Saskatchewan
Labour Relations Board

SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, LOCAL 1105, Applicant v DARRYL UPPER, Respondent and GOVERNMENT OF SASKATCHEWAN, Respondent

LRB File Nos. 170-22 and 195-22; August 18, 2023
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Applicant, Saskatchewan Government and General Employees' Union, Local 1105:	Jake D. Zuk
The Respondent, Darryl Upper:	Self-Represented/ Sheri Gordon
Counsel for the Respondent, Government of Saskatchewan:	No one participating

Preliminary Issues – Delay – Sections 6-111(1)(h) and 6-112 of the Act – Underlying Duty of Fair Representation Application – Letters of Expectation and Discipline – Application to Dismiss Underlying Application for Undue Delay – Application Granted in Part – Remaining Issues Involve Union's Actions on Termination Grievance – Matter to be Scheduled for a Hearing for Remaining Issues.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to a preliminary issue of delay in the filing of an employee-union dispute, raised by the Saskatchewan Government and General Employees' Union, Local 1105 [Union]. Until his employment was terminated on August 6, 2021, Darryl Upper [Upper] was an employee with the Government of Saskatchewan. He began his employment on April 16, 2016 and, during the course of his employment, worked at Prince Albert Youth Residence (PAYR) and Pine Grove Correctional Centre (PGCC), both located in Prince Albert, Saskatchewan. In the underlying matter, Upper complains that the Union breached its duty of fair representation contrary to section 6-59 of *The Saskatchewan Employment Act*.

[2] After his employment was terminated, a grievance was filed, and an arbitration hearing was then held on March 10, 2022. The termination was upheld by an award dated April 21, 2022. Upper filed the duty of fair representation [DFR] application on October 21, 2022. In it, he makes

various allegations about the Union's actions in relation to matters arising prior to the termination date. The Union filed an application for summary dismissal, which was considered by the Board in its Reasons issued on February 16, 2023: *Saskatchewan Government and General Employees' Union, Local 1105 v Darryl Upper*, 2023 CanLII 10506 (SK LRB). In that decision, the Board made the following observations:

> *[37] Piecing together the Employee's allegations, he is suggesting that the Union failed to bring a grievance in relation to a letter from the Employer dated February 24, 2020, and that at some point, the Employee believed that he was being harassed but felt that he was not listened to or believed by the Union, and then felt that the Union failed to investigate the alleged harassment (at whichever time), which was connected to his termination, and which failure to investigate impacted the result of the Arbitration hearing.*
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> *[38] These allegations lack clarity as to when and for how long the alleged harassment was taking place, when and in what way the Employee approached the Union to seek assistance in relation to the alleged harassment, and when the investigation is supposed to have taken place. They raise a question as to whether the investigation is supposed to have taken place in furtherance of a potential grievance following the letter of February 24, 2020; or, as to whether the investigation is supposed to have taken place after this and closer in time to the arbitration hearing; or both. Although it is not explicitly stated, it is implied that the letter of February 24, 2020 was a disciplinary letter. Other than the reference to the disciplinary letter, the termination, and the arbitration, there are no details about timing. However, it is implied that the alleged failure to perform any fact finding impacted the outcome of the arbitration.*

[3] The Board found that a preliminary hearing, and not a summary dismissal proceeding, was the appropriate method for determining the delay issue that had been raised by the Union. The Board also decided to schedule a date for a case management conference to ensure that the hearing would be fair, the main concern being the extent of particulars provided.

[4] A case management conference was held on May 4, 2023. There, the Board set deadlines for a request for particulars to be provided by the Union to Upper, for a response to particulars from Upper, and for the filing of amended pleadings. Dates were scheduled for a hearing in relation to the preliminary issue. That hearing was held on June 26, 2023. At the hearing, the Board received evidence and heard arguments from the Union and from Upper. The Employer did not participate.

[5] The Union's position is that the portions of the complaint that relate to the Union's inaction or breach of section 6-59 in 2019, 2020, or early 2021, and in relation to an alleged campaign of harassment, should be dismissed for delay. The Union has not opposed and has all but conceded that the dispute pertaining to the carriage of the termination grievance should not be prevented from going forward.

Particulars:[1]

[6] In the particulars, Upper alleges that, starting with the letter of expectation dated September 17, 2019, each of the letters he received from the Employer were a form of singling out and harassment. He claims that the Employer targets Union Stewards when they conflict with management and that he was the victim of such conduct.

[7] On February 24, 2020, he received a letter of discipline which he discussed with the Union. A grievance was to be filed but after some time had passed, he contacted the Union and was told that the 30-day timeline had passed.

[8] He states that one of the Union representatives refused to provide an opinion about his matters in the absence of the Employer's side of the story. The Chief Steward and others within the Union did nothing to assist him. He twice made a reclassification request, but the request went nowhere. He spoke with a Union representative about a lack of investigation into his concerns, but there was no follow-up on his requests. He asked the Union representatives to deal with the repeated harassment but nothing was done and so it continued.

Evidence:

[9] At the hearing, the Board heard testimony from four witnesses: Patrick Sander and Bonnie McRae on behalf of the Union; Sheri Gordon and Upper on behalf of Upper. Sander and McRae are Labour Relations Officers [LROs] who work out of the Prince Albert office. Gordon was Upper's colleague during the material times.

[10] The issues raised by the current application relate primarily to three letters issued by the Employer prior to Upper's termination. The first of these, received by Upper on September 17, 2019, was a letter of expectation. This letter was not put in evidence. According to both Sander and McRae, the letter was not grievable. Letters of expectation never are.

[11] Next was a letter of reprimand dated February 24, 2020, listing violations of the Ministry's Code of Conduct and a violation of a Procedural Directive. In the letter, the Employer states that Upper's actions were particularly concerning given the expectations that had been set in the letter of September 17, 2019.

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[1] Given the issues raised by the Union, this summary does not include allegations directly related to the termination.

[12] Sander testified that filing grievances is officially the responsibility of the Stewards but that LROs would file grievances if there were no Stewards available to do so.

[13] Sander testified that he spoke with Upper about the letter dated February 24, 2020, explained that they had 30 days to file a grievance and explained that Upper would need to sign it before they did. This meeting took place sometime after the letter was issued and before the end of February. At the end of the conversation, Upper was going to think about whether he wanted to file a grievance. According to Sander, Upper never did provide instructions to file a grievance. Sander explained that the Union representatives do not reach out to employees to promote grievances.

[14] Sander testified that between the 2020 reprimand and the termination, Upper was frequently in Sander's office. McRae confirmed that she and Upper met with Sander quite often.

[15] Sander acknowledged in cross that he filed a grievance on the same day that Upper was terminated, without meeting in person. Sander also acknowledged that if the grievor sends an email giving permission to do so the Union representatives may sign a grievance.

[16] According to Sander, the Employer generally refuses to accept grievances that are filed past the 30-day deadline. He acknowledged that the timeframe from termination to arbitration is 120 days. He testified, however, that arbitrations tend to proceed after the deadline has passed. The Union process involves three committee levels. According to Sander, a period of 230 days, which was the timeframe for the arbitration in this case, does not fall within the established timeframe but is comparable to many other grievances.

[17] Gordon explained that she and Upper had spoken about the letter dated February 24, 2020, and had wanted it to be grieved. She explained that when they left Sander's office after the meeting, she had understood that a grievance was going to be filed (without Upper's signature). In fact, she understood that Sander would file the grievance that day. After the meeting, Gordon and Upper were waiting for a Step 1 meeting to be arranged and held. In response to a cross examination question about the state of her knowledge by the Summer of 2020 (May, June, July), Gordon explained that she eventually became aware that the 30-day deadline had passed with no grievance filed.

[18] Upper also testified that Sander had committed to filing a grievance in relation to the letter dated February 24, 2020. He had been so concerned about the Employer trying to fire him, that, according to him, he had told Sander to "bring in the heavies". He testified that, at some point, he

called Sander to ask how the grievance was going. According to him, Sander told him that no grievance had been filed and the deadline had passed. Upper testified that by the time he learned that the grievance had not been filed, there was no point in trying to fight it. He testified that Sander had always done what he said he was going to do, and he was shocked when the grievance had not been filed. Upper asked rhetorically, "should I have checked in on Pat? Well, again, Pat is…too busy sometimes."

[19] With respect to harassment, Sander explained that the Union does not fill out harassment complaint forms on behalf of members but does assist members in filling out the forms if they decide to do so. Sander testified that he spoke with Upper about this process and gave Upper the forms. Gordon corroborated this testimony, confirming that Sander had told them that the Union does not fill out harassment forms. She added that Sander had told Upper and herself that harassment allegations are hard to prove. She explained that when they left the meeting with Sander, she did not know what Upper would decide to do with respect to the harassment matter. In his testimony in chief, Upper admitted that, after the meeting with Sander it was "up in the air" whether Upper was going to file a harassment complaint against his supervisor. He was acutely aware of the challenges of proving harassment.

[20] Upper was elected as Chief Steward in June 2020, received Steward training in August 2020, and served in that role until his employment was terminated. In evidence are the facilitator's training materials. The materials include information on grievance handling, such as:

> *When an individual's rights have been violated and that person refuses to file a grievance, the steward should seek guidance from the LRO about the possibility of filing a grievance on behalf of the union. The management's argument that the steward cannot file an individual grievance on behalf of the union is false. However, it is not a best practice to file a grievance without the support of the grievor. If the individual is hesitant to file, some strategies may be utilized.*

[21] There are also some statements specific to timelines:

- *Your collective agreement usually outlines a fair, step by step process which sets the timeline and procedures for resolving grievances.*
- *It is important to file a grievance as soon as possible because your right to file a grievance expires after the defined time limit set out in your collective agreement.*

[22] One of the training sessions dealt specifically with respectful workplace and domestic violence. The course objectives include understanding a "steward's role in creation and

maintenance of a respectful workplace" and describing "how to respond appropriately to situations involving bullying and harassment".

[23] The Steward Handbook includes a section on harassment. There, the Stewards are advised not to offer to file a complaint on behalf of someone else but to explain to a member the workplace harassment procedure and the consequences of not taking formal action.

[24] Both Upper and Gordon testified that no Union representative had ever explained this Board's role in an employee-union dispute. Upper testified that the Steward training did not cover this topic. It was put to him that the Steward Handbook includes a section on a union's duty of fair representation, which states, "[l]abour boards use three standards to decide if the duty of fair representation has been violated". Upper suggested that he was confused as between the "Labour Board" (he is familiar with the Board in Ontario) and "Labour Standards" in Saskatchewan.

[25] Next, the third letter is dated January 7, 2021. In it, the Employer listed certain violations of the Code of Professional Conduct, referred to the earlier letter of reprimand, and imposed a one-shift suspension without pay to be served on January 8, 2021. Sander and Upper discussed grieving the letter. No grievance form was signed.

[26] On January 31, 2021, Upper sent an email to McRae asking "[w]hen is the deadline to hear … a response from the grievance?" On the same day, McRae responded, "what grievance are you talking about?" No grievance had been filed. In Gordon's view, he still had time to ask that a grievance related to the letter dated January 7, 2021 be filed. However, Upper did not follow up.

[27] Both Gordon and Upper testified that Upper had taken responsibility for the suspension imposed in January 2021. McRae also testified that, while not necessarily advisable, Upper was able to file a grievance on his own behalf as Chief Steward.

[28] McRae provided what was, at times, confusing evidence about Upper's request for a reclassification and a letter of offer in relation to a Level 5 position. In cross-examination, she acknowledged that these were two separate issues.

[29] Upper testified that, after the termination, he was not in a good state for a couple of months. He did not do much. About a month after the arbitration decision, he started looking into other avenues to "appeal" the arbitration decision. He contacted the Human Rights Commission.

He contacted Labour Standards a few times. Finally, someone at Labour Standards told him that this Board would deal with his matter. On cross examination, Upper testified that, as a result of his own research, he first learned in July of 2022 that he could file a DFR application with this Board. At this time, he gave the Union one last attempt to try to help him.

[30] In cross examination, Upper was asked why in 2020 he did not call around to determine the process for making a complaint against the Union. He replied, "because I was doing…pretty good from that time…the letter thing was blown out…all I had to do was make it two years." He queried, "am I supposed to make an issue out of every little thing the Union has done wrong?"

[31] Upper also testified that he "didn't expect to get fired". He later acknowledged in cross that after he received the letter dated January 7, 2021, he knew "they were gonna fire" him. People were coming up to him and making a point of saying, "you're still working here!" Although he accepted responsibility for the incident, he still believed that the letter was harassment. He believed that all of the letters were a form of harassment.

[32] Upper also identified certain individuals from whom he had claimed to have sought assistance: a member of the negotiating team representing PAYR; the President of SGEU; both the existing and present Vice-President of the SGEU Public Service Sector; and the SGEU Director of Labour Relations.

[33] Finally, Upper testified that his goal is to get his job back and that he wants a re-do through arbitration.

Arguments:

Union:

[34] Given the length of the delay, Upper is obligated to provide an explanation to overcome the presumption that a late filed application should be dismissed. Upper's explanation is insufficient. He states that the issues that are now important as a result of his termination were not important at the time that they arose. In effect, he attempts to link isolated complaints to extend the timeline and thwart a delay argument. The Board should reject this attempt on the part of Upper to circumvent the principles relating to delay.

[35] Upper is as sophisticated a member as is possible in relation to grievances, progressive discipline, and the duty of fair representation. He cannot plausibly suggest that he did not understand the implications of the Union's decision not to file grievances on his behalf. The

present matter is one where the fading recollections of the necessary witnesses would undermine the fairness of the hearing of the complaints.

[36] Furthermore, the Union will suffer real litigation prejudice if required to defend against the complaints. Since the circumstances that allegedly ground the allegations, Upper has been terminated and that termination was upheld in an arbitration decision which is binding upon the parties. If the Union were found to have breached its duty, there would be no opportunity for it to take up a grievance on Upper's behalf. The only potential remedy would be monetary. To defend against the complaints, the Union would have to address whether the evidence establishes a causal link between the absence of earlier grievances and the termination decision. The corrosion of evidence due to the passage of time would make this task unnecessarily difficult.

Employee:

[37] The letter of expectation dated September 17, 2019 was wrongfully carried over into the letter dated February 24, 2020. The Union was supposed to grieve the February 2020 letter and did not. Every letter was one step closer to the termination. In the arbitration, it was determined that his termination was justified, not because of the culminating incident but because of the progressive discipline.

[38] Upper acknowledges that there has been a delay in bringing the DFR application but suggests that much of the delay is attributable to the Union. The Union exceeded the arbitration deadline by approximately 110 days. After the arbitration decision was issued, Upper did not have the mental capacity to move forward with a complaint. When he regained his strength, he contacted the Union but had to wait for a response. From April until October, he contacted several Union representatives. Not one of them mentioned this Board. In July, he obtained the employee-union dispute form through this Board.

[39] Upper also complains about the delay from the time that he filed the application until the date of the hearing. The Union's application for summary dismissal has caused delays. The Union could have sought particulars from him directly but did not do so until the Board made that suggestion itself.

Analysis and Decision:

[40] The Board in *Hartmier v SJRWDSU, Local 955*, 2017 CanLII 20060 (SK LRB) [*Hartmier*] described the factors the Board considers when deciding whether a duty of fair representation application should be dismissed for undue delay:[2]

> *[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:*
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> - *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.*
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> - *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.*
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> - *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.*
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> - *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.*
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> - *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?*

[41] In *Saskatchewan Union of Nurses v South Central District Health Board*, [1995] 2nd Quarter, Sask Lab Rep, 281 [*SUN v South Central*], the Board reviewed the factors considered relevant by the Ontario Board:

> *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:*
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> > *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*

[2] *Hartmier*, at para 120.

> *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.*
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> *[…]*

[42] When adjudicating delay applications, it is not the role of the Board to assess the merits of the underlying allegations, but instead to determine what the allegations disclose about the relevant timeframe and what the circumstances disclose about the impact of delay.

[43] Upper states that the Union failed to fairly represent him in relation to the letters he received from the Employer, which he believes were harassment. Two issues that arise from these claims are: whether the Union failed to represent him in relation to grievance proceedings and whether the Union failed to represent him in relation to his harassment allegations.

[44] Given the close correlation between the allegations, the timelines for each are related. That is not to suggest that the deadlines that apply to grievances also apply to harassment complaints. Rather, it is to point out that Upper was identifying the letters as harassment, and at least with respect to the final two letters, communicating with the Union about them. He ought to have been, and was, aware of the options with respect to the letters, whether by way of filing a grievance or by way of filing a harassment complaint or otherwise, and about the assistance that the Union was willing and/or able to provide at approximately the same time.

[45] Whether or not it was an option, if he had wanted to file a grievance with respect to the first letter, it would have had to have been filed within 30 days. That said, letters of expectation are not grievable. Therefore, the focus in relation to this letter is the request made by Upper in relation to his harassment allegations. However, there is no clarity as to the content of any discussions about this letter. Therefore, it is necessary for the Board to consider the subsequent timelines.

[46] Upper states that he had expected the Union to file a grievance on his behalf in relation to the letter of February 24, 2020. It is not entirely clear when he became aware that the Union had not done so. Sander testified that Upper was going to consider whether to file a grievance but

never came back. Upper testified that he left Sander's office believing that Sander was going to file a grievance. Gordon's testimony suggests that, at least by Summer of 2020, she was aware that no grievance had been filed.

[47] According to Upper's account, he seemed quite satisfied to proceed on the basis that a grievance had been filed not only in the absence of his signature but also in the absence of a copy of the grievance that was supposed to have been filed on his behalf. However, for the current purposes, he ought to have exercised some due diligence to determine whether the Union had filed the grievance on his behalf either after the meeting or around the expiry of the deadline. The Union should not be penalized because its representative, Sander, happens to be particularly reliable. As such, Upper ought to have been aware of the relevant circumstances around March 2020.

[48] This puts the delay in relation to the grievance at over 30 months. Even if Upper were not required to exercise this due diligence, he knew, by July 2020 at the latest, that the grievance had not been filed. This puts the delay at approximately 27 months.

[49] Furthermore, Upper ought to have been aware of his options with respect to harassment when he met with Sander about the letter. On that date, he was provided the forms to fill out to file a harassment complaint. Even if he were not aware of the nature of the Union's assistance on that date, then he was aware, as of July 2020, that his only option was a harassment complaint. By that point, he ought to have exercised due diligence with respect to his concerns and been aware of the circumstances giving rise to his allegations against the Union with respect to harassment. This puts the delay at 27 months.

[50] In relation to the letter dated January 7, 2021, Upper admits that he took responsibility for the events as described and had not wanted to file a grievance. Clearly, Upper did not seek that a grievance be filed in relation to this letter. As such, he has no complaint against the Union based on a failure to file a grievance.

[51] Through its argument, the Union has suggested that all of Upper's complaints in relation to the letter dated January 7, 2021 are untimely but relies for its delay argument on Upper's knowledge of the actions or circumstances giving rise to the allegations as of February or March of 2020 (by not identifying a separate timeline).

[52] However, in the Board's view, Upper ought to have been aware of his options in respect of the letter dated January 7, 2021 by the beginning of February 2021, and ought to have known of the circumstances giving rise to his allegations at around the same time. The extent of the delay in relation to these allegations is approximately 21 months.

[53] Next, Upper also complains generally that the Union failed to assist him with the Employer-led campaign of harassment, overall. Upper ought to have known about the Union's actions or omissions in response to his allegations of a campaign of harassment, generally, by at least February 2021. Although the evidence is unclear as to the exact dates that he sought assistance from various Union officials, by this point he was convinced that the Employer was engaged in a campaign against him and he had been communicating with Sander about workplace concerns on a relatively frequent basis. Whether he could foresee the ultimate consequence of the Employer's actions is of no matter. He was sufficiently aware of the circumstances, including through his interactions with the Union, such that he ought to have been aware of the nature and extent of the Union's assistance.

[54] In summary, the relevant delay is at least 27 to over 30 months in relation to the first two letters and 21 months in relation to the third letter and the campaign.

[55] Next, 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.*

[56] The delays that the Board has identified are excessive. Acceptable delay is measured in months rather than years. Upper explains the delay by suggesting, first, that he was unaware of the Board's processes and, second, that he was never expecting to get fired and therefore was not sufficiently concerned by the Union's actions until he was terminated. In other words, the incidents at the time they occurred were not sufficient to galvanize action on his part but became sufficient at the point of termination.

[57] Neither of the reasons provided by Upper are compelling.

[58] First, Upper suggests that he was unaware of the Board's processes. This raises a question about the "sophistication of the applicant", which is a matter generally considered under the third factor. For ease of reference, the Board will consider it here.

[59] Upper was a Chief Steward from June 2020 until the date of his termination. Filing grievances is officially the responsibility of the Stewards. Upper received his Steward training in July 2020. The training covered grievances and DFRs. Although he suggests that he was unaware of the Board's processes and that the training did not properly prepare him for a DFR, the Steward's Handbook refers to the test applied by labour boards when addressing duty of fair representation complaints. Upper insisted that he was not aware of or did not understand the role of this Board in particular, however, when it was sufficiently important, he was able to do the necessary research and make the necessary calls and come to an understanding of the Board's role.

[60] Moreover, Upper admitted that he did not make the necessary phone calls any earlier because he had been satisfied with the state of affairs. According to Upper, "all I had to do was make it two years". He further indicated that he was not interested in complaining about "every little thing" that the Union did wrong and that there was no point in "trying to fight". He made these statements despite his evidence suggesting that he understood the nature of progressive discipline and believed that he was a target of the Employer's plan to terminate his employment.

[61] The Board has found that 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. There is a lack of coherence and consistency in the reasons Upper has provided for the delay. In the Board's view, the delay was not due to a lack of sophistication but instead a lack of concern about the events and a lack of willingness to pursue matters further at the time that they arose.

[62] Upper's second reason supports this conclusion. His second reason is that, due to the circumstances, he was not sufficiently concerned by the Union's actions until his employment was terminated. In other words, he was justified in waiting for a culminating event to occur. The Union argues that, in making this argument, Upper is attempting to link older events to newer events to justify the delay and to revive his complaints. In arguing that this approach is inappropriate, the Union relies on *Woodley*, 2000 CIRB 85 (CanLII), *N.A.B.E.T. v Dartmouth Cable TV Ltd*., 1991 CarswellNat 976, and *Coull v Warehousemen*, 1992 CarswellNat 913.

[63] In the Board's view, Upper was not justified in waiting for a culminating event to occur. The evidence reveals that Upper was aware that he was subject to progressive discipline. He was even concerned about it. He went so far as to suggest in cross that, after the second disciplinary

letter, he knew he was going to be terminated. He mentioned multiple times that he believed that he had a target on his back and believed that the Employer's actions were designed to eventually get him fired.

[64] Lastly, Upper has not relied on any special circumstances such as those that were set out in *Fraser v Saskatchewan Government and General Employees' Union*, 2023 CanLII 8378 (SK LRB).[3] Nor has the Board heard any evidence to support a finding that any such circumstances are applicable.

> 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.*

[65] Given the passage of time, the Union is concerned that the witnesses' memories are less well preserved, and the reliability of the oral evidence will be impacted. Despite these concerns, the Union suggests that the Union does not claim "actual" prejudice. Although there is an apparent contradiction in these positions, the Board understands the Union to be claiming actual prejudice only in relation to the degradation of the witness' memories. In fact, the Board observed issues with the memory, in particular, of McRae who repeatedly stated during her testimony that she was confused as between the letters. Perhaps this observation reveals what is just an assumption that these issues were caused by the passage of time. However, even in the absence of this evidence, the presumed prejudice weighs in the Union's favour.

> 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.*

[66] This factor has been addressed in the first section.

> 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.*

[67] Here, the Board must consider the nature of the issues at the time that the matters arose. At that time, the issues involved, firstly, a letter of expectation and two disciplinary letters (one of

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[3] *Fraser v Saskatchewan Government and General Employees' Union*, 2023 CanLII 8378 (SK LRB), at paras 111-114.

which imposed a one-day suspension). The stakes in relation to these matters are not sufficiently significant to overcome the excessive delay that has occurred in this case. Even assuming the stakes in relation to harassment are greater, the delay is excessive, and the reasons provided are insufficiently compelling to overcome the delay. Even if the stakes could be described as pertaining to the termination of Upper's employment, the same would hold true.

> 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?*

[68] The central issue is whether justice can be achieved in the matter despite the delay in filing the application. This standard recognizes the discretionary nature of the Board's decision. The Board has come to the conclusion that justice cannot be achieved in the matter, as it relates to the Union's actions (or omissions) around the letters of September 17, 2019, February 24, 2020, and January 7, 2021. To be clear, this determination covers the Union's actions in response to Upper's allegations that those letters were forms of harassment. Furthermore, the Board has come to the conclusion that justice cannot be achieved in the matter as it relates to the Union's actions in response to the alleged campaign of harassment.

[69] In summary, the portions of the application filed in LRB File No. 170-22 that put in issue the Union's actions or omissions in relation to the letters of September 17, 2019, February 24, 2020, and January 7, 2021 and the alleged campaign of harassment are dismissed for inordinate delay.

[70] What remains are the allegations about the Union's actions or omissions pertaining to the termination grievance. LRB File No. 170-22 will be placed on the Appearance Day schedule for the purpose of setting a date for a hearing of the matters that remain to be adjudicated.

[71] An appropriate Order will accompany these Reasons.

DATED at Regina, Saskatchewan, this **18th** day of **August, 2023.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson