Saskatchewan
Labour Relations Board

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

LRB File No. 170-22; December 19, 2023
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

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

**Employee-Union Dispute – Duty of Fair Representation – Section 6-59 of *The Saskatchewan Employment Act* – Probation Period for New Position – Training Session – Impugned Conduct – Fact-finding Interviews – Union Present at Meetings – Termination of Employment.**

**Grievance Filed – Union Pursued Steps – Recommended to Proceed to Arbitration – Choice of Proceeding – Case Management Proceeding – No *Viva Voce* Evidence – Decision of Arbitrator – Upheld Termination.**

**Allegation of Arbitrariness – Diligent Processing of Grievance – Strategic Decisions – No Breach of Duty – Application Dismissed.**

## REASONS FOR DECISION

**Background:**

**[1]** **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to an employee-union dispute filed by Darryl Upper. Upper alleges that the Saskatchewan Government and General Employees' Union [Union] has failed to comply with its duty of fair representation under section 6-59 of *The Saskatchewan Employment Act* [Act].

**[2]** As the hearing was bifurcated, these Reasons intend to address only whether the Union has contravened section 6-59 of the Act, and not to address the liability of the Union if it is found to have contravened the Act.

**[3]** The relevant allegations pertain to the Union's actions or omissions in relation to a termination grievance. Upper has raised additional allegations but in a prior decision[1] the Board granted the Union's application for summary dismissal, in part:

> *[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.*
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> *[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.*

**[4]** As background, until Upper's employment was terminated on August 6, 2021, he was an employee of the Government of Saskatchewan. Since 2016 he had worked as a part-time Level 5 HC Parental Care Supervisor and a part-time Level 8 HCS Facility Youth Worker. He held these positions at the Prince Albert Youth Residence (PAYR). During the course of his employment, Upper became Chief Shop Steward with the Union.

**[5]** On June 5, 2021, he commenced a part-time Level 8 HCW Corrections Officer position at Pine Grove Correctional Centre (PGCC), a women's correctional facility. He was on probation when his employment was terminated. After Upper's employment was terminated, a grievance was filed, and an arbitration hearing was held on March 10, 2022. Patrick Sander, a Labour Relations Officer (LRO) with the Union, was responsible for the carriage of the grievance. In an arbitration award dated April 21, 2022, the termination was upheld.

**Evidence:**

**[6]** The Board heard from two witnesses – Upper and Sander.

**[7]** Upper testified that he was a target of harassment in the workplace. He had spoken to Sander about this on previous occasions. He explained to Sander that the Employer was trying to terminate him; that was the direction the Employer was headed. When his employment was terminated, he believed that it was all a part of the Employer's plan.

**[8]** Prior to the Fall of 2020, men were not allowed to work at PGCC. The change in policy presented an opportunity for Upper. It was a condition of employment that new recruits attend a

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[1] *Saskatchewan Government and General Employees' Union, Local 1105 v Darryl Upper*, 2023 CanLII 75148 (SK LRB).

three-day Women Centered Training course. Upper attended the course on July 6, 7, and 8, 2021. Approximately one week after the conclusion of the course, two complaints were submitted to management – one by a facilitator, Gina Martin, and one by a supervisor who was in attendance at the training, Jamie Brahniuk. The complainants alleged that Upper had made inappropriate comments during the training session. The first was a question: “are the women allowed bananas”? The second was a comment that he “was excited to get into the facility so he could see where the blind spots on the cameras were”.

**[9]** In his testimony, Upper recalled the facilitators inviting the participants to ask any questions they wish, no matter “how vulgar”. He testified that there were other discussions during the training session about vulgar subject matter. The facilitators failed to control the class.

**[10]** The Employer conducted an investigation. In attendance at the investigation meetings was Michelle Pistun, a Union Steward, who was known for taking good notes. The Union’s notes indicate that Upper admitted to making the comments but that he attempted to provide context for them.

**[11]** According to the Employer’s notes, which were more detailed, Upper had indicated that black spots are there for the protection of staff, that they are a good place to go not to be seen, but also that a person has to watch one’s boundaries for one’s own protection.

**[12]** A follow-up meeting raised an allegation that Upper had been sleeping during an Indigenous training component of the course. The notes indicate that he denied sleeping, that he had a migraine and was “rubbing his eyes”, but also that he believed that the training was irrelevant.

**[13]** The notes from the subsequent meeting also suggest that some of the youth at PAYR had been asking about bananas – it was for this reason that Upper had raised the issue. And, he claimed that he had made the blind spots comment for the protection of the male staff, that is, so they would know to stay in plain sight.

**[14]** He was also asked to provide some information about the conduct of the instructors which he did.

**[15]** At some point, Upper indicated that “[w]e all know about women getting sexually assaulted and abused so we don’t need to be taught that”.

**[16]** In the hearing on the employee-union dispute, Upper acknowledged the statements and attempted to provide context similar to that which he had provided in the investigation. He also provided detailed reasons as to why he believed that the Indigenous training, which he says was not training but a presentation, was irrelevant to working at PGCC.

**[17]** Upper received two termination letters. The second letter was a revised version of the first. After he was terminated, he spoke with Sander. Sander filed a grievance right away. The Union proceeded through the grievance steps. Then, Sander went through two levels of the Union recommending that the Union proceed to third party resolution. In the first recommendation, he raised the context that Upper had provided. In the second, he raised the expectation that the instructors would address behaviors at the time of the training; the observation that Upper had been held to a higher standard due to Union involvement; and the concern that the Employer had not upheld the confidentiality of the training session.

**[18]** The collective bargaining agreement [CBA] provides four options for dispute resolution mechanisms: grievance mediation, expedited arbitration, case management, and full panel arbitration.

**[19]** The majority of the Union's grievances are resolved through case management. The case management process is described in the CBA. The general rules of evidence are not strictly applied ("except rules of 'onus'"). A grievance may be removed from case management at any time, prior to the hearing. Although the CBA does not mention witnesses,[2] Sander testified that a party may apply to cross examine witnesses if necessary.

**[20]** Expedited arbitration, by contrast, provides for a maximum of two witnesses who are examined, cross-examined and questioned by the arbitrator. The CBA indicates that a full panel arbitration consists of three members of a panel. Sander testified that the parties rarely use a full panel.

**[21]** In relation to Upper's grievance, Sander decided to proceed to case management. Sander was not comfortable putting Upper on the stand to testify. He was concerned that Upper would undermine his own case. In particular, Upper had not shown any remorse for his actions. Although he had acknowledged that he made the statements that were attributed to him, he had suggested that he was justified in making the statements due to the actions of others. Sander observed that a grievor who shows a lack of remorse is a risky witness.

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[2] Within the case management process.

**[22]** Sander was also concerned about the testimony of any Employer witnesses. He expected that the Employer witnesses would stick to their stories. He could not predict what they might add that would have injurious consequences.

**[23]** Sander did not interview any witnesses. He asked Upper to provide him with a list of individuals who had attended the training but Upper did not. Upper expressed reluctance, stating that the participants would be unlikely to testify, given that they would still be on probation.

**[24]** Upper had wanted Sander to interview the complainants and the Indigenous presenter. He thought that Sander could persuade them to retract their statements or could expose weaknesses in their stories. As far as Martin was concerned, Upper wanted to know if she had been told by management to submit the complaint. He believed that Martin had a close relationship with management.

**[25]** At the case management, both the Employer and the Union submitted materials to the arbitrator for his review. They made brief verbal submissions; no witnesses were cross examined. Sander argued that there was context for Upper's comments and that the termination was excessive in the context of progressive discipline.

**[26]** Sander advised Upper that he did not need to be present at the case management. Sander believed that the Union had a good case. He had informed Upper of this.

**[27]** The arbitration decision was issued on April 21, 2022. In it, the arbitrator summarized the positions of the Employer and the Union. The arbitrator found that the Employer was justified in determining that Upper had not passed his probationary period. In deciding whether the decision to terminate his employment was excessive, he took into account the seriousness of his misconduct "along with other factors including his disciplinary record".[3] He found it significant that the Employer had attempted progressive discipline but Upper had continued to demonstrate "an unwillingness or inability to conform with normal and reasonable behaviour expected of Correctional Officers".[4]

**Arguments:**

**[28]** What follows is a summary of the parties' arguments.

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[3] *Arbitrator's Decision*, at 7.
[4] *Arbitrator's Decision*, at 7.

*Upper:*

**[29]** The Union breached its duty of fair representation. Upper was not represented fairly and fully and to the best of Sander's ability.

**[30]** Sander did not do any fact-finding, whether with respect to the training session or the previous incidents of discipline. The package that Sander provided to the arbitrator included no supporting documents or steward notes related to the previous incidents. There was no documentation outlining the relevant context.

**[31]** Furthermore, not all of the facts contained in the package were factual. Sander simply made assumptions and proceeded on the basis of those assumptions. Beyond the Employer's investigation, he provided no additional information that would have supported Upper's case. He should have taken into account that management does not always follow its own policies in fact-finding meetings.

**[32]** Sander never told Upper why he was proceeding to case management. Nor did he tell Upper that he would be a bad witness or why he would be a bad witness. Sander speculated about the complainants but did not interview them as he should have.

**[33]** No case law was presented to the arbitrator.

**[34]** The time to arbitration was excessive. The CBA allows for 120 days; this case took 256 days.

*Union:*

**[35]** Upper has made no claims that the Union has acted in bad faith or in a discriminatory manner. Therefore, the sole issue is whether Sander's decision to use the case management process was arbitrary.

**[36]** The Board's role is to determine if the Union has arrived fairly and reasonably at its decision. It is not the Board's role to substitute its own opinion for that of the Union. Nor can it evaluate the Union's conduct on the basis that it was simply wrong, that the Union could have provided better representation, or that the Union did not do what the member wanted.

**[37]** The *Hartmier*[5] criteria require that a union: conduct a proper investigation into the full details of the grievance; clearly turn its mind to the merits of the grievance; make a reasoned judgment about its success or failure; and provide clear reasons for its decision not to proceed with a grievance. Applied to the present case, these criteria would disclose the following.

**[38]** First, the Union did conduct an investigation. The Steward was in attendance at the fact-finding meetings and took notes that could be relied upon by the LRO. Upper indicated that he understood that the findings could be used to assess the merits of the grievance or to determine its outcome.

**[39]** Sander's view was that it was unnecessary to interview the Employer's witnesses. There was no requirement to do so. They were unlikely to provide information helpful to Upper's case – after all, they had felt confident enough to bring the complaints in the first place. His reliance on the Employer's investigation notes, given Upper's admissions, was completely reasonable.

**[40]** Although Upper wanted the Union to conduct an independent investigation, it is the context of the grievance that determines what type of investigation is needed.

**[41]** After deciding to proceed with the case management process, Sander continued to meet with Upper. He asked Upper to review the submissions he intended to make. Sander turned his mind to the merits and after considering Upper's discipline record made the decision to pursue a grievance and to argue that the termination was excessive.

**[42]** After hearing from Upper that other training participants were unlikely to testify, Sander had no responsibility to embark on a fishing expedition for witnesses. He wasn't required to interview all 13 participants to determine if one of them might impeach the complainants. In a hearing with witness testimony, the Employer was very likely to bring its own evidence to support the termination. Sander's view was that the only way to sustain the grievance was to use the case management mechanism and to focus on the progressive discipline argument. Sander made a strategic decision based on his view of the potential evidence.

**[43]** Second, Sander turned his mind to the merits of the grievance. He made choices based on his belief that a full hearing would be fatal to the grievance. Even if his decision was wrong, it was not arbitrary.

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[5] *Hartmier v RWDSU, Local 955*, 2017 CanLII 20060 (SK LRB) [*Hartmier*].

**[44]** Third, the Union made a reasoned judgment about the dispute resolution process. Upper believes that he was entitled to a full arbitration hearing. A grievor has no standalone entitlement to an arbitration hearing, let alone a preferred type of arbitration hearing.

**[45]** The Union and the Employer have negotiated the inclusion of the case management process within the CBA. It is a legitimate dispute mechanism. This Board has considered the case management process in relation to the same bargaining unit and has found no issue with it.[6] The Federal Court of Appeal has also upheld the use of expedited arbitration.[7]

**[46]** Fourth, Sander explained to Upper why he decided to use the case management process. Sander had questioned Upper about the availability of additional witnesses. When a witness list was not forthcoming, he decided to focus on argument instead of contested evidence.

**[47]** Upper also has the benefit of the arbitrator's decision which makes clear why the termination was upheld.

**Analysis:**

**[48]** The Applicant bears the onus of proof in this application. In assessing the allegations, the Board considers whether the evidence demonstrates that it is more likely than not that the Union contravened its obligation pursuant to section 6-59 of the Act. The evidence must be sufficiently clear, convincing and cogent.

**[49]** This Board has on many occasions recited the principles that govern a duty of fair representation claim, as captured in a few key cases.

**[50]** One of these cases is *Ward*, in which the Board explained:[8]

> *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 favoritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*

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[6] *Koop v Saskatchewan*, 2009 CanLII 53732 (SK LRB).
[7] *Veillette v International Association of Machinists and Aerospace Workers*, 2011 FCA 32 (CanLII).
[8] *Glynna Ward v Saskatchewan Union of Nurses*, [1988] Winter Sask Labour Rep 44 at 47 [*Ward*].

**[51]** The Board has adopted the Ontario Board's explanation in *Toronto Transit Commission*, that an applicant must demonstrate, to the satisfaction of the Board, that a union's actions were:[9]

> *(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
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> *(2) "Discriminatory" – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
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> *(3) "in Bad Faith" – that is, motivated by ill-will, malice, hostility or dishonesty.*

**[52]** Upper does not allege discriminatory or bad faith conduct. He does not indicate into which category his allegations fall, but they are closest in description to the category of "arbitrariness".

**[53]** With respect to arbitrariness, the Board has often relied on *Rousseau*[10], in which it was said:

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

**[54]** A union is not held to a standard of perfection in its conduct of a grievance.

**[55]** In *Owl*[11], the Board commented on the scope of an investigation that is required by a union. The applicant had argued that the union had failed to interview witnesses who were supportive of her case. The Board found that those allegations "go to the nature and manner in which the Union chose to present the case" and that "[a]bsent gross negligence or extraordinary circumstances in the handling of the case, the Board should not interfere in second guessing or micro-managing the Union's case."[12]

**[56]** The Board relied on the Supreme Court of Canada's comments in *Noel*:[13]

> *50 The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the*

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[9] *Toronto Transit Commission*, [1997] OLRD 3148, at para 9.
[10] *Rousseau v International Brotherhood of Locomotive Engineers et al*., 95 CLLC 220-064 [*Rousseau*].
[11] *Owl v Saskatchewan Government and General Employees' Union*, 2014 CanLII 42401 (SK LRB) [*Owl*].
[12] *Owl*, at para 64.
[13] *Noël v Société d'énergie de la Baie James,* 2001 SCC 39 (CanLII), [2001] 2 SCR 207, cited in *MacNeill v RWDSU*, 2005 CanLII 63107 (SK LRB).

> *relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible. The association's resources, as well as the interests of the unit as a whole, should also be taken into account. The association thus has considerable discretion as to the type and extent of the efforts it will undertake in a specific case. (See Adams, supra, at pp. 13-20.1 to 13-20.6.)*

**[57]** In *Alexander*[14], the Board found that the union's investigation, in which it attended the employer's investigative meetings, was conducted in accordance with guidance previously provided by the Board. The Board stated:

> *[27] Here, the Union attended the Employer's investigative meetings, gathered information arising from that investigation, remained in direct communication with the Applicant, and sought advice from the National Representative. The Union's investigation was conducted in an objective and fair manner. The Executive considered the National Representative's assessment in deciding whether to proceed to arbitration. The Applicant was given a sufficient and fair opportunity to provide input into that process. By all accounts, the Union demonstrated that it was aware of its duty pursuant to the Act.*

**[58]** In *Datchko v Deer Park Employees' Association*,[15] the Board held:

> *[46] It is not for us to determine whether the Union was correct in deciding that the grievance would not be successful but rather to determine whether the Union arrived at that decision in a fair and reasonable manner, without gross negligence, taking into account all reasonably available information and relevant considerations. Mr. Leik, the Union's president, fairly investigated the matter, discussed it with the Employer's representative and, in consultation with his colleagues on the Union's executive, fairly arrived at the decision not to advance the grievance. As has been stated in numerous decisions of the Board, for example, in Hidlebaugh v. Saskatchewan Government and General Employees' Union and Saskatchewan Institute of Applied Science and Technology, [2003] Sask. L.R.B.R. 272, LRB File No. 097-02, it is not for the Board to minutely assess and second guess the actions of the Union in its conduct of the grievance procedure so long as it does not do so in violation of s. 25.1 of the Act.*
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> *…*
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> *[48] In Radke v. Canadian Paperworkers Union, Local 1120, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, the Board commented on what may reasonably be expected by an employee of a union at 64 and 65:*
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> > *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 interest 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.*

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[14] *John Thomas (Cameron) Alexander v Canadian Union of Public Employees*, 2020 CanLII 69948 (SK LRB).
[15] *Datchko v Deer Park Employees' Association*, 2006 CanLII 63025 (SK LRB).

**[59]** The Board does not minutely examine each and every action of the Union, but looks at the entirety of its conduct. As explained in *Chabot v Canadian Union of Public Employees, Local 4777*:[16]

> *The Board does not minutely examine each and every action by a union but looks at the whole course of conduct to see if the union failed in its duty of fair representation. Thus, it is not the duty of the Board to assess the performance of a union in each meeting, telephone conversation and correspondence undertaken in the course of representation of a member. The Board must look at the Union's representation of the Applicant in its entirety and determine if the Union acted arbitrarily in not filing a grievance with respect to the Applicant's complaints of harassment.*

**[60]** Finally, in *Hartmier*, the Board found that a union must fulfill four criteria to meet its duty of fair representation:[17]

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

**[61]** The Union defends its actions on the basis of the *Hartmier* criteria. Given that the Union chose to proceed to arbitration, most of these criteria do not fit neatly within the circumstances before the Board. While it is appropriate to ask whether the Union conducted a proper investigation, it is not relevant to ask whether the Union turned "its mind" to the merits of the grievance, made a reasoned judgment about its success or failure, or provided clear reasons for its decision "not to proceed". Given the relevant principles, it is more appropriate to ask whether the Union turned "its mind" to the central issues, made a reasoned judgment or judgments about the conduct of the case, and satisfied its duty to communicate with the grievor.

**[62]** Taking into account the foregoing principles, the Board will now decide whether the Union met its duty of fair representation in this case.

**[63]** First, the Board is satisfied that the Union conducted a proper investigation into the details of the grievance. The Union Steward attended and took notes during the fact-finding meetings. The LRO was in possession of those notes and reviewed them in assessing his next steps. He

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[16] *Chabot v Canadian Union of Public Employees, Local 4777*, 2007 CanLII 68749 (SK LRB) at para 74.
[17] *Jason G. Rattray v Unifor National*, 2020 CanLII 6405 (SK LRB), at para 90.

also obtained the Employer's notes and reviewed those. He met with Upper and discussed the issues Upper wished to have raised in the grievance proceeding. He sought a witness list from Upper. He reviewed and was familiar with Upper's past discipline matters. The submissions that Sander made, in his grievance proceeding recommendations and before the arbitrator, demonstrate that he was familiar with the issues. Upper acknowledged that Sander had a good understanding of the issues.

**[64]** Upper complains that Sander didn't interview the Employer's witnesses. There is no property in witnesses. No doubt, Sander might have gained more clarity about their likely evidence if he had done so. On the other hand, Upper's suggestion that Sander could have interviewed the Employer's witnesses for the purpose of having them retract their statements has an air of the inappropriate. Furthermore, interviewing a witness who is friendly to the opposing party carries a risk of improving the opposing party's case by eliciting evidence not previously disclosed. Some parties choose to take that risk. Here, Sander decided that the evidence from the Employer's witnesses was unlikely to be helpful. He made a tactical decision based on his experience and his understanding of the file. His decision not to interview the Employer's witnesses is not indicative of a breach of the Union's duty. Rather, it was a reasonable exercise of Sander's strategic judgment.

**[65]** Sander sought a witness list from Upper. That list was not forthcoming. Upper suggested that the participants were not likely to be willing witnesses. If they were not willing to testify, it is difficult to imagine how they would have been willing to participate in interviews intended to be used in grievance proceedings. Given these circumstances, the Union was not required to reach out to each of the 13 participants (or any of them) to determine whether one of them might be willing to testify on Upper's behalf. Sander had decided that doing so would be futile. This was also a reasonable exercise of Sander's strategic judgment.

**[66]** To be sure, the Union's investigation was not perfect. Sander did not seek information about the Employer's application of its policies to other employees. He explained that Upper's behaviour needed to be assessed on its own merits. However, an employer is required to apply its policies in a consistent and uniform manner, without regard to personal preferences or animosity. Surely, there was a way to obtain some general information along these lines.

**[67]** Furthermore, Upper had raised harassment as an issue. To be sure, he did not file a harassment complaint. Anything the Union did or did not do in relation to the previous discipline matters is not the subject of this hearing. But the fact is, whether from the previous discipline

matters or their post-termination conversations, Sander was aware of Upper's concerns about inconsistent treatment on the part of the Employer. He was also aware that there were two versions of the termination letter, and that the first version had relied on an inappropriate comment allegedly made by a different recruit.

**[68]** In considering this aspect of the investigation, the Board must appreciate that the Union is not held to a standard of perfection in its carriage of a grievance. It may be guilty of honest errors or even some laxity in the pursuit of the grievor's interests. It is not the Board's role to minutely examine each and every action by the Union but, instead, to review the whole course of conduct to determine whether the Union failed in its duty.

**[69]** The relevant context includes the following.

**[70]** First, it appears that Upper occupied a unique position in relation to the other participants in the training session. The evidence suggests that he was the one continuing employee among 13 new recruits. As such he would have had a unique history with the Employer, which included previous discipline matters that were taken into account in the discipline decision. Other employees would not have been in similar circumstances. The value of comparisons with such employees would have been limited by these facts.

**[71]** And, even if there were other continuing employees, further contextual factors persuade the Board that the Union's approach was sound.

**[72]** First, Upper failed to show remorse for his actions, including within the fact-finding meetings. Sander was very appropriately concerned about this. The Employer argued that Upper's demeanor in the fact-finding meetings was an aggravating factor in its decision to terminate his employment. In his decision, the arbitrator observed that Upper appeared "to just not get it".[18] The issue was not simply how Upper behaved in the training session, but also how he dealt with the allegations in the fact-finding meetings.

**[73]** Second, Sander was alive to the context of the allegations. He raised the conduct of the instructors and the other trainee during argument before the arbitrator. However, he appreciated that there was some risk in focusing excessively on the conduct of others. Sander had anticipated the Employer's argument, that is, that "the grievor failed to take accountability, shifting blame onto

[18] *Arbitrator's Decision*, at 7.

others". Relatedly, he found it necessary to highlight Upper's willingness to take responsibility. He indicated that Upper was not "shifting blame".

**[74]** Under the circumstances, Sander was walking a fine line between providing context and demonstrating Upper's willingness to take responsibility. Given the extent to which Upper was focused on the conduct of others, raising harassment was a double-edged sword. It would also be very difficult to prove. Sander believed that Upper had a good case on the basis of excessive discipline.

**[75]** In short, this aspect of the Union's investigation does not disclose serious or gross negligence; nor is it indicative of superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory conduct.

**[76]** Overall, the investigation was careful and considered, showing due regard for the grievor's interests.

**[77]** Next, during and after the grievance steps, Sander continued to proceed diligently. Sander attended the step meetings and did most of the talking. He made recommendations to proceed to arbitration, based on matters of relevance and significance.

**[78]** In deciding on his strategy, Sander took note of the fact that Upper had made certain admissions but that he had provided context which he believed had the effect of mitigating his conduct. Sander assessed the nature of the admissions and determined that his best approach was to argue that termination was excessive.

**[79]** Sander found that Upper would not make a good witness. He based this determination on Upper's failure to take remorse and his inclination to place the blame for his actions on other people. He also had to consider the unpredictable nature of witnesses. Sander had to make a strategic decision, weighing the risks inherent in presenting a case to an arbitrator. The Board finds no fault in Sander's assessment. In fact, it is likely that this decision gave Upper the best possible opportunity to have the grievance upheld.

**[80]** Overall, Sander decided that the best approach was to focus on the facts at a high level and to leave the rest for argument. The case management process had its benefits – greater

control over the evidence and more focus on the argument. Sander's decision to take advantage of these benefits was completely reasonable.[19]

**[81]** Sander prepared a package of materials that he presented to the arbitrator as a part of the case management proceeding. The package demonstrates that Sander was aware of the relevant issues, considered how best to address those issues, and advocated in relation to issues of relevance. Given that the general rules of evidence were not strictly applied, the factual bases for his arguments could have been gleaned from the materials.[20]

**[82]** He also provided some brief context for the previous disciplines, which included the full letters that the Employer had issued. Upper argued that Sander should have included the additional documentation arising from the investigation of the previous discipline matters. What he fails to understand is that the arbitration was not a re-litigation of the previous discipline matters. As a result of the investigations, the letters were issued. The letters were the relevant evidence for assessing the context of previous discipline matters.

**[83]** While the Union did not file any case law with the arbitrator, nor did the Employer. The Board does not find this to be indicative of arbitrary conduct. The matter was highly dependent on the factual context. The arbitrator is a highly regarded decision-maker with no shortage of experience and understanding of the law to be applied in similar matters.

**[84]** Upper also complained that Sander did not submit the relevant Employer policies to the arbitrator. Sander explained that the arbitrator was in possession of the policies and so they did not need to be submitted. The Board finds this explanation to be satisfactory.

**[85]** The Board has no concerns with the Union's communications with Upper. Sander met with Upper, discussed the grievance, talked about the fact-finding meetings, communicated sufficiently such that he understood the nature of his concerns, and provided Upper with an opportunity to review and consider the Union's package. When given the opportunity, Upper added to the submissions. Upper was provided with a copy of the arbitration decision.

**[86]** Upper complains that he was not told that he would make a bad witness. Clearer communication on this issue would have changed nothing. It is highly unlikely that Upper's testimony would have benefited him in any way.

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[19] See also, Michael MacNeil, Michael Lynk, Peter Engelmann, *Trade Union Law in Canada*, loose-leaf (11/2022 – Rel 4) (Toronto: Thomson Reuters, 2023), at 7-187.
[20] Having reviewed the package, including the attached materials.

**[87]** Finally, Upper raised the timeline to arbitration as an issue. The Board has no concerns about the length of time taken to arrive at the hearing. The timeframe was significantly shorter than that which was considered in *Lapchuk*.[21] It was not indicative of an uncaring attitude in the resolution of Upper's grievance.

**[88]** Lastly, Upper raised a concern about Sander not having provided information about short term disability. Within this proceeding, the Board has found that Upper's pleadings have lacked clarity.[22] For this reason, the Board has created procedures to ensure that the Union would have the information necessary to know the case it had to meet and to allow for a fair hearing. Nowhere in the pleadings or particulars that were initially filed or developed for the purpose of this process has Upper mentioned the issue of short-term disability. It was raised for the first time in the middle of the hearing. As a result, it would be unfair and prejudicial to the Union for the Board to consider this issue. The Board will not consider it.

**[89]** In conclusion, Upper has failed to discharge his onus. The Board is not satisfied that the Union breached its duty of fair representation, pursuant to section 6-59 of the Act, in relation to the termination grievance.

**[90]** The employee-union dispute is hereby dismissed. An appropriate Order will accompany these Reasons.

**DATED** at Regina, Saskatchewan, this **19th** day of **December, 2023.**

**LABOUR RELATIONS BOARD**

Barbara Mysko
Vice-Chairperson

[21] *David B. Lapchuk v Saskatchewan Government and General Employees' Union*, 2022 CanLII 21656 (SK LRB), at paras 165, 166.
[22] *Saskatchewan Government and General Employees' Union, Local 1105 v Darryl Upper*, 2023 CanLII 10506 (SK LRB), at para 68.