despite the delay. This standard recognizes the discretionary nature of the Board's decision. There is no specific threshold which, if reached, will automatically lead to a decision to dismiss for reasons of delay. Each case must be considered in context.

[122] The Board should be careful not to encourage individuals to delay bringing applications before the Board simply because they are busy. Such an explanation will often fail to distinguish one individual from the next. However, Fraser's circumstances (accounting for his legal representation), layered with the impact of the pandemic, were exceptional.

[123] The Board has come to the conclusion that justice can be achieved by hearing and determining the issues before it. Those issues are such that they can be determined primarily with reference to broad legal principles, a significant documentary record, mathematical calculations, and testimony in relation to a few key events. Despite the Board having observed some issues with detailed recall in relation to certain events, the material issues are sufficiently well-documented to permit the Board to make the necessary determinations. The remedy requested

is financial. Finally, the Board is not persuaded that the delay has caused a shift in a potential remedy from the Employer to the Union (see analysis under “Remedy”).

Substantive Issues:

Duty of Fair Representation – General:

[124] Fraser has the onus to prove, on a balance of probabilities, that the Union has breached its duty of fair representation.

[125] The nature of the Union’s duty of fair representation 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:*
>
> > *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.*

[126] 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.*

[127] 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 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. 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.

[128] There is no free-standing duty to take direction from a grievor. A union will not be found to have breached the duty just because it has come to a conclusion with which the grievor did not agree.

[129] 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* 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.

[130] 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.[5]

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[5] *Hargrave* at para 35, quoting *Rousseau v International Brotherhood of Locomotive Engineers et al*., 95 CLLC 220-064 at 143.

[131] It is well established that, in a case involving critical job interests, the union may be held to a higher standard "than in cases of lesser importance to the individual".[6]

[132] Fraser alleges that the Union's conduct was seriously or grossly negligent and therefore arbitrary and that the Union was motivated by bad faith. He makes these allegations in relation to the Union's settlement of the remedy portion of the Arbitrator's award following the hearing of his grievances. Although these circumstances distinguish the matter from the majority of the cases that come before the Board, which involve a union's decision whether to file a grievance or whether to proceed to an arbitration hearing after filing a grievance, the general principles relating to a union's duty of fair representation are applicable.

[133] Fraser is extremely dissatisfied with the process used to arrive at the settlement and with the terms of the settlement. Given the nature of his concerns, the Board has had to consider whether the Union in its negotiations has acted arbitrarily or in bad faith. However, it needs to be said that the Board's role does not extend to reviewing the Union's decisions for correctness or even for reasonableness. Furthermore, the reality of settlement negotiations is that they are marked by uncertainty about alternative scenarios and involve power dynamics that require parties to weigh risks and engage in give and take.[7] The reasons underlying the various bargains that are proposed and that are reached are not always apparent. The result can be a settlement that is not obviously "rational".

[134] Underlying Fraser's arguments is the suggestion that the Union was motivated, due to its past mistakes and its preference to avoid responsibility for those mistakes, to settle the remedy under pressure from the Employer and without regard for Fraser's interests. The mistakes that Fraser alleges are many; the Board has not recited the related evidence in detail in these Reasons. Among the mistakes that Fraser alleges are that the Union failed to assist Fraser with his requests for a lateral transfer; failed to pursue other grievances it should have pursued; failed to bring the grievance to arbitration in a timely fashion; failed to bring key issues back to the arbitrator in the middle of negotiations over the remedy issue; failed to communicate key messages to the Employer, among others.

[135] The Union, on the other hand, complains that Fraser was not cooperative with its attempts to represent him. The Board has observed that one of the most common and consistent themes

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[6] *Hargrave* at para 40.
[7] See also, *KLS v Grain and General Services Union*, 2014 CanLII 11662 (SK LRB) at para 40.

throughout the evidence was Fraser's resistance to the notion that he had a duty to mitigate and, in particular, to the notion that his earnings, which were apparently flowing through his company, should be taken into account in the calculation of the settlement. This was despite the Arbitrator expressing clearly that Fraser's company's earnings were relevant (after the Union had brought the matter back) and the Union providing him with the same, solid advice. As will become evident through these reasons, Fraser's approach to this issue had an impact on the Union's ability to represent him.

[136] Next, the Board will consider each of the issues raised by Fraser within the overall context of the Union's representation, taking into account the following:[8]

> *[145] The Board does not minutely examine each and every action by the Union but looks at the whole course of conduct to determine whether the Union failed in its duty of fair representation. It is not the duty of the Board to assess the performance of the Union in each meeting or email undertaken in the course of Lapchuk's representation. The Board must look at the Union's representation of Lapchuk in its entirety and determine if the Union breached its duty of fair representation.*

Mitigation Calculation – Use of Higher Earnings:

[137] There is no doubt that Fraser had an obligation to mitigate his damages after he was terminated from his employment. The law on this basic point is clear.[9]

[138] In this application, Fraser's primary concern is that the Union agreed to reduce the lost income owing to him for the period of May 2017 to April 2018 by relying on the increased income from a contract that began in April 2018 despite him being unemployed during that initial period. He argues that, not only did the Union misapprehend the law with respect to mitigation, but the Union representatives completely failed to turn their minds to this question. To be clear, he does not argue that the Union breached its duty by permitting consideration of the income earned after the arbitration award was issued and the duty to mitigate had ended.

[139] There is no doubt that the Union sought and relied upon Fraser's additional income from the Recipient Appointed Advisor position.

[140] Fraser overstates the certainty of the law in this area. He relies on *LeBlanc* and *Shaw Communications*, two cases from the New Brunswick Court of Appeal from 1998 and 2004 respectively, and on *Loraas,* a 1999 decision of this Board. *LeBlanc* and *Shaw Communications*

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[8] *Lapchuk v Saskatchewan Government and General Employees' Union*, 2022 CanLII 21656 (SK LRB).
[9] Donald J. M. Brown and David M. Beatty, *Canadian Labour Arbitration*, looseleaf, 4th ed. (Toronto: Thomson Reuters, 2017) [*Brown and Beatty*] at 2:1512. See, for example, *Rattray, 2021* at para 15.

held that, regardless of the appropriate notice period, the damages should be cut off when the new employment commences so as to prevent the employer from benefiting from a windfall. *Loraas* described what were then the principles that had emerged from the Board's case law on mitigation, including:

> *2. The Board will compensate for the period of time that the employee would have been working if he or she had not been wrongfully terminated; see Remai Investment Corp. v. Saskatchewan Joint Board, R.W.D.S.U., [1991] Sask. Lab. Rep. 48 (Sask. L.R.B.), LRB File Nos. 056-90 to 058-90.*
>
> *[…]*
>
> *4. Employees who earn more income than they would have received from the employer are entitled to receive monetary loss for any period during which they had no earnings or employment; see Rite Way Mfg. Co. Ltd., supra, at 58-59.*

[141] However, the Union argues that this issue is not as straightforward as was suggested by Fraser, relying in particular on *Crook v Duxbury*, 2020 SKCA 43 [*Crook*] and *Rattray*. It should be mentioned that both of these decisions were issued after the settlement in the current case was reached.

[142] In *Crook*, the employer had terminated a fixed term employment contract before the expiry of the term. The parties had agreed that there was no duty on the employee to mitigate her loss. Despite this, the Court of Appeal found that, since the employee had mitigated her loss, the amounts she had earned were to be taken into account in determining the extent of the damages owed. The Court summarized the reasons for its conclusions at paragraph 46:

> *…Speaking generally, whether the parties to a fixed-term employment contract have contracted, either expressly or impliedly, for an amount to be payable on early termination as contractual damages or liquidated damages depends on the wording of the contract. That is to say, absent a provision to the contrary, the employee's cause of action following wrongful dismissal lays properly in breach of contract and is, therefore, subject to the usual principle of the law of damages, i.e., recovery is limited to the actual loss.*

[143] It is noteworthy that, in *Crook*, the contract that had been breached consisted of a fixed term, after the expiry of which there would have been no requirement for notice or pay in lieu. The actual loss could refer only to the term of the fixed contract.

[144] In *Rattray*, the Board considered the applicant's total loss and found that, due the applicant's higher income, no loss had occurred:

> *[15] Rattray had an obligation to attempt to mitigate his damages. He did that, by obtaining an equivalent position with AUPE, after approximately three months, that paid significantly more than the salary he was previously receiving at SGEU. As a result, no loss occurred;*

> *the amounts Rattray claimed for loss of vacation time and overtime are more than made up by this mitigation.*

[145] The Board explained its approach:

> *[27] The Union is fortunate that Rattray took seriously his duty to mitigate his damages, and quickly found employment that pays more than what he was earning from his employment at SGEU. This eliminated any requirement for the Union to pay him any further compensation for the loss of his employment than he received from SGEU. While Rattray may consider this unfair, it is consistent with the Board's longstanding position that the purpose of damages is not deterrence, but compensation. It is consistent with the Board's direction in the earlier Reasons that remedies are to be compensatory, not punitive. Throughout Rattray's submissions with respect to an appropriate remedy, he emphasized that a fair and equitable amount of damages would not just compensate him but also punish the Union, for example, "It is our firm belief that without a substantial penalty imposed upon the Local as a deterrent, there will be no recognition of the offences committed by the Local, and certainly no deterrence imposed on the Local, to not engage in this type of misconduct again."[16] In taking this approach, he lost sight of the purpose of the remedy that the Board would grant, and misinterpreted the direction provided to the parties when the Board urged the parties to attempt to resolve the issue of compensation on their own.*

[146] The Union also relies on *Toronto (City) v Toronto Civic Employees Union, Local 416*, 2004 CarswellOnt 9946 [*City of Toronto*]. There, the arbitrator described two divergent judicial approaches to cases involving alternate employment obtained during the notice period. One approach cuts off the damages when the new employment commences regardless of the appropriate notice period, as in *LeBlanc*. The other approach determines the appropriate notice period and then reduces the damages by the earnings of the employee throughout that period.

[147] The arbitrator observed that there is no meaningful distinction between court and arbitral principles which hold that the duty to mitigate obligates a wrongfully dismissed employee to be placed in the same position as if the breach had not occurred.[10] However, the fundamental principle of compensation is that the compensation should be for actual losses attributable to the wrongful conduct.

[148] In *Kideckel v Gard-X Automotive Refinish Inc*., 2020 ONSC 37 (CanLII), the Ontario Divisional Court stated:

> *[21] Although cases seem to go both ways on this point, the weight of authority, both academic and judicial, comes down on the side of the view expressed by the New Brunswick Court of Appeal [in LeBlanc], with which I am in respectful agreement.[3] As noted by Professor Waddams in his leading text, if the employer gave adequate working notice for the entire notice period, the worker would have been paid while he continued work up until commencing new employment, with no duty to account back to his old employer for his increased wages.[4]*

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[10] *Toronto (City) v Toronto Civic Employees Union, Local 416*, 2004 CarswellOnt 9946 [*City of Toronto*] at 6.

[149] On the other hand, in *International Alliance of Theatrical Stage Employees and Moving Picture Machine Technicians, Artists and Allied Crafts of the United States its Territories and Canada, Local 295 v Saskatchewan Centre of the Arts*, 2008 SKCA 136 (CanLII) [*IATSE*], the Saskatchewan Court of Appeal found:

> *[26] And a corollary of this is that any income earned by the grievor from another employment after the termination must be taken into account to the extent that it alters the actual loss. Otherwise, it is conceivable that a person in the position of the grievor could collect substantial damages far exceeding his actual loss. For he could begin a new job with equal or better pay and benefits commencing soon after his termination and suffer very little loss, yet collect full damages. That is what happened here. The grievor was awarded 85 weeks of salary when he was out of work for about six months, or 26 weeks. Neither simple logic nor the law allows such a result because the damages would no longer serve only the purpose of compensating the grievor for his actual loss, but to reward the grievor and punish the employer. In sum, it was unreasonable of the board to find that earnings of the grievor after termination should not be taken into account in assessing damages because that would compensate the grievor for a loss that he did not in fact incur.*

[150] The Federal Court of Appeal in *Bahniuk v Canada (Attorney General)*, 2016 FCA 127 (CanLII) commented on *IATSE*, stating that the set-off in that case was appropriate because "the damages awarded were referable to the same period as the monies earned in mitigation".[11] In the current case, there is no question about whether the "same period" is in issue. The settlement took place in the context of a reinstatement. The issue of determining an appropriate notice period is not relevant and has not been raised by the parties.

[151] The foregoing review of the case law reveals divergent approaches to mitigation in cases involving a person who has found alternate employment resulting in higher earnings. Granted, some of the cases that the Union relies upon were decided after the events relevant to the current dispute. However, even without the inevitable unpredictability of litigation, there would have been risk in bringing either argument before an arbitrator.

[152] However, Fraser makes the point that the Union did not even research the alternative argument. The Union therefore forfeited any opportunity it might have had to use the alternative argument as a bargaining chip with the Employer. It is well established that it is a breach of the Union's duty to fail to direct its mind to the merits of a matter.

[153] It is unlikely that the Union performed any significant research prior to the meeting on October 11. However, it is not accurate to conclude that the Union performed absolutely no

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[11] *Bahniuk v Canada (Attorney General)*, 2016 FCA 127 (CanLII) at para 26.

research on the general principles of mitigation prior to the settlement. Hardy's letter dated October 17, 2019 included an excerpt from a textbook describing arbitral decisions on the duty to mitigate. She obtained that excerpt from McCorriston. The excerpt suggests that there were resources available to the Union representatives that they had consulted. They were not operating out of willful disregard of their responsibilities.

[154] In cross, Hardy was asked about one decision, described in the excerpt, which found that an employer was not entitled to set off damages by amounts earned as a result of "extra effort". However, that same description draws a conclusion that goes against Fraser's interest:

> *…On the facts before him, Arbitrator Dissanayake decided that the employer was in fact entitled to the benefit of the grievor's very substantial overtime earnings, although solely, it would appear, on the basis that overtime was compulsory in the grievor's new job, and thus represented nothing more than the "normal performance" of that job.*

[155] Although a union is required to direct its "mind" to the merits of a matter, it is not required to direct its mind to every class of issue, regardless of the extent of complexity, nuance, or impact on a member's case. A union must be given reasonable latitude to make decisions about the settlement of a remedy within the whole context of the case. The foregoing review demonstrates that the mitigation principles involving higher earnings are complex and nuanced. In Saskatchewan, there is not clear support for Fraser's alternative argument. Given this, it was not gross or serious negligence for the Union not to have identified an issue with the Employer's position that would have then motivated it to research whether there was an alternative argument available to it. It was not arbitrary or in bad faith.

[156] Had the Board decided otherwise, it would not have found compensation to be an appropriate remedy. It was not necessary or critical to the outcome of his settlement for the Union to do research on this issue. The parties had significant room to maneuver in their negotiations. They settled on terms that were a compromise for the Employer given its position that Fraser had completely mitigated his losses. Fraser was compensated for some of his lost income in 2017 despite the conclusion that he had over-mitigated over the entire three-year period.

Overall Calculation:

[157] Fraser also argues that it was a problem for the parties to settle his remedy on the basis of gross income as opposed to deducting EI, CPP and income tax. Fraser says that his net income should have been $60,914 - approximately $5000 per month. If the Union had had regard for this basic principle, it would have had much greater success in its negotiations. Unfortunately for

Fraser, this argument is based on a wrong view of the law in this area. As explained by authors Ellen Mole and Marion Stendon, "[w]here remuneration is by salary, the calculation of damages is usually straightforward, based on the gross salary that would have been payable during the notice period".[12] By proceeding in the fashion that it did, the Union was acting in accordance with the generally accepted approach.

[158] Next, for 2019, the Employer estimated Fraser's income as $20,000 per month. The Union accepted this estimate. In justifying this, the Union states that the $20,000 per month estimate was "not really unreasonable" because Fraser invoiced $196,000 in approximately eight months in 2018, which is $24,500 per month and $196,000 divided by twelve is $16,333. The Union points out that $20,000 is in the middle of those figures. There is some truth to this. Fraser began working for the First Nation in April or May 2018. The business' gross billings for 2018 were $196,814 (inclusive of a relatively small amount from the University contract).

[159] Fraser argues that this calculation is inconsistent with the contract between the First Nation and the Government of Canada which he says allowed for his yearly income cap. The amending agreement sets out an amount of "$203,333.00, subject to any adjustments, or subsequent amendments". Fraser suggested that everyone should have been able to understand that the Amending Agreement was his yearly income cap and that he could not have earned more than that (and therefore the Employer's numbers, which allowed for a $240,000 annual gross income, had to be wrong). Reviewing the Agreement, it is not at all clear that he was limited to earning $203,000. The agreement allows for adjustments and amendments, is lacking in detail, and is not overly helpful in understanding the contract under which Fraser was operating.

[160] The fact that Hardy had experience working at a First Nation does not mean that she should have known better. Fraser bore some of the responsibility to provide the Union with the information it needed to calculate his income and factor it into the settlement. His income was information within his possession and, to some extent, within the scope of his knowledge.

[161] The Board disagrees with the Union when it suggests that Fraser "made no effort whatsoever to provide income or expense information about 2019". In fact, Fraser's corporate tax return for 2019 was not prepared by the time he was required to provide income information to the Union because it was not due until June 30, 2020.

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[12] Ellen E. Mole and Marion J. Stendon, *Wrongful Dismissal Practice Manual*, loose-leaf (Rel 68-4/2022) 2nd ed, Vol 2 (Toronto: LexisNexis, 2022) [*Wrongful Dismissal Practice Manual*] at 9.66.

[162] However, as early as February 28, 2019, after the return-to-work clearance, the Employer was requesting Fraser's employment income to date and the Union was forwarding this request to Fraser. Fraser was asking Buchinski why it mattered what employment income he made. Later, he was questioning why his corporate income should be included. Buchinski met with Hardy to discuss the fact that Fraser had not been providing the financial information needed to calculate the back pay. The Arbitrator later directed Fraser to provide his employment income. His direction was pointed and telling:

> *"Mr. Fraser is not working for free". (This would be unreasonable on Mr. Fraser's part, implying that he has been working for nothing) This needs to be done in the very near future (indicate an amount so the PSC can do a reasonable mitigation calculation).*

[163] In September, in response to the Union's request to provide income information, Fraser provided corporate tax returns and summaries; personal income tax returns; personal notices of assessment; T4s; contracts with the University; the Amending Agreement; and a Financial Analysis. The returns and assessments were for 2017 and 2018. He suggests that the Union led him along by seeking tax specific information, and if they had wanted something other than tax information, then they should have asked for it. However, the Union, while providing him with a list of required documentation, also sought "any additional documentation that details your employment income". They had been seeking employment income information from him for months. The specific request for service contracts should have been a signal that tax returns were not necessarily determinative.

[164] In the covering letter to the income information, Fraser explained that, in his view, he had provided all of the available information to allow for settlement discussions. And then he continued to suggest that his corporate income was irrelevant:

> *But I am still waiting for the employer's, [union's] and arbitrator's legal justification of why my personal settlement for wrongfully not being paid and ultimately fired by the employer has anything to do with the financial information of a separate legal corporate entity I work for. What money I make outside of working for the government should have no bearing on my personal settlement.*

[165] He also asked for clarification as to what the Union needed for 2019. Fraser makes the point that the Union representatives did not respond to this request, did not meet with him prior to the October meeting, and, prior to this timeframe, did not do proper research to support its position if it had one. McCorriston testified that he only "skimmed" the materials that Fraser submitted. The Board agrees that all of these actions and omissions were problematic and do not weigh in the Union's favour.

[166] However, Hardy then met with Fraser to give him an opportunity to speak to the calculations.

[167] Fraser suggests that at the November meeting Hardy presented the offer as a “done deal”. Even if there was a general sense of finality or impending finality to the negotiations, the Board believes that Hardy had intended to give Fraser an opportunity to review the calculations. In the course of her testimony, the Board observed that Hardy was careful not to speak to things that she did not understand or know. She acknowledged when mistakes were made, sometimes to her detriment. Hardy’s testimony was credible.

[168] Hardy drove to Kamsack to meet with Fraser. She brought two sets of documents, which suggests that she wanted Fraser’s input. Her description of Fraser’s initial reaction is consistent with the evidence of his frequent resistance to the parties considering his mitigation income in their negotiations. Her description of their conversation suggests that she was frustrated that Fraser was not doing more to help himself. She relied on his familiarity with accounting principles to provide a justification for the deductions.

[169] By contrast, there were significant inconsistencies in Fraser’s testimony. He repeatedly denied that he had resisted including his corporate income in the negotiations. The documents show otherwise. He found many ways to re-characterize his communications to the Union and the Employer on this issue, but it is clear from those communications that he was resisting the notion that his corporate income should be considered, even after the Arbitrator had ruled on this specific issue. He suggested that some accountants with whom he had spoken had advised him that this approach was wrong in principle (after saying accountants should not be expected to understand legalities).

[170] He denied in cross that, at that last meeting with Hardy, he was given a chance to discuss the numbers. He suggested that what she communicated was that it was a done deal. He then conceded that she may have left the documents with him, but that he couldn’t recall because he was in a state of shock. It was put to him in cross examination that Hardy gave him a chance to review and get back to her. He admitted that he did not review them or follow up.

[171] Although the Union did not give him very much time to review the documents he did not ask for more time. Furthermore, it is apparent that he received a copy of the package, did not review it, and did not get back to Hardy.

[172] In the Board's view, Hardy brought the draft agreement back to Fraser to seek his feedback on the calculations. She gave Fraser an opportunity to provide the Union with the information that was in his possession about how much income he had earned. For whatever reason, he chose not to take the opportunity.

[173] The Board does not place any weight on the fact that the Union took Fraser's signature line off the settlement offer. It was not unreasonable for the Union to conclude that it would not be able to obtain Fraser's agreement to any settlement as long as the settlement accounted for mitigation from his corporate income. A union does not have a free-standing duty to obtain a grievor's consent to a settlement.[13] Hardy was transparent in her testimony that she asked that his signature line be removed. That does not mean that Hardy was not going to try to discuss the details with Fraser in November – she did try.

[174] The Union argues that the question is not whether the Union was wrong but whether it was "$49,000 wrong" and whether it was grossly negligent for the Union not to have understood that. In the Board's view, this certainly provides some cushion for the Employer's estimates and for the Union's acceptance of those estimates. It also introduces some risk into the negotiations.

[175] For all of these reasons, the Board is not persuaded that the Union acted arbitrarily in permitting the Employer to estimate the 2019 income.

[176] Finally, despite McCorriston's testimony about "number crunching", the evidence suggests that the Employer's original offer did not change after the October meeting. However, there is nothing inherently wrong in the Union agreeing to a reasonable offer when presented with the facts upon which the offer is based.

Incomprehensible Timeframe:

[177] Fraser says that the settlement relied on an incomprehensible timeframe, by ending his payout period as of December 31, 2017. One could infer from the evidence that the 2017 cut-off (and income allowance) was an acknowledgement of what was determined to be over-mitigation that occurred in 2018 and 2019 and a compromise to permit compensation in 2017 despite over-mitigation in later years. Even if this inference were not available, the Union's agreeing to an incomprehensible timeframe, without more, is not evidence that it breached its duty. The Union's duty in the negotiations was to act in pursuit of Fraser's interests, not to ensure that the agreement

[13] For example, *KLS v Grain and General Services Union*, 2014 CanLII 11662 (SK LRB).

conformed exactly to Fraser's expectations. Fraser had an interest in the financial outcome, which was the focus of the negotiations.

Business Expenses:

[178] In the Board's view, Fraser was focused, to his detriment, on obtaining the precise deductions that were reflected in his tax returns and he did not appreciate the need to justify those deductions in the context of the mitigation calculation.

[179] Unfortunately, there is no formula to provide certainty about the business expenses that are to be deducted from a wrongful dismissal award. When expenses are accepted as business deductions by Revenue Canada it is not a guarantee that they will be allowed as deductions from the award:

> ***10.180 Expenses: General principles*** *– It has been said that expenses must reflect real losses as opposed to a financial strategy to minimize income. In one case, the expenses accepted as business deductions by Revenue Canada for income tax purposes were used as mitigation expenses to be deducted from earnings. These expenses have included incorporation and set-up costs, depreciation, the cost or value of a home office, and interest paid on funds invested in the business, both the employee's own and others' funds. Unreasonable and undocumented expenses have been refused.*[14]

[180] When Fraser finally provided his employment income information, he did not provide any justification for the business expenses that he was claiming, other than by providing the tax returns on which they were claimed.

[181] Fraser makes the point that he provided what he was asked for – tax information. If the Union needed different information to determine his income it should have asked for it. However, the Union provided him with the information he needed to understand the basis for the calculations that were made. The Union had the numbers related to income and expenses – he was given an opportunity to explain his expenses and he did not take it.

[182] Could the Union have done more to try to understand these expenses prior to the November 13 meeting? Yes. After the October meeting, the Union could have followed up with Fraser directly and discussed the business expenses. But when the November meeting came around, he refused to engage and chose not to review the documents or discuss the expenses with Hardy. He was given an opportunity to discuss these expenses, which he forfeited.

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[14] *Wrongful Dismissal Practice Manual* at 10-131.

[183] As for the donations, at the end of the hearing Fraser's counsel unexpectedly suggested that it was not a live issue. Given the brevity of those comments, the Board has considered this issue anyway. The Employer took the position that the donations were not reasonable expenses. The Board agrees with the Union that it had no argument with respect to the donations. The donations were obviously discretionary spending and not representative of a "real loss". The Union representatives fulfilled their duty by reviewing the nature of this item and the amount and then hearing from the Employer about its position on the matter.

University of Regina Income:

[184] Fraser argues that the Union should not have allowed the Employer to take into account his income from the University of Regina, as it was earned through a contract that his company has held with the University since 2013. It was not replacement income.

[185] The law is clear that only amounts earned in new employment or new self-employment or amounts that would not otherwise have been earned during the notice period, are to be deducted from the payout in mitigation.[15] The University of Regina income was not replacement income. It should not have been included as mitigation income.

[186] Even if the Union did not have Fraser's complete resume, there is no reason why it would not have known that at the time of his termination his contract with the University was an existing income source. Fraser had been working on a contract with the University since 2013. The arbitration award refers to Fraser working at the University in January 2017 to deliver a training session that "he had previously taught" and to the Employer expressing concern over him working elsewhere while on sick leave.[16]

[187] The 2017 University income is included as mitigation income in the settlement despite there being two versions of the calculation – one including this amount and one not.

[188] For 2017, one of the Employer's settlement calculations showed total earnings for 2017 as $55,264.22, which amount is comprised of total earnings owing plus pension contributions. Total reductions from this amount are $24,435, representing the EI payments in 2017. The total settlement payable was determined to be $30,829.22. There was no deduction for the University of Regina income because there was no net income. For the University contract, the calculations

[15] *Wrongful Dismissal Practice Manual* at 10-124 and 10-126.
[16] *Arbitration Award* at 20, 49, 50.

show an income amount of $9,185 less a deduction for expenses totaling $9,323 for a net loss of $138.

[189] Then, another calculation includes the same total earnings amount of $55,264.22, but total reductions in the amount of $33,620. This latter amount includes both the EI income and the University of Regina income. In this calculation, the total settlement payable is $21,644.22. This is exactly twice the amount that Fraser received in the settlement. In other words, the settlement amount represents exactly half of $21,644.22. Clearly, this is the calculation that was accepted.

[190] Next, the Union knew that Fraser was working at the University in 2018 but did not attempt to carve this income out of his gross earnings for the purpose of the negotiations. The gross billings of Fraser's company in 2018 were inclusive of the University income. His bank records suggest that he made approximately $6,000 in University income in 2018 (however, it is unclear whether this information is complete).

[191] The Union was aware that Fraser was objecting to the University income being included, albeit because he objected to the inclusion of corporate income. Fraser was advised that he was required to mitigate and that mitigation earnings attributed to his company were relevant. However, the Union made no attempt to determine whether there was any basis upon which to exclude existing income. Nor did it make any attempt to raise the specific issue of existing income with the Employer, despite the fact that the University of Regina income was included in the Employer's settlement calculations.

[192] Unlike the alternative argument on higher earnings, existing income would have been an obvious, uncomplicated, and easy legal issue to raise and address. It should not be up to a grievor to raise all manner of legal issues with a union so as to initiate their consideration. It is the Union's duty to turn its mind to the issues. The Union is a large and sophisticated organization with experience in negotiating settlements. The Union representatives should have had the relevant knowledge to be able to identify that existing income was an issue and to raise it in negotiations.

[193] In exercising its duty of fair representation, the Union is permitted to make mistakes. However, at no time did the Union turn its mind to the relevance of this specific category of income. Instead, the Union proceeded as though there was no issue whatsoever with including existing income as a mitigation offset. It would have made no difference if Fraser had raised it again in the November meeting – the Union representatives had demonstrated that they did not have the

knowledge to identify the problem. In this respect, the Union's conduct in the negotiations was cursory and therefore arbitrary.

50% Reduction in Lost Wages:

[194] The next issue relates to the 50% reduction in lost wages. The Union has correctly pointed out that what is not before the Board is whether the Union is 50% liable for the termination. The Arbitrator canvassed this matter at a high level. It cannot be argued that his determination on liability is a foregone conclusion.

[195] What is before the Board is the issue of whether the Union breached its duty of fair representation when addressing this issue in the settlement negotiations. In relation to this issue, the Union confirms that it is prepared to defend the settlement agreement, including the process that it engaged in and the substance of the agreement.

[196] The Employer repeatedly took the position that the Union was 50% liable for the termination. The Employer based its position on the following statement in the Arbitrator's award:

> *From this evidence, I am satisfied that had the Union contacted the Employer on April 17, 2017, the letter of termination would not have been sent on that date. While it is impossible to say with any certainty what might have transpired if the termination had been delayed, it is possible, even likely, that some of the constructive discussions that had been occurring in the two weeks prior to the termination would have re-started. Whether this would have led to a return to work or merely resulted in a short delay to the letter of termination is unknown. Any compensation for the Grievor's losses between his termination and reinstatement should take into account that the termination could have been postponed had the Union responded to the Grievor's email on April 17, 2017.*[17]

[197] The Union did not agree that its liability was 50%; it believed that its liability was minimal, and that its actions would have delayed the termination by only a few weeks.

[198] However, Buchinski sent an email, dated April 29, 2019, in which he summarized the discussion with the Arbitrator and confirmed that it was clear to all that the liability for loss of earnings did not rest solely with the Employer. On February 28, 2019, the Employer proposed that each of the Union and the Employer be responsible for half of the back pay. Buchinski disagreed and indicated that if this were the Employer's position that the Union would be asking to return the matter to the Arbitrator. On April 25, 2019, Buchinski was again asking the Employer to return to the Arbitrator to get direction about this issue.

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[17] *Arbitration Award* at 54-5.

[199] On August 13, 2019, the Employer again proposed a 50% reduction in the Employer's payment. This time, the Employer suggested that the reduction was due both to the Arbitrator's liability finding and to Fraser's demonstrated lack of cooperation with the process. In relation to this, on August 14, 2019, Buchinski wrote to McCorriston stating that it appeared that the Employer was going to "stick with the '50% reduction' theme, re: 'had the Union responded to the Grievor's email on April 17, 2017. It appears that the parties will need to have another discussion with [the Arbitrator]". McCorriston testified about the Employer's proposal, suggesting that the Employer was attempting to sell its proposal to the Union. In other words, the Employer's oblique reference to Fraser's lack of cooperation was an attempt to sell the 50% reduction to the Union by providing it with a different rationale.

[200] The Union and Employer did not revisit the 50% reduction issue in the meeting held on October 11. Although the Union believed that the percentage proposed by the Employer was wrong it did not come up with an alternative percentage. Nor did it bring the issue back to the Arbitrator. The Employer apparently chose to keep the original offer on the table.

[201] The settlement states that the "grievor will be issued a lump sum payment in the amount of $10,822.13 representing 50% of…". The settlement calculations for the period of May to December 2017, dated October 25, 2019, disclose a "total settlement payable" of $21,644.22. Half of this sum is exactly $10,822.13.

[202] The settlement does not specifically disclose the justification for the 50% reduction. McCorriston testified that the Employer needed to have some rationale to get the settlement approved. He also suggested that the final settlement was roughly equivalent to one party's cost of the arbitration.

[203] Fraser argues, relying on *Murray v Saskatoon (City)*, 1951 CanLII 202 (SK CA), that the Board should draw an adverse inference from the Union's failure to call Buchinski as a witness at the hearing. According to Fraser, Buchinski could testify about why the Union did not follow his recommendation to refer the liability issue back to the Arbitrator. The Union argues that there is no requirement to call witnesses on collateral facts. Anything Buchinski could have spoken to, the documents address clearly.

[204] On this issue, the authors of *The Law of Evidence in Canada*[18] state:

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[18] *Sopinka, Lederman and Bryant: The Law of Evidence in Canada, 5th ed* (LexisNexis Canada Inc., 2018), at paragraphs 6.471 and 6.472.

> *In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.*

[205] In the Board's view, Buchinski would not be assumed to be willing to assist the Union; nor does the Union have exclusive control over Buchinski. The Board is not persuaded that Buchinski's evidence would have been superior to other similar evidence. An adverse inference is not appropriate.

[206] The Union suggests that the Employer's calculations show that Fraser benefited $49,000 from the termination, and that as a result, there was a lot of room to be wrong about the specific numbers before it could be said that Fraser had not over-mitigated. The liability issue was overtaken by Fraser's significant over-mitigation. Given this, the relative liability of the Union was irrelevant to the final settlement and it did not need to be raised with the Arbitrator.

[207] Whether there was some other rationale for the reduction in the settlement by 50% does not provide a full answer to whether the Union fulfilled its duty to fairly represent Fraser. The Arbitrator had directed the parties that "any compensation for [Fraser's losses] should take into account that the termination could have been postponed had the Union responded to [the email]." Yet, the Union made a unilateral decision about the extent of its liability without regard for the positions or opinions of any of the Employer, Fraser, or the Arbitrator. Just because the Union did not believe that it was 50% liable did not make it true.

[208] Fraser suggests that the Union failed to recognize its conflict of interest in relation to this issue. The Union, on the other hand, suggests that conflicts of interest in union operations are commonplace; a union, by its nature, is required to balance the interests of one member with the interests of the overall membership and those interests do not always align. In the Board's view, the Union was being directed to take responsibility for its mistake. This is not the same as balancing the interests within an organization. At the least, the Union should have returned to the Arbitrator on this issue when it was apparent that it would not reach an agreement with the Employer.

[209] Hardy admitted in her testimony that she had very little experience with apportionment. It is obvious that the Union was not equipped to deal with this issue on its own. Its conduct in proceeding unilaterally to decide the extent of its liability, in all the circumstances, was arbitrary.

Missing Pension Contributions:

[210] First, Fraser complains about the fact that he was advised by the Union to acquiesce to the Employer's request that he contribute funds to match the Employer's pension contributions. Around this time, Buchinski was in regular contact with the Employer to facilitate progress being made on Fraser's settlement. His advice was entirely reasonable. The Employer had made an error in calculating the income that was owing and had determined that its missing pension contributions were to be subtracted from his gross pay. The request was logical and the amounts were relatively small. Fraser has not proven that he suffered any detriment (experienced any loss) as a result of the Union's advice on this issue.

[211] Second, Fraser suggests that the Union allowed the Employer to skip multiple pension contributions, causing financial loss. The Arbitrator's award required the payment of sick leave benefits including pension contributions from December 13, 2016 to May 13, 2017. Fraser states that the bi-weekly contributions were $243.96 and there were 12 bi-weekly pay periods, totaling $2,927.52. Fraser says he repeatedly asked the Union why the total pension contributions were missing but did not receive a satisfactory response. However, reviewing the pension account information provided by Fraser in this proceeding, it is clear that he received an Employer contribution at least equivalent to the required contribution for each bi-weekly pay period. Fraser has not proven that the Union failed to represent him in relation to this issue, as there was no problem to resolve.

[212] Third, Fraser argues that the Union failed to represent him in relation to the Employer's pension contributions for the period of time after May 13, 2017. Between December 13, 2016 to July 2019, there should have been 38 bi-weekly pay periods, totaling $9,270.48. The only Employer contributions totaled $1,101.06, resulting in a shortfall of $8,169.42. However, the Board has found that this allegation is completely unfounded. The Employer's calculations, which were provided to the Union for its review, included the pension amounts owing. The parties arrived at the settlement on the basis of those calculations.

Private Health Insurance:

[213] Fraser states that after his employment was terminated he was forced to purchase his own private health insurance. This cost was not factored into the settlement.

[214] Before the Union opened its case, the Board asked the parties whether this matter was properly before it. The application did not allege that the Union breached its duty by failing to negotiate for coverage of the cost of Fraser's private health insurance. However, the issue was raised squarely in Fraser's opening statement. Fraser presented evidence in his testimony in chief on the cost of the private health insurance and entered an exhibit specifying certain amounts. An email in evidence indicates that the Union's counsel was put on notice, prior to the commencement of the hearing, that Fraser's counsel was including in his exhibit book the cost of Fraser's private health insurance. This specific information does not touch on anything privileged or confidential.

[215] Counsel for the Union admitted that they were not surprised by the allegation but argued that there was prejudice flowing from the fact that this issue was not plead in the application. The Board reminded counsel that, consistent with its role as an administrative tribunal, it had the authority to amend the proceedings to determine the real questions in dispute. The Board asked counsel for the Union whether he wished to have a ruling on the issue before the Union opened its case. Counsel then opted to open the Union's case without a ruling for the sake of expediency, indicating that he would be in a position to lead evidence on the issue.

[216] Had counsel sought another opportunity to cross-examine Fraser on the issue, this was the time to apply to recall the witness, who was present at the hearing. At that point, with the extent of the information presented, it would have been inappropriate for counsel to lie in the weeds.

[217] The Union had sufficient notice of the issue such that it was aware of the case it had to meet. Pursuant to subsection 6-112(3), the Board hereby amends the defect in the proceedings for the purpose of determining the real issue that was raised, being the breach of the Union's duty in relation to the private health insurance costs.

[218] The Union argues that Fraser now relies on receipts of health care coverage that he had not provided to the Union in the course of the negotiations. This issue could have been resolved if Fraser had participated in the review of the calculations with Hardy on November 13, 2019. The

Union also acknowledges that, had Fraser provided receipts, it is an issue that could easily have been resolved.

[219] On August 4, 2018, Fraser provided Buchinski with a financial analysis that included an assessment of the cost of the personal health and dental plan, being $3,779.88 per year for two people plus $1,074.84 per year for one dependent (although initially covered with group insurance). These details should have permitted the Union to at least begin discussions with the Employer about this out-of-pocket cost. To be sure, this information (lacking receipts) was not sufficient to allow the Union to finalize a settlement including these benefits.

[220] In September 2019, in his package to the Union, Fraser directed the Union to "email me how you are going to factor in other required items like pension compensation, & health coverage we had to purchase etc." Although he had no written proof, McCorriston testified that the Employer had agreed to include health and welfare expenses if receipts were provided (despite the Employer's position on over-mitigation). McCorriston testified that he was confident that the Employer would have compensated for private health insurance in addition to the existing settlement amount if only Fraser had provided receipts.

[221] McCorriston admitted that after receiving all of the employment income information, he did not follow up to ask questions. The Union suggests that Fraser should have known to provide receipts. Based on what, it is unclear. The Union in its letter of September 6 did not mention this issue. The Union had not asked him for receipts. Hardy admitted that she did not address this issue with him at any point. To be sure, she testified that at the November meeting she wanted to discuss with him whether anything was missing from the calculations, and he was not interested in talking about any of it. However, the Board has no reason to believe that this issue was on Hardy's radar. There is no evidence to suggest that McCorriston and Hardy discussed the importance of following up with Fraser about his private health insurance.

[222] By the time Fraser met with Hardy in November, he had raised the issue multiple times and it was still not mentioned anywhere. Even if he had reviewed the package it is unlikely he would have thought that receiving coverage for health insurance was even an option. There is nothing that would have lead Fraser to believe that the Employer was willing to provide additional compensation under this heading.

[223] It was the Union's duty to provide Fraser with a reasonable opportunity to provide it with the information it needed to settle his grievance. It did not provide him with a reasonable

opportunity to provide information about the private health insurance. For all of these reasons, the Board finds that the Union acted in a manner that was cursory and superficial, and therefore arbitrary, in relation to the private health insurance.

Employment Insurance:

[224] First, Fraser suggests that the Union breached its duty by allowing the Employer to deduct EI from the settlement award. He argues that this approach is contrary to long established law.

[225] Sections 45 and 26 of the *Employment Insurance Act*, SC 1996 c 23 state:

> ***45*** *If a claimant receives benefits for a period and, under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person subsequently becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to the claimant for the same period and pays the earnings, the claimant shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid.*
>
> ***46 (1)*** *If under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to a claimant for a period and has reason to believe that benefits have been paid to the claimant for that period, the employer or other person shall ascertain whether an amount would be repayable under section 45 if the earnings were paid to the claimant and if so shall deduct the amount from the earnings payable to the claimant and remit it to the Receiver General as repayment of an overpayment of benefits.*
>
> ***(2)*** *If a claimant receives benefits for a period and under a labour arbitration award or court judgment, or for any other reason, the liability of an employer to pay the claimant earnings, including damages for wrongful dismissal, for the same period is or was reduced by the amount of the benefits or by a portion of them, the employer shall remit the amount or portion to the Receiver General as repayment of an overpayment of benefits.*

[226] Under a labour arbitration award or "for any other reason", if an amount that is repayable under section 45 is paid to the employee, then the employer shall deduct the amount from the payable earnings and remit it. If the employee had received the payment of earnings then he would have been required to repay "as an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid".

[227] However, authors Ellen Mole and Marion Stendon have observed that the law in this area remains far from clear:

> ***13.83 Deduction of EI benefits*** *– Whether benefits received should be regarded as mitigation of damages and deducted from the award has been in dispute over the years…*

> …
> ***13.82 Repayment of Benefits*** *– The issue seemed settled when the Unemployment Insurance Act was amended to provide for repayment of benefits received where the recipient later receives remuneration for the period of the benefits. An early decision under the amended law required a deduction and repayment from the award, but later decisions held that a damages award for wrongful dismissal did not constitute "remuneration" and therefore no repayment need be made from the award.*
> …
> ***13.85 Deduction from wrongful dismissal award*** *– Thus, despite further legislative attempts to make benefits received repayable by the employer, many cases have held that there should be no deduction from a wrongful dismissal award in consideration of unemployment insurance benefits or employment insurance benefits received. This is treated as a matter between the employee and the Unemployment Insurance Commission or Employment Insurance Commission, or as a statutory matter that will be applied when the money is paid, so it need not be dealt with by the court.*
> …
> ***13.86 Judges' practice*** *– Note, however, that a few judges continue to deduct from awards the benefits received by the employee. Some judges have specified that the amount of benefits received be deducted and remitted to the Unemployment or Employment Insurance Commission as a means of satisfying the judgment, or simply order that the amount of benefits paid shall be repaid to the Commission.*[19]

[228] An example of a one of the "few" court cases in which the benefits received by the employee were deducted from the award and required to be remitted by the employer as a means of satisfying the judgment is a case from Saskatchewan, *Fichter v Mann*, 2002 SKQB 464 (CanLII).

[229] The legislative attempts to make benefits received repayable by the employer have not had resounding success. The courts have adopted different approaches to the issue, one of which is to order an employer to remit the amount that is equivalent to the benefits received by the employee.

[230] The question, however, is whether the Union failed to fairly represent Fraser in permitting these deductions. There is minimal evidence that the Union gave this issue much thought. McCorriston's explanation for how the parties arrived at the deductions was not logical. It would have been preferable if the Union had at least insisted on a clause requiring the Employer to remit the equivalent amount. It is surprising that the Union did not.

[231] However, given the responsibility (whether on the employee or on the employer) to remit overpayments, the possibility of any detriment flowing to Fraser was negligible. Moreover, a remittance clause once decided that the Employer would make the deductions was not an issue

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[19] *Wrongful Dismissal Practice Manual*.

of critical interest to Fraser; the question of whether a remittance was owed was a question between the Employer and Service Canada.

[232] For these reasons, the Board does not find that the Union's conduct in relation to EI was arbitrary.

[233] Even if the Board is wrong about this, financial compensation is inappropriate. Fraser has not proven any loss nor demonstrated that he is being required to remit the money. Furthermore, if the Employer is liable for the remittance, then there is no loss.

Discrepancy in the Settlement Amount and Sum of $8,657.69:

[234] The Union points out that the application did not allege that the Union had breached its duty by permitting the Employer to make deductions from the lump sum prior to the payout. Fraser's lawyer raised the specific discrepancy in written submissions at the beginning of the hearing. As with the issue of private health insurance, the Board raised this issue before the Union opened its case. In the Board's view, the reference to the wrong sum in the application at paragraph 4(v) was an inadvertent error, which was clarified on multiple occasions throughout the proceedings, providing the Union with ample opportunity to cross examine the applicant on the matter. In view of these circumstances, the Board will amend this error in the proceedings, pursuant to subsection 6-112(3), for the purpose of determining the real issue that was raised.

[235] However, the Board has concluded, based on her testimony, that Hardy advised Fraser that the deductions from the lump sum would be made. Moreover, the "discrepancy" was not reported to the Union and therefore the Union could not have done anything about it. Although Fraser suggested that he reached out to the Union about it, he failed to provide the Board with any detail about that communication. His testimony on this point was unreliable. Furthermore, there is no evidence that there was some error in the calculation of the deductions to which the Union should have objected. The Board is not persuaded that the Union's conduct in relation to this issue was perfunctory, grossly negligent, superficial, cursory, or non-caring.

[236] Even if the Board were wrong, there could be no financial remedy arising from this issue. There is no evidence of loss. Fraser's T4A slip information includes the amount of $10,822.11 as "other income" and indicates a total of $2,164.42 income tax deducted from that amount. The difference between these two sums is $8,657.69, which is exactly what Fraser received.

Bad Faith:

[237] To find that the Union acted in bad faith it is necessary to consider the meaning of this term as it has been applied in employee-union disputes. The Board in *Canadian Union of Public Employees, Local 650 v Cristina Sipos-Bozzai*, 2022 CanLII 53790 (SK LRB) relied on the following descriptions:

> *[42] The next issue is whether the Union acted in bad faith. The test that the Board applies to determine if the Union acted in bad faith was described as follows in Zalopski:*
>
> > *[50] In Noël, LeBel J. stated that for purposes of duty of fair representation claims, the concept of bad faith "presumes intent to harm or malicious, fraudulent, spiteful or hostile conduct".*
>
> *[43] In Eros, the Board stated:*
>
> > *[184] Bad faith requires an element of intention. There is no evidence that any of the missteps in representing Mr. Eros were motivated by ill-will. Whenever possible, the representatives made efforts to set aside Mr. Eros's criticisms to focus on the task at hand. Even where they did not succeed in doing this, there is no evidence that they intended to deny Mr. Eros the benefits under the CBA. While individual representatives expressed some frustration towards Mr. Eros at various times, other representatives intervened to continue to provide Mr. Eros with service. On the whole, the Board does not agree that the Union was motivated by ill-will or hostility in its representation of Mr. Eros.*

[238] Fraser argues that the Union was acting in bad faith out of a desire to cover up its past mistakes. The Board does not find support for this argument in the evidence.

[239] The Board has considered the evidence about events that occurred prior to the arbitration. One of the issues raised was the delay in proceeding to arbitration. On this issue, Fraser did not present the relevant provisions from the collective bargaining agreement. The Union was successful at arbitration. The award does not disclose any issues with delay. The Union could not have been motivated to cover up a mistake that did not materialize into a problem.

[240] Fraser argues that the Board should draw an adverse inference from the Union's failure to call Buchinski to testify about the Union's negligence at the arbitration. As previously mentioned, Buchinski would not be assumed to be willing to assist the Union; nor does the Union have exclusive control over Buchinski. Moreover, there is no credible evidence that the Union was negligent during the arbitration; there is nothing to which Buchinski would have needed to respond. An adverse inference is not appropriate.

[241] The Union repeatedly advocated for Fraser following the issuance of the arbitration award; provided him with advice about mitigation and cooperation with the return-to-work efforts; assisted

him in advocating for more notice for interviews; and brought the matter back before the Arbitrator for additional guidance. Similarly, the Board finds no reason for the Union to have been concerned about its conduct in relation to the request for a lateral transfer or the decisions to pursue specific grievances and not others.

[242] Furthermore, Fraser's actions impeded his return to work. First, when he was offered a position, instead of showing up to work, Fraser fixated on a different position that was not offered and that he was not entitled to. He ignored the Employer's direction and the Union's advice. Furthermore, much of the delay following the arbitration was related to Fraser's schedule and the back-and-forth on his employment income.

[243] It is necessary to also consider the liability arising from the events of April 2017. As recently as August 14, 2019, Buchinski had indicated that the liability issue should return to the Arbitrator. The day Buchinski went on leave, McCorriston sent a letter to Fraser demanding all of his employment income information. In the letter, McCorriston's comments to the effect that Fraser had jeopardized the "monetary settlement" were inaccurate and his overall tone was bordering on hostile. From this point forward, there were occasions on which the Union representatives were found to be rushed and cursory in their approach. They suggested that they were under pressure to settle old grievances, which is a legitimate interest, but does not excuse poor judgment. The evidence suggests that McCorriston in particular was frustrated with the lack of progress on the file and was running out of patience.

[244] Against this backdrop, the Union representatives had convinced themselves that the Union's liability was minimal and that they had no real reason to return to the Arbitrator. No doubt, it is entirely open to a union to consider external factors, such as cost, in deciding whether to bring a matter to an Arbitrator. However, their failure to recognize the conflict of interest and to bring the matter back to the Arbitrator to determine the parties' respective liabilities suggests a degree of willful blindness.

[245] On the whole, however, the Board does not believe that the Union representatives intended to harm Fraser or to act in a malicious, fraudulent or spiteful manner, but instead lost their patience and rushed through the closure of his file without fully considering the consequences of their actions.

Remedy:

Nature of Remedy:

[246] The goal of a remedy is to place Fraser 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. 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;*

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

[248] Fraser also seeks compensation. Here, it is necessary to address the Union's argument about apportionment.

[249] The Union argues that it does not automatically flow that the Union is liable for all of the damages being sought. In this respect, the Union asks the Board to follow *Blondahl and Douglas College Faculty Assn., Re*, 2012 CarswellBC 3784, [2012] BCLRBD No 250 [*Blondahl*]. The Union argues that because the losses were accrued when the collective agreement was breached, no damages have accrued as a result of the Union's failures. The issues at the time of the settlement are the same as they are now. The Union asks the Board to consider by analogy the subrogation rights of an insurer against the party that caused the loss.

[250] It is well understood that the remedy for a breach of a union's duty of fair representation can be "innovative" and can impact an employer.[20] As explained by Adams:

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[20] George W. Adams, *Canadian Labour Law*, loose-leaf (12/2022 - Rel 5) 2nd ed (Toronto: Thomson Reuters, 2022), at 13-119.

> *Where the complainant employees have suffered damages as a result of lost earnings, the prevailing principle is to apportion losses between the trade union and the employer on the basis of causation. As the court stated in Vaca v. Sipes:*
>
> > *The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.*

[251] *Vava v Sipes*, an American case from the 1960s, involved a decision by the union to not take a grievance to arbitration.

[252] In *Blondahl*, the B.C. Board found that the union had breached its duty in the act of settling a grievance without proceeding to arbitration. It observed that in a case involving a failure to pursue a grievance to arbitration the standard remedy is to refer the grievance to arbitration even if this means visiting the consequences of the union's breach on the employer. The Board decided that the facts before it were indistinguishable from such a case and that it would be inconsistent with the principles of the Code to find that the settlement agreement barred remitting the grievance to arbitration.

[253] In such cases, an employer is generally liable for the damages that it would have had to pay had there been no breach of the duty of fair representation. In other words, the Union is liable for its portion of the damages attributable to the breach of the statute whereas the Employer is liable for its breach of the collective agreement. Although the question of whether and how to apportion damages is a discretionary determination, in exercising this discretion the Board must consider the parties' relative responsibilities and conduct.

[254] Turning to the present case, the first issue is the existing income from the University. Had the Union chosen to and successfully argued this issue, then the University income could have been deducted from the overall income considered in determining his settlement. However, to determine whether there is an appropriate compensatory remedy, the question is whether the breach of the Union's duty resulted in any quantifiable loss to Fraser. The Employer was taking the position that Fraser had over-mitigated by $49,000 over all three years and that Fraser was owed nothing. The higher earnings gave the Employer a major bargaining chip. Given the extent of over-mitigation, it is unlikely that there would have been any additional gain in the settlement.

[255] The Union also made a mistake when it failed to attempt to exclude the University income from the 2018 earnings. But had it been excluded it would have made only a small dent in what

the parties had agreed was over-mitigation for that year (even if the $6,000 is an underestimate) and cannot be found to constitute a loss.

[256] Therefore, there is no compensation arising from the breach of the Union's duty in relation to the existing income.

[257] The next issue pertains to the purchase of private health insurance. In his argument, Fraser states that the cost of the insurance was $343.10 per month for a total of $13,037 for 38 months. Fraser uses this same number (38) to refer to the number of bi-weekly payment periods that existed between December 13, 2016 to July 2019. Therefore, he has overestimated the amount that could be owing by confusing bi-weekly and monthly cycles and by claiming for the period of time prior to the date when he purchased the private health insurance (which was after April 2017).

[258] Fraser bears the onus to present the evidence of loss. In evidence are annual statements for Fraser's out-of-pocket expenses for his health insurance plans for the year 2021, which are not material. Also in evidence are bank entries for 2017 and 2018. The monthly premiums that show up on the bank entries total $3,579.62. Fraser testified that, due to his family composition, the premiums for these earlier years were higher than the premiums in 2021. The records also show that the premiums increased in March 2018.

[259] Although Fraser testified that he was locked in for a year, his bank records provide no details of any premiums paid after March 2018. In response to a question from his counsel, he was unable to confirm whether after this point the premiums were paid by himself or by the business, and by extension, whether they were claimed as business expenses. Although he was able to provide records for 2017, part of 2018, and 2021, he was not able to produce records for any other time period.

[260] Given the quality of testimony around this issue, the Board is unable to conclude without documentary records the extent of any losses incurred in relation to the purchase of health insurance after March 2018. Therefore, the award must be limited to compensation for the amounts specified in the bank records until March 2018, for a total of $3,579.62.

[261] In the Board's view, the liability for the losses related to private health insurance rests entirely with the Union. The arbitration has occurred and it was left to the parties to negotiate the remedy. The Union was responsible for representing Fraser's interests in those negotiations.

Throughout the course of those negotiations, the Union made choices, including choices that compromised Fraser's interests and weakened his position relative to that of the Employer.

[262] The Employer indicated that it would cover the private health insurance with proof of payment. It was the Union's responsibility to provide that proof but it did not take the steps that it needed to fulfill that responsibility. Although the original breach of the collective agreement caused Fraser to purchase the private health insurance, it was the intervening error by the Union that resulted in the settlement loss following arbitration.

[263] This is unlike a union breaching its duty by settling a grievance prior to arbitration. There, a union will often be found to be responsible for bringing the grievance to arbitration and bearing any additional loss. Here, the Union's argument suggests that the Employer is entirely liable for the Union's error and that the Union is liable for no loss except for that which might be occasioned as a result of the passage of time (prejudgment interest). However, the Employer was willing to take responsibility for its breach, barring the Union's failure. Due to the Union's failure, it has since settled the entire claim. The responsibility to compensate belongs to the Union.

[264] The last issue is the appropriate compensation for the Union's arbitrary conduct in relation to the 50% liability issue. It cannot be said that Fraser lost half of his income in 2017. There were too many variables influencing the final settlement to draw that conclusion. It is likely that the Employer initially chose to offer only half of the income from 2017 because it believed that the Union was partly liable. The motivation for maintaining this offer is unclear; what is clear is that the parties believed that Fraser had fully mitigated, and the Employer believed he was owed nothing. There is no way of knowing what the Arbitrator would have decided about the Union's liability. It is not evident that Fraser lost income as a result of the breach. What Fraser did lose was the opportunity to return to the Arbitrator and to determine the extent of the Union's liability.

[265] For these reasons, the Board will award Fraser the cost of a half day in front of the same Arbitrator in November 2019, subtracting the total amount of union dues that was waived. The total amount of union dues is not before the Board. Therefore, the Board will leave this calculation to the parties. This is not meant to be a precise determination of how much time it would have taken to decide the issue, but instead an acknowledgement of the lost opportunity, an appreciation of the uncertainty of any outcome, and a rough estimation of time for an experienced Arbitrator already familiar with the issues to decide a narrow issue. To be clear, this is a symbolic award for which precision is elusive; it is therefore not intended to be precise. Nor is it intended to require any payment on Fraser's behalf should the calculation result in a negative number.

[266] Finally, in the Arbitrator's award, he stated:

> *In terms of back pay to which the Griever may be entitled, that Issue cannot be determined before knowing when the Griever would have been medically fit to return to the workplace had he not been terminated;*

[267] To be clear, neither party has raised the issue of the return-to-work date and the impact that this would have had on the remedy. Therefore, there is no argument before the Board on this issue and the Board cannot factor it into its assessment of any loss.

Prejudgment Interest and Costs:

[268] Fraser has asked for prejudgment interest on any amounts awarded. While not common, there are precedents from this Board in which prejudgment interest has been ordered. Given the delay that occurred in bringing this application, it is not an appropriate case for prejudgment interest.

[269] Lastly, Fraser asks for an award of costs. The law of costs as applied by this Board was canvassed in *Hartmier*:

> *[237] As this Board noted in Rattray v Saskatchewan Government and General Employees' Union, LRB File No. 011-03, 2003 CanLII 62853 (SK LRB), at paragraph 13, "requests for costs are made so often and awards for costs are made so infrequently". It is necessary, therefore, to determine whether this is one of those infrequent cases where a costs order, let alone an order for costs on a solicitor-client basis, is warranted.*
> …

[270] The Board considered the following reasoning as set out in *Gordon Johnson v Amalgamated Transit Union, Local 588 and City of Regina*, LRB File No. 091-96 dated February 17, 1998, as follows:

> *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, 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. [Emphasis added in Hartmier]*

[271] Applying that reasoning, the Board in *Hartmier* found that an order should be made to reimburse the applicant for a portion of her legal expenses.

[272] Based on the Board's observations, Fraser could not have easily represented himself in these complicated proceedings. However, with greater attention to the central issues of his case, Fraser could have shortened and simplified his case greatly. Although he has been successful with some of his claims, many of his arguments are unfounded.

[273] There is no indemnification resolution in evidence, as in *Hartmier*.

[274] Given these conclusions, the Board would not have entertained more than a nominal amount as a costs award. However, the issue of costs was not raised until the close of relatively lengthy proceedings. On the whole, this is not an appropriate case in which to grant costs as part of an extraordinary make-whole remedy and, therefore, the request for costs is denied.

Conclusion:

[275] An appropriate order will accompany these Reasons. Given the calculations that need to be performed, the Union will have 60 days from the date of the order to make full compensation. The Board will remain seized to address any remedial issues that arise from this decision.

[276] The Board thanks both counsel for their excellent advocacy and for their helpful and extensive submissions, all of which have been reviewed.

DATED at Regina, Saskatchewan, this **8th** day of **February, 2023.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson