Saskatchewan
Labour Relations Board

The Applicant v SEIU-WEST and SIENNA SABRA LP, Respondents

LRB File No. 175-22; July 10, 2024
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for Applicant:	Self-represented
Counsel for SEIU-West:	Shannon Whyley
Counsel for Sienna Sabra LP:	Not Participating

Duty of Fair Representation Application – Casual Employee – Disability – Harassment Allegations – Time Off – Medical Documentation and Clearance Required – Union Intervention – Employee Placed on Leave of Absence – No Follow Through on Medical Clearance – Employment Status Unclear.

Onus Not Satisfied – Conduct Not Found to be Arbitrary, Discriminatory, or in Bad Faith – Application Dismissed.

REASONS FOR DECISION

Introduction:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to a duty of fair representation [DFR] application filed by the Applicant on October 28, 2022. During the material times, the Applicant was a casual employee of Sienna Sabra LP. Her place of employment was a retirement community located in southwestern Saskatchewan. SEIU-West was the certified bargaining agent representing the unit of which the Applicant was a member.

[2] During the Summer of 2022, the Applicant took time off work to attend to certain medical issues. She was asked to support her return to work through medical documentation. She provided some medical documentation but did not provide documentation that would ultimately clear her to return to work.

[3] No grievance was filed, and to date, the status of the Applicant's employment remains unclear.

[4] In the application, the Applicant makes the following allegations about the Union:

> *Not attending to requests in a timely manner*
>
> *No follow through with grievance processes*
>
> *No follow through with wrongful termination*
>
> *No follow through with work assignment from [location] to Saskatoon*
>
> *No providing attention to Harassment Complaint in a timely manner*
>
> *Request of Days worked, pay records for a Social Services Appeal for October 26, 2022 that has been adjourned to November 2, 2022, has not been provided in full*

[5] She seeks two remedies:

- *That I receive documentation for Social Services Appeal immediately*
- *That I receive and go through processes in place I was promised both from the union and Employer*

[6] In the Applicant's opening statement, she alluded to an unquantified request for compensation, but said that no amount could repair the harm that the Union has caused.

[7] The Union denies the Applicant's allegations. According to the Union, the Applicant is responsible for her current situation. In the summer of 2022, the Employer concluded that the Applicant had abandoned her position. The Union attempted to resolve the issue by working through a return-to-work process. Due to the Applicant's resistance, the return-to-work issue was never resolved. Instead of cooperating, the Applicant filed this application.

[8] A hearing was held with respect to the application in April and June of 2024. The Applicant and the Union attended and participated in the hearing. The Employer gave notice that it did not intend to participate due to its view of the dispute as resting solely between the Applicant and the Union.

[9] The Applicant has a disability (or disabilities) that impacts her ability to communicate with others. On October 2, 2023, the Board provided the Applicant with a link to its accommodation policy and related contact information. The Applicant did not make an accommodation request. Despite this, the Board took into consideration her stated limitations and, whenever fair for both parties, modified its process accordingly.

[10] Furthermore, the Applicant sought anonymization of this decision. The Union consented to this request on the condition that the Board would list the general issues, without mentioning specific terms, and would outline the applicable timelines.

[11] As this decision references the Applicant's personal health information, the Board has exercised its discretion to anonymize her name and to limit the amount of detail that might identify her. The Applicant should not interpret the lack of certain detail as suggesting the Board has not carefully reviewed the evidence, but only that it was not necessary to include that detail in these Reasons.

Summary of Evidence:

[12] Four witnesses testified at the hearing: the Applicant on her own behalf; and, Katelyn Thibeault, Angela Hosni, and Linette Pinfold for the Union.

[13] Thibeault was the union representative assigned to the workplace at the time. Hosni was Deputy Director of Contract Bargaining and Enforcement for the Union, and the supervisor of both Thibeault and Pinfold. Pinfold was a temporary union representative who was assigned to the workplace as needed and was assisting with Thibeault's workload.

[14] The Applicant started working in the position in or around October 2021. During the material times, she has been a beneficiary of the SAID program (Saskatchewan Assured Income for Disability).

[15] On May 9, 2022, the Applicant contacted the Union through the Member Resource Centre [MRC] with a concern about benefits. She had apparently been told that she didn't have any.

[16] On or about May 16, 2022, the retirement community saw a change in ownership.

[17] In or around June 2, 2022, the Applicant was advised that she would be subject to a triannual review by the Ministry of Social Services for the purpose of assessing SAID benefits.

[18] On June 6, the Applicant wrote a letter to the Employer, describing an incident which she believed was workplace harassment. The next day, the Applicant signed a Health and Safety Incident Report.

[19] On June 21, the Employer held a meeting via Webex to address certain observations that had been made with respect to the Applicant's behavior. Thibeault attended as the Applicant's union representation.

[20] On June 29, the Applicant spoke with Thibeault on the phone about the work environment. According to the notes from that phone call, Thibeault asked if she had made an incident report. The Applicant replied that she had not. Thibeault advised, "you need to". The Applicant said the behavior needed to stop. Thibeault asked if she was disciplined and indicated that the Applicant needed to ask that Thibeault be at disciplinary meetings. The Applicant agreed to email her complaint to Thibeault to be forwarded to the new HR Business Partner, Cristina Herman.

[21] On July 20, Thibeault emailed the Applicant, stating:

> *Hi there…*
>
> *I got your voicemail today, I apologize I was away sick so I received it late.*
>
> *It sounds like you have a lot going on right now. I feel like maybe having a formal accommodation meeting should be in order. How do you feel about that? Is there any information your Doctor can provide that could help the Employer know what you need in the work place in order to make things easier?*
>
> *What I am seeing in your incident report isn't necessarily what I would call harassment. Of course I understand this is probably a small part of what is going on for you. Can I ask if these concerns are new for you or have they been going on for sometime? Is the concern mainly that you feel you are not talked to or dealt with respectfully? What is it exactly that makes you feel that way?*

[22] The following day, the Applicant responded. The response was confusing and Thibeault replied to seek clarification.

[23] On July 26, Herman emailed Thibeault to ask if she knew that the Applicant had called in sick for the week, and asking if they were in contact. Thibeault replied that she had been trying to contact her without success but would email because "sometimes she responds that way".

[24] On August 3, Herman reached out to the Union to say that the Applicant hadn't shown up to her shifts and asking if they were in touch. Thibeault stated she hadn't heard from her, the Applicant's voice mail was full, but she would try to email. A minute later, Thibeault sent the Applicant an email indicating her voicemail was full, telling her that the Employer was looking for her, and asking if everything was okay.

[25] Later, Herman emailed to say she had drafted a letter for the Director to send to the Applicant's home and noted the location of the mailing address on file. Thibeault responded, providing the Applicant's mailing address and indicating that Saskatoon was her residence. (At some point, the Applicant had moved to Saskatoon).

[26] The Director sent a letter to the Applicant with a correct street address but transposing Saskatoon, where the Applicant was living, for the other location. This error was later corrected, but in pen.[1] The letter summarized her recent absences from work and indicated that she hadn't followed protocols to report absences or reasons therefor, hadn't made any effort to communicate with management, and asked her to get in touch.

[27] On August 4, the Applicant sent a lengthy description to Thibeault of the workplace circumstances that she believed to be harassment. Thibeault responded that she would address the information, but that first, the Applicant needed to submit medical documentation to the Employer "to hopefully avoid disciplinary action". She indicated that the medical could be sent by email and asked the Applicant to advise when that happened.

[28] In the morning of August 5,[2] the Applicant's supervisor texted the Applicant to advise that he hadn't yet received her doctor's note. He asked for a clear picture of it. This exchange suggests that the Applicant had spoken to her supervisor prior to August 5 about not attending work. Later that morning, the Applicant sent him a photo of a doctor's note, indicating that she was unfit for work until August 8.

[29] Shortly after, the Applicant emailed Thibeault stating that she had "sent it now". Later that day, she emailed again, indicating that she had returned home without being seen because she was "[n]ot sick enough". A few minutes later she emailed once again, stating that her daughter had accepted a registered letter and then opened it, and expressing concerns about her privacy due to the nature of the sender's address, which she didn't recognize.

[30] The Applicant was concerned, in part, that the letter had been sent in a normal envelope and had been registered to be sent to her address, not her person, which meant that her daughter was allowed to sign for it. She was also concerned (and, although it is unclear, this latter concern is seemingly related to the same letter sent by regular mail) that her daughter had opened the envelope, which contained her private information.

---

[1] E6 at page 2, 2nd full paragraph.
[2] The date is unclear.

[31] On August 7, the Applicant texted her supervisor to advise that she was not going to be at work for medical reasons. He replied that the doctor's note that she had submitted was valid only until August 8 and that she would need to provide another one "for any further time off". He asked that she "[p]lease let me know when you will be back to work".

[32] On August 15, the Applicant visited the Union office to discuss her circumstances. Hosni was pulled out of lunch to speak with her, and they had a lengthy discussion. According to Hosni, the Applicant was "lovely" to deal with. The Applicant disclosed that she had a disability. Hosni suggested that she seek an accommodation.

[33] Also on August 15, the Applicant sent an email to Thibeault stating that she didn't know what was going on because she had sent Thibeault "a whole bunch of information with no reply". She also stated that no one from work had contacted her, she hadn't been supplied a schedule, and would like to be at work. The subject line was "What is the Next Step". She asked for some direction.

[34] She sent another email to Pinfold and Barb Cape, the Union President, on August 16. She forwarded the August 15 email, stating that she had expected a reply from Thibeault about what she was doing, and had just learned through an automatic reply email that she was away from the office for a month.

[35] Then on August 18, the Employer sent a letter (by registered mail, regular mail, and email) to the Applicant asking for "an update on your medical status by having your attending physician complete the enclosed medical documentation and providing copies". The Employer provided a deadline, being August 24, 2022.

[36] On August 19, Pinfold replied to the Applicant stating that she gave the Employer her email to contact her, that the Applicant was on unpaid leave because of the insufficiency of medical, and that she needed to provide the Employer with a doctor's note. The Applicant replied stating that no one had called or texted and that she does "not answer private callers. They shouldn't call like this either."

[37] On August 23, Herman advised the Union that the Employer had not heard from the Applicant since they had sent the August 18 letter.

[38] The Employer sent another letter on August 25 (by registered mail, regular mail, and email), indicating that the Applicant had not been in contact, "nor shown for work". The Employer asked if she would be returning to her position, providing a deadline of August 29, after which the Employer would assume she was abandoning her position.

[39] On the same day, Pinfold emailed the Applicant, stating that the Employer had sent her a letter and asking her to respond, "or they will remove you from their employment", and indicating that "even an email to them will be ok".

[40] On August 29, Herman emailed Pinfold and Thibeault to advise that the Employer had not heard from the Applicant and were "going to have no choice but to assume she has abandoned her job and resigned" and asking if Pinfold or Thibeault had heard from her. Pinfold responded,

> *Hello I have emailed her to get in touch with you when you sent the last letter Advising her that if she is still ill to advise u of same but no response she sent me the same email u sent her*
>
> *Thanks for the notice*

[41] On August 30, Herman emailed the Applicant to formally accept her resignation "effective today". Apparently confused, not understanding that Herman was referring to the presumed abandonment, Pinfold replied "Has she sent her resignation?" Herman explained what had happened.

[42] The next day, the Applicant emailed Cape more than once, and then forwarded at least one of those emails to Pinfold a few days later (September 2). In it, she indicated that she was considering taking action against the Union. She complained that the Union representatives had only ever emailed her as a form of communication. She referred to the fact that she was a casual employee who was being treated as full-time, the Employer was supposed to be sending schedules, and she had not been sent a schedule since the last day she "left when I took a picture". She also seemed to suggest that the Employer wanted information about her future doctor's appointments, which she believed was meaningless.

[43] The Applicant had also expressed to Cape that she could not get in to see her family doctor until the end of September, and then only by phone. She suggested that she couldn't get the documentation signed.[3]

---

[3] U-30.

[44] On September 2, Pinfold and Herman exchanged emails to arrange a call to discuss the situation. Pinfold expressed that the Applicant had medical issues that "we need to deal with as a union and an employer", that "[s]he states that email is not the best way to deal with her", and that she would be off work until September 14. Pinfold asked if the Applicant could be put on a leave of absence until the situation was cleared up.

[45] Herman stated that, despite the Employer's attempts to reach out to the Applicant, they hadn't heard from her.

[46] Also on September 2, the Applicant sent a long email to Pinfold apologizing for offending her because "I stepped over and around you". She explained that she was upset about the breach of her privacy and that she was so angry that "every ounce of me is not picking up the registered letter nor have I opened the other letter".

[47] Hosni testified that she believed that the Applicant sent the apology email in part because of her own involvement. The Applicant felt she had a poor relationship with the union representatives. Hosni had said she would talk to them but asked her to reach out to them to work on the relationship. Hosni spoke with the representatives about their role.

[48] After receiving this email, Pinfold asked Herman who belonged to the return address displayed on the letters. She was told that it was Herman's address, as Herman was working from home.

[49] On September 7, there was a meeting between Hosni and Herman to discuss the Applicant's situation. Hosni described it as a "special measures" meeting that could serve as a pre-grievance step if necessary. Herman agreed to review the situation, to consider whether to return the Applicant to employment status, and under what conditions.

[50] The day after that meeting, on September 8, Pinfold wrote to Herman to say that she had a lengthy discussion with the Applicant and that the Applicant would get a doctor's note from a walk-in clinic as soon as possible. She also indicated that the Applicant was interested in switching to a facility in Saskatoon because she was living there now, and that she had enrolled in an employment program and would like to work around her school hours.

[51] The medical note that the Applicant obtained, and sent to the Union, indicated that she was unfit for work from September 12 to 13. The Applicant's email, sending the note to the Union,

implies that she was supposed to provide medical for future absences ("he said it's kind of hard to book you off sick ahead of schedule so there we go").

[52] Another doctor's note dated September 15, indicated that the Applicant had attended an appointment on September 13 at 3 p.m.

[53] On September 22, Thibeault wrote to the Applicant asking if she had been "able to get something written to cover you from the Aug 8th day to current". Later that day, the Applicant responded with a lengthy email in which she complained about various issues, including: the Union hadn't asked her what she needed; she had been dealing with many issues that created obstacles to obtaining medical information; and there had been a lack of action in response to the workplace harassment.

[54] She also provided a list of demands:

- *A full year of benefits*
- *Enrolment and completion of the medication administration course*
- *Document of medication course*
- *Information about Resident Assistant [RA] course, enrolment, and reimbursement*
- *Grievance of the RA position*
- *A copy of all her pay stubs and dates worked*
- *Harassment complaint dealt with*
- *Incident and harassment report dealt with*
- *The above to be done as soon as possible to resume working*
- *Corrective action in form of harassment education at workplace*

[55] She indicated that she wasn't ruling out compensation.

[56] On September 28, the Applicant followed up with Thibeault stating that she hadn't heard from Thibeault in response to her email, and then posed a number of questions. Thibeault replied, providing answers to the questions, and indicating that the Employer needed a medical note clearing the Applicant to return to work "after being off for so long" and that they "technically need a note excusing your time from Aug 8th to current but they have said they will accept a note simply clearing you to return to work". She advised that with medical clearance the Applicant would be brought on board the Saskatoon facility at the same rate of pay as previous.

[57] Thibeault closed with:

> *…I cannot stress enough the importance of you getting this medical complete in order to return you to work. The position [in] Saskatoon hinges on you getting that medical to them.*
>
> *…*
>
> *[Let's] get you to work in Saskatoon and then we can deal more with the problems that were at [location].*
>
> *Can I sign you up for SEIU-West's Unionism 101 course?*

[58] On October 3, the Applicant emailed Hosni asking for a meeting and stating that "everything we discussed [has been] the exact opposite". She also expressed concern about "going into a new probation just to show and be fired for no reason".

[59] Hosni replied, expressing confusion over the Applicant's qualifications for the Resident Assistant [RA] position, suggesting that the bullying concerns were partially addressed by the inquiries about the mystery union address, and stating that the move to Saskatoon was a reasonable resolution. She also stated:

> *As I understand it, the termination is due to "abandonment of shifts" but we agree with you that you didn't abandon any shifts, you were booked into shifts without your knowledge. Further, it has been discussed between the parties that your unavailability (as opposed to absence) has been mostly due to medical issues, for which you have provided some evidence. We believe we have successfully clarified those points with your Employer.*

[60] The Applicant wrote again on October 5, stating that she "wasn't completed" the medication course, which information was presumably connected to the RA position (however, it is unclear whether the medication course was a necessary component). Hosni forwarded the email to Pinfold.

[61] The Applicant testified that she had tried to communicate to the Union that she wanted to finish the necessary modules for the RA position, but when the Union communicated to the Employer it failed to get the facts right. According to Hosni, the reason that the RA issue did not result in a grievance was that the Applicant did not have the qualifications for the position.

[62] Also on October 5, the Applicant wrote to Pinfold asking that common sense be applied in the request for medical clearance, stating that she was attending a program "about work", indicating that she had received no SAID benefits for September or October, stating that she needed information about actual days of work and pay stubs, expressing interest in two Saskatoon positions (the interest in the second position was conditional), and asking for more details about hours. Pinfold responded that she would have to contact the Employer for the

information for SAID, and asking if she should contact Herman about “the job”. Apparently, Pinfold missed the part about the Applicant being potentially interested in either job.

[63] On October 6, Pinfold wrote to Herman asking for more information about one of the positions (not the conditional one) and advising that the Applicant was involved in a work placement program. Herman wrote Pinfold stating that the Saskatoon facility had an opening and reiterating that they were “not willing to provide an offer of employment” without medical clearance to work and asking for information on the work placement program. Pinfold forwarded the information about the program.

[64] On October 7, Hosni wrote to the Applicant confirming: that the Employer had to provide her with the historical payroll data; that the Employer had to acknowledge that she didn’t abandon any shifts (she was unaware she was booked); and that the Employer’s request for medical clearance for the position in Saskatoon was reasonable, was urgent, and was the Employer’s attempt to resolve all outstanding matters. She explained: “They are requesting that you provide medical that indicates you are fit to work, which SEIU-West does see as a reasonable request based on current jurisprudence.”

[65] Hosni offered the following alternative:

> *The alternative to all of the above is for us to pursue grievance(s) to the point of presenting them to our internal Grievance Committee, who may elect to pursue arbitration or may elect to withdraw your grievances and take no further action on your behalf.*

[66] The Applicant didn’t respond to this email.

[67] In her testimony, Hosni agreed that if the Applicant had been terminated it would have been wrongful. The Applicant was a casual employee, which meant that she could not be booked for shifts without having accepted them. It seemed that the Employer had been booking her for shifts and then taking the position that the Applicant needed medical documentation to support her absences.

[68] On October 12, the Applicant emailed Pinfold stating that “[a]attached is the doctor’s note that I got last night. This should put everything to rest which was a waste of my time and money.”

[69] She also asked for help in obtaining the information for the SAID review. Pinfold emailed Herman stating that the Applicant hadn’t been able to access the system.

[70] On October 13, Herman provided only the last three pay stubs but indicated that she would send more if requested.

[71] On October 20, the Applicant emailed the Union expressing her frustration with what she viewed as a lack of action by the Union. Based on the email, the Applicant seemed to think her position had been terminated and that she should have received a record of employment, despite having been told that she was on leave. She gave the Union a short deadline for a response, after which she would be "taking a different line of action".

[72] Shortly after this email, there was vague response from Pinfold, a blunt response from the Applicant, and then a request from Hosni that the Applicant communicate respectfully: "No one likes to be threatened, particularly when it is your employer that isn't acting, not us".

[73] On October 21, Herman provided all pay stubs since the company had assumed operations in May 2022. The Applicant was never provided with the pay stubs from the previous owner. In the meantime, the first hearing date for the Social Services appeal was on October 10. The Applicant didn't have the information she needed by then, and the hearing was adjourned. She was also involved in a matter before the Office of Residential Tenancies. In or around January or February of 2023, the Ministry of Social Services withdrew the matter, and the issue went away. It is unclear exactly what happened with the ORT matter.

[74] On October 28, the Applicant filed this application. She has never provided a medical clearance, sought that a functional assessment be completed, or returned to work for the Employer.

[75] As mentioned, the Employer did not participate in these proceedings. As a result, there was no specific evidence before the Board about the scheduling process for casual employees. The Applicant described the process only in very general terms.

Procedural Matters:

[76] After the Union's last witness was called, the Applicant made an application to call rebuttal evidence. The application was non-specific and, as articulated, appeared to be an attempt to re-do the Applicant's cross-examination of Hosni. The Board advised the Applicant that, as articulated, the application would not be allowed, but provided her with an opportunity to re-consider and remake the application the following day. The following day, when the Board asked the Applicant whether she intended to renew the application, she indicated that she did not.

[77] Next, the Applicant asked for more time to prepare her written closing argument, signaling that she was prepared to make oral argument that Friday but wanted to submit her written argument the following Tuesday. The Board indicated that it would not split oral and written submissions in that manner, as it would be unfair to the Union, and asked if the Union could accommodate a later closing argument date.

[78] After some discussion about the limited availability of the Union and the Board, the Board suggested adjourning until the afternoon, providing the Applicant with more time to prepare her written submissions. The Board reminded the Applicant, that since the last hearing dates, she had had weeks to prepare her closing arguments. Following discussion, the Board adjourned until 2 p.m. that afternoon and the closing arguments proceeded at that time.

Arguments:

Applicant

[79] The Applicant relies on sections 6-59 and 6-60 of the Act, and claims that the Union breached its duty of fair representation in its dealings with her.

[80] She acknowledges that there is no provision in the CBA that requires the Employer to provide her with pay stubs, but it is common sense that if employees have a right to their pay stubs, they have a right to access them.

[81] Even though the Employer repeatedly asked for medical information during a high stress period of her life, the Applicant was reprimanded when she asked for pay stubs so as to prevent a devastating life event. This is asymmetrical treatment.

[82] Initially, the Applicant was off work due to the treatment she was experiencing at work. The harassment that she suffered has never been addressed.

[83] The Applicant relies on the definition of “disability” in *The Saskatchewan Human Rights Code*, and states that her disability or disabilities were not properly addressed. She wasn’t asked about her disability. The Union representatives didn’t seek clarification or documentation. They failed in how they interacted with her disability. They discriminated against her.

[84] She also raises the following prohibited grounds as listed in the Code: “place of origin” and “receipt of public assistance”.

[85] In terms of the medical documentation, the Employer was not clear as to what was being requested. There was evidence that she didn't get the Employer's letters. She also chose not to open letters because she didn't know who they were from. She wasn't in control of the medical documentation. In the beginning, the fitness assessment was not raised.

[86] The Union breached the Applicant's privacy when it submitted to the Employer the information about the work placement program. The Union was willing to submit this information but wasn't willing to forward the medical information.

[87] While the Union representatives were preoccupied with the sick notes, no one looked into the Applicant's benefits. Even casual employees are entitled to benefits according to employment standards.

[88] All the issues the Applicant raised are still outstanding. She is seeking the following remedies:

- Reinstatement with the option to choose either [location] (she is open to working as an RA);
- Benefits for a full year;
- Enrolment in the medication administration program;
- Pay stubs and tax information;
- Harassment complaint be addressed.

Union

[89] The Applicant has not met the burden of proof to establish a breach of section 6-59. The sequence of events demonstrates that the Union assisted the Applicant extensively. The Union replied in a timely manner, tried to address her concerns, and intervened to try to save her employment. The evidence simply does not meet the standard for arbitrariness, discrimination, or bad faith conduct.

Arbitrariness:

[90] The Applicant raised multiple issues with the Union. The Union investigated each issue, corresponded with the Employer when appropriate, and attempted to report back to the Applicant, as necessary. The Union provided the Applicant with advice and direction. In all of this, the Union acted in a timely manner.

[91] The Union was "particularly attentive" with respect to "the three most impactful issues":[4] the alleged harassment; the health issues that prevented a return to work; and, the transfer to Saskatoon. In addition to addressing these issues, the Union proposed as an alternative that a grievance be pursued. The Applicant never responded to this proposal. She failed to initiate a grievance.

[92] The Union doesn't dispute the Applicant's assertions about being a casual employee. However, the Applicant was away for medical reasons. The Union worked tirelessly to support the Applicant while the Employer was seeking medical verification. When the Employer announced her abandonment, the Union responded in turn, reaching a solution through negotiation. A termination grievance would have been meaningless. It was the Applicant's resistance to providing medical documentation that caused the breakdown in the process – not anything the Union did.

[93] The Applicant asks why her summary of medical concerns was insufficient. Obviously, a personal email is not the same as medical verification. Moreover, the Union couldn't forward the Applicant's email without her consent to do so.

[94] After the Applicant disclosed that she had a disability, the Union suggested an accommodation. Again, the Applicant did not respond.

[95] With respect to the SAID records, the Applicant presents a sympathetic case, but the SAID process wasn't an employment issue. And, even if the Union did have a duty to facilitate the provision of records, the Union assisted her with obtaining her records, and after some of the records were provided, there was no follow-up by the Applicant.

[96] While the Applicant complains about benefits, Thibeault had inquired into this issue and determined that she wasn't eligible.

[97] As for the RA position, there was an insufficient basis for a grievance. The Union did not have information to suggest that the Applicant was qualified for the position.

[98] Not surprisingly, the evidence drops off after October 28. The parties were never able to resolve the issues. The Union was pursuing a resolution, and the Applicant didn't allow the resolution to play out. Instead, she filed this application.

---

[4] *Union Brief*, at 12.

[99] The Applicant has suggested that the Union should have been aware of her challenges communicating by email and should have called her on the phone. This argument is meritless. The Union attempted to reach out through various methods based on what was reasonable at the time. The Applicant put up roadblocks that made it very challenging to communicate with her.

Discrimination:

[100] There was no evidence that the Applicant was treated in a differential manner.

[101] With respect to discrimination on the basis of "receipt of public assistance" there is no evidence to support this allegation.

[102] The Applicant implies that the Union has a duty equivalent to an employer's duty to inquire. Whether a union has such a duty is unclear. Regardless, this case doesn't raise a question about whether the Applicant has a disability. The Union knew that she did.

[103] The Applicant alerted both the Employer and the Union to a disability but then provided no clarification about how the disability impacted her needs within the workplace. Given the Union's lack of information and the Applicant's failure to respond to its accommodation request, the Union cannot be faulted for not adopting an accommodation in its interactions with her.

Bad Faith:

[104] There is no evidence that the Union's conduct was motivated by bad faith.

Statutory Provisions:

[105] The following provisions of the Act are applicable:

> ***6-59****(1) An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.*
>
> *(2) Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee.*
>
> ***6-60****(1) Subject to subsection (2), on an application by an employee or former employee to the board alleging that the union has breached its duty of fair representation, in addition to any other remedies the board may grant, the board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of that time, if the board is satisfied that:*

> *(a) the denial of fair representation has resulted in loss of employment or substantial amounts of work by the employee or former employee;*
>
> *(b) there are reasonable grounds for the extension; and*
>
> *(c) the employer will not be substantially prejudiced by the extension, either as a result of an order that the union compensate the employer for any financial loss or otherwise.*
>
> *(2) The board may impose any conditions that it considers necessary on an order made pursuant to subsection (1).*

Analysis:

Applicable Principles:

[106] The Applicant bears the onus of proof in this duty of fair representation 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.

[107] In duty of fair representation applications, the Board applies the following principles, as outlined by the Supreme Court of Canada in *Gagnon*:[5]

> *1. The exclusive power conferred on a union to act as a spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employees.*

[108] In *Ward*, the Board explained the prohibition against conduct that is "arbitrary", "discriminatory", and "bad faith":[6]

---

[5] *Canadian Merchant Services Guild v Gagnon*, [1984] 84 CLLC 12,181.
[6] *Glynna Ward v Saskatchewan Union of Nurses*, [1988] Winter Sask Labour Rep 44 at 47 [*Ward*].

> *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.*

[109] 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:[7]

> *(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.*

[110] In reviewing a union's actions for the presence of arbitrariness, the Board has often relied on *Rousseau*[8], 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.*

[111] The Board is also guided by the Supreme Court of Canada's comments in *Noel*:[9]

> *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 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.)*

---

[7] *Toronto Transit Commission*, [1997] OLRD 3148, at para 9.
[8] *Rousseau v International Brotherhood of Locomotive Engineers et al*., 95 CLLC 220-064 [*Rousseau*].
[9] *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).

[112] A union is not held to a standard of perfection in its conduct of a grievance. Arbitrariness is distinct from "mere errors in judgment, mistakes, negligence and unbecoming laxness".[10] To find that a union committed a simple error does not equate to a finding of arbitrary conduct.

[113] Next, an early articulation of the prohibition against discriminatory action asserts that there "can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favouritism".[11]

[114] The Union adopts the Board's more recent explanation that unions "must not discriminate for or against particular employees based on invidious distinctions such as race, sex or personal favouritism without reasonable justification or labour relations rationale".[12] The Union accepts that to establish discriminatory conduct, "an application is required to show that they have been treated in a differential manner".[13]

[115] Finally, bad faith invokes a union's subjective state of mind. It involves conduct on the part of a union that is motivated by ill-will, malice, hostility, or dishonesty.

[116] In coming to its conclusions, the Board has assessed the reliability of the evidence before it in line with the following approach:

> *[70] While the Board assumes that witnesses attempt to be truthful, it must assess the reliability of witness evidence, considering various indicia of credibility such as: powers of observation, relationship to parties in the dispute, self-interest, consistency, and a failure to produce material evidence if necessary. Issues with reliability do not equate to a finding of dishonesty. Witnesses' capacity to recall events is fallible, limited by memory, sensory perception, and perspective.*[14]

[117] In the present case, all of the witnesses demonstrated some lapses in recall. Nevertheless, the Board found more serious problems with the reliability of the Applicant's testimony, arising from repeated inconsistencies in her recollection of the facts; a tendency to favour a disagreeable response over a factual response; and, a refusal to acknowledge the facts until pressed.

---

[10] *Walter Prinesdomu v Canadian Union of Public Employees*, [1975] 2 CLRBR 310 (OLRB)
[11] *Rayonier Canada (B.C.) Ltd. and International Woodworkers of America, Local 1-217*, [1975] 2 Can LRBR 196, at 201.
[12] *Canadian Union of Public Employees v Allan Klippenstein*, 2022 CanLII 44759 (SK LRB), at para 46.
[13] *Brief of Union*, at para 57, citing *Sai Raju Ragala v Saskatchewan Government and General Employees' Union*, 2021 CanLII 85144 (SK LRB), at para 43.
[14] *Conrad Parenteau v Saskatchewan Government and General Employees' Union*, 2019 CanLII 57379 (SK LRB).

Review of Evidence:

[118] Given the evidence, the Applicant has not met the burden of proof to establish that the Union breached its duty pursuant to section 6-59 of the Act.

[119] There is no doubt that the Union representatives made mistakes. They knew that the Applicant had a disability but did not inquire as to whether they should modify their interactions with her. Hosni expressed skepticism when faced with the possibility that the Union might engage its representatives in some form of disability training for the purpose of interacting with and serving diverse populations. The representatives received emails and documents from the Applicant and did not ask enough questions about what she intended to convey. They did not always clarify what she needed.

[120] Thibeault and Pinfold appeared not to have fully questioned the need for medical documentation, despite the context. Thibeault and Pinfold were unable to fully articulate their understanding of the basis for the Employer's request. Pinfold entertained various arguments[15] but acknowledged that she didn't fully consider the Applicant's particular circumstances.[16] Furthermore, Pinfold and Thibeault's references to doctor's "notes", as a shorthand for medical clearance, confused an already complicated exchange with the Applicant.[17]

[121] On the other hand, the Applicant's complaints need to be understood within the full context of the interactions between herself and the representatives. The Applicant repeatedly suggested that she hadn't received correspondence from the Employer, that the representatives didn't communicate with her properly, and failed to take into account her disability. However, she admitted she didn't check email regularly, used email to communicate with the representatives, chose not to open her mail on at least one occasion, presented with a full voice mail, and refused to answer calls from "private callers". Union representatives attempted more than one form of communication. Their testimony suggests that they felt restricted in their ability to contact the Applicant and chose methods that were the most successful and were reasonable under the circumstances.

[122] The Applicant has suggested that, even if she didn't want an accommodation, or express a desire for an accommodation, the Union should have accommodated her anyway. The Board

---

[15] Employer has the right to request medical; a casual shall be deemed to have severed employment after not working for a period of one hundred and eighty (180) calendar days, pursuant to Article 9.04 of the CBA.
[16] She didn't ask for her last day of work.
[17] U-24, U-48.

interprets this to mean that the Union representatives should have adjusted their approach when dealing with the Applicant, in line with a notion of "substantive equality", and that they should have done so despite her lack of cooperation. Leaving aside the problem that she wasn't cooperating, she seemed to envision the Union accommodating her disability similar to a workplace accommodation, for example, by seeking more information about the Applicant's disability (from her and from external sources) and formalizing an approach taking into account the Applicant's relevant limitations.

[123] The Union argues that the Applicant's position rests on an assumption that the Union has a duty to inquire and suggests that the applicability of such a duty to a union is questionable.[18]

[124] The Union does not, however, argue that a discriminatory motive is an essential element of a finding of discriminatory conduct.[19] The Union accepts that it cannot engage in differential treatment without labour relations justification.

[125] Whether or not the Union was legally required to adopt such an approach, especially with the information it had, it is difficult to imagine what more the Union representatives could reasonably have been required to do.

[126] The Applicant was focused on interacting with the Union on her own terms. She set the agenda. She disclosed her disability and shortly thereafter, she was asked about accommodation. She failed to entertain those inquiries. She provided only limited information about how to interact with her, for example, by stating her preferred mode of communication was by phone or in person. Despite this, she was responsible for significant obstacles related to phone communication. Hosni was available to speak with the Applicant in person, and the Applicant took advantage of her availability.

[127] To some extent, the Union did take her disability into account in dealing with her. Pinfold expressed to Herman that the Applicant had medical issues that "we need to deal with as a union and an employer" and that email might not be the best way to communicate with the Applicant. The Union negotiated an interim resolution of her problem under challenging circumstances.

---

[18] The Union relies on *Volpi v Alberta (Human Rights Commission)*, 2023 ABKB 608 (CanLII) and *Sollitt v Trillium Lakelands District School Board*, 2013 HRTO 1128 (CanLII).

[19] In the Saskatchewan case law and in other writings, the language around "intent", "reasons", and "motive" as they relate to the term "discriminatory" under section 6-59 has required some interpretation. See, citation of *Noel,* at paras 49, 52, in *CB, HK, & RD v CUPE, Local 21*, 2017 CanLII 68786 (SK LRB), at para 149 and The Honourable George W. Adams, K.C., *Canadian Labour Law*, loose-leaf (12/2023 - Rel 5) 2nd ed (Toronto: Thomson Reuters, 2023), at 13-38. However, much of the case law in this area more closely aligns with a modern interpretation of "discriminatory" suggesting that the "reasons" go to whether there is labour relations rationale for the distinction.

[128] Furthermore, the Applicant's excuse for not seeking an accommodation rings hollow. She suggested that she didn't ask for an accommodation because she didn't know what that meant, and yet she didn't follow up with the Union to find out. This is despite having had a one-on-one conversation with Hosni and despite the very clear language used by Thibeault in her email, "Is there any information your Doctor can provide that could help the Employer know what you need in the work place in order to make things easier?"

[129] The Applicant claimed that the representatives didn't ask enough questions but at times when they did ask questions for clarification her response was to criticize the questions that were asked.

Summary of Conclusions on Application:

[130] In summary, none of the issues raised in the application disclose a breach of section 6-59, whether through arbitrary, discriminatory, or bad faith conduct. While the Board has considered the Union's conduct as a whole, it will outline some discrete observations with respect to each of the allegations for ease of reference:

Not attending to requests in a timely manner:

[131] To the extent possible, the Union representatives tended to respond to her inquiries quickly, or at least within a few days. At times, it appears that the Applicant expected immediate responses. Her expectations were unreasonable. The Union was responsive and timely.

Failure to Follow Through with Grievance Processes:

[132] The Union provided the Applicant with the option to file a grievance and she failed to respond. This allegation is meritless.

Failure to Follow Through with Wrongful Termination Grievance:

[133] The Applicant was not terminated in August 2022, but instead, the Union negotiated with the Employer and accomplished placing the Applicant on a leave of absence. Relatedly, whether she received the Employer's letters was of no consequence because the Union had rectified the termination.

Failure to Follow Through with Work Assignment/Transfer to Saskatoon:

[134] The Union could have taken a stronger stance with the Employer about the Applicant's casual employee status. However, the Union had negotiated a compromise with the Employer that it reasonably believed would protect the Applicant's employment, albeit, in an alternative setting. By insisting on medical, Thibeault testified that the Union was trying to keep the Applicant employed so that they could file a grievance if necessary. Although there were no Employer witnesses called, it is a reasonable inference that, given the Applicant's reasons for taking sick days in August, the Employer sought reassurance that she was healthy enough to return.

[135] The Applicant claimed that she wasn't once asked for a functional assessment. However, even if the language around doctor's "notes" caused some confusion, Thibeault had advised the Applicant that she needed medical clearance to return to work, specifically in Saskatoon, and apparently sent the Applicant a copy of the functional abilities form.[20] Hosni advised the Applicant that she needed "medical that indicates you are fit to work".[21]

[136] If the Applicant had questions or concerns about the form or about the process, she could have asked. The Union representatives had demonstrated that they were available to provide the Applicant with information and assistance. She could also have indicated that she needed more time. Instead, the Applicant's responses reveal that she was refusing to cooperate with the process.[22]

[137] The Applicant suggested that common sense should have been applied to the medical clearance. For instance, in the Applicant's mind, it should have been obvious that she was fit to work because she was attending educational programming. This is a meritless suggestion. Relatedly, none of the medical documentation that the Applicant relies upon[23] would have reasonably satisfied the Employer's request for medical clearance.

[138] Furthermore, based on Hosni's email dated October 7, it appears that the Union considered the reasonableness of the Employer's request in light of the existing case law. Therefore, even though Pinfold and Thibeault struggled with articulating the necessity for the medical, the Union had turned its mind to the rationale underlying the request.

---

[20] U-24, E-14.
[21] U-37.
[22] U-37: "I am not paying for another doctor's note without the benefits I am entitled to". U-48: "Around requesting a doctor's note for work. Cannot some common sense be applied?"
[23] This "documentation" included her own written chronology of medically related events.

[139] Finally, the Applicant withdrew from the process. Ultimately, she was given one task to ameliorate her employment situation and to date, has chosen not to engage with it. She has suggested that various life crises have interfered with her ability to accomplish this task, and while she has certainly faced her share of challenges, she has not sought more flexibility or consideration, but has instead filed this application.

Failure to Provide Attention to Harassment Complaint in a Timely Manner:

[140] This allegation does not disclose a breach.

[141] The Applicant's expectations of the Union were unreasonable. At one point, the Applicant testified that she believed that the Union had a duty to require the Employer to deal with the work environment even if she didn't want to move forward.

[142] When she hadn't filed an incident report, Thibeault advised her to do so. She reminded the Applicant to ask for union representation when permitted. She asked the Applicant for clarification of her experiences in the workplace. The Union didn't take further action with respect to the harassment allegations because the Applicant was no longer working in that location. The Applicant had told Thibeault that she didn't want to move back to the area where the workplace was located. The Union was working on a solution that took the Applicant's stated preference into account.

[143] The Union demonstrated that it was responsive to the Applicant's concerns, was attempting to work with her, and was seeking and finding solutions that were reasonable and practical given all of the circumstances.

Request of Days worked, Pay records for Social Services Appeal:

[144] Assuming that the Union has a duty to facilitate the provision of work-related information, such as pay stubs, this issue is moot. In any event, it does not disclose a breach of section 6-59.

[145] The SAID appeal was withdrawn, and although Pinfold could have checked whether the Applicant had received all of her pay stubs, the evidence does not establish that the Applicant followed up. Furthermore, it was the Union's intervention that resulted in the Applicant obtaining the pay stubs that she did obtain.

[146] The Applicant has acknowledged that the SAID appeal went away but has attempted to detract from this fact by asserting that the Ministry has the right to re-initiate the process. However,

the appeal process is over and there is no outstanding concern – in other words, the missing pay stubs had no negative impact on the Applicant.

Summary of Conclusions on Additional Issues:

[147] Next, the Board will address the specific issues raised by the Applicant in the course of the hearing that were not made explicit in the application. None of these issues disclosed a breach of section 6-59.

Benefits:

[148] The Applicant has not met her onus with respect to this issue. In her argument, the Applicant stated that casual employees are entitled to "benefits" according to employment standards (meaning, for example, compensation for medical and dental services). Whether or not the Applicant is simply operating based on a misunderstanding of employment standards and the meaning of "benefits", she did not point to a provision of the CBA that provides for the benefits she was claiming. In fact, the evidence demonstrated that benefits are not covered by the CBA but are addressed outside of the agreement.[24]

[149] Even if the Union owed the Applicant a duty in relation to rights that fall outside of the CBA, the Applicant has not established that she was entitled to those benefits and to the Union's representation in relation to them. To the contrary, the Union has suggested that as a casual employee, the Applicant was not entitled to benefits. The Applicant's own evidence shows that she was provided with the same information.

Enrolment and Completion of Medication Administration Course; Assistance and Grievance for RA and RA Course:

[150] There appears to have been a misunderstanding about the RA position. The Applicant testified that she had tried to communicate to the Union that she wanted to finish the necessary modules for the RA position, but the Union didn't understand that she wanted support with obtaining the position. According to Hosni, the reason that the RA issue did not result in a grievance was that the Applicant did not have the qualifications for the position.

[151] In the Board's view, the Union's failure to fully understand the Applicant's intent was reasonable. It was entirely reasonable, given the information she had, for Hosni to conclude that

[24] See, *Saskatchewan Polytechnic Faculty Association v Chau Ha*, 2024 CanLII 13533 (SK LRB), at para 25.

the Applicant was not qualified for the RA position and to determine that the related issue could not be grieved.

[152] Besides, it has not been made clear that by obtaining the RA qualifications (or completing the medical administration course, whether or not it was related), the Applicant would have solved her immediate concerns. Given the Employer's insistence on medical documentation and the Applicant's failure to follow through, she would not have been able to fill that position either.

[153] The same could be said about Pinfold's misunderstanding around the Applicant's interest in two, rather than just one, of the Saskatoon positions. This was a simple misunderstanding that could have been clarified by having a conversation, but it was, nonetheless, immaterial to the Applicant's employment situation.

Privacy Concerns:

[154] The Applicant expressed concerns about the manner in which correspondence was sent to her home address. She communicated her concerns to the Union and the Union checked into the issue and provided the Applicant with, easily, the most important information that she had been seeking. To be sure, there was no follow-up about the manner in which the registered letter had been posted, or registered, but that was of no consequence. She had become difficult to contact. A choice was made to send correspondence to her home address. Her mail was opened. The privacy breach that resulted did not result from the Union's choices.

[155] The Applicant raised another privacy concern with the Union's sharing of information about the work placement program. She contrasted the Union's sharing of this information to the Union's unwillingness to forward her medical information. However, the Applicant had told the representative that she wanted the program to be taken into consideration in a return to work. The information about the program disclosed no specific information about her health, other than by inference that she had a disability.

Conclusion:

[156] In summary, the Union investigated the Applicant's concerns, was timely in its responses, communicated with her as much as was reasonably required, and provided her with assistance and direction for resolving the most significant of her workplace problems. The Union was flexible in its approach and attempted alternative modes of communication. It negotiated a resolution of the primary conflict between herself and the Employer and found a potential path forward that

would allow the Applicant to work in her place of residence and would not require any further action with respect to the harassment concerns. Before then, the Union offered support to the Applicant in relation to the harassment process. She was offered an accommodation process and a grievance process, and she did not follow up.

[157] Still, the Union didn't resolve the Applicant's concerns to her satisfaction. However, a union is not required to meet each and every one of a member's expectations. It is not required to achieve a standard of "perfection" in its representation of a member's interests.

[158] Given the evidence, it simply cannot be said that the Union's representation of the Applicant was flagrant, capricious, totally unreasonable, or grossly negligent, or in any other way, arbitrary. Nor was it discriminatory. There is no evidence of bad faith motive on the part of the Union.

[159] For the foregoing reasons, the application is dismissed. An appropriate Order will be issued with these Reasons.

DATED at Regina, Saskatchewan, this **10th** day of **July, 2024.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson