Saskatchewan
Labour Relations Board

ANDREW LIVINGSTON, Applicant v CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1871, Respondent and SASKATCHEWAN HUMAN RIGHTS COMMISSION, Respondent

LRB File No. 124-21; April 11, 2025
Chairperson, Kyle McCreary (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*
Citation: *Livingston v CUPE*, 2025 SKLRB 18

For the Applicant, Andrew Livingston:	Self-Represented
Counsel for the Respondent, Canadian Union of Public Employees, Local 1871:	Jake Zuk
Counsel for the Respondent, Saskatchewan Human Rights Commission:	Paul Harasen

Duty of Fair Representation – Union settled grievance over the objections of the grievor – Breach not found as Union considered the relative merits of the case in deciding to settle – Reasoning not tainted by improper motives

REASONS FOR DECISION

[1] **Kyle McCreary, Chairperson:** Mr. Livingston has applied pursuant to Section 6-59 of the *Saskatchewan Employment Act,* SS 2013, c S-15.1 ("the Act") for a finding that the Canadian Union of Public Employees, Local 1871 ("the Union") breached its duty of fair representation in its representation of Mr. Livingston in grievances with the Saskatchewan Human Rights Commission ("the Employer").

[2] The evidence in this matter was heard over a number of days before Chair Morris (as he then was). With the consent of the parties, I have listened to the evidence previously called and the original final argument. I have also reviewed the Exhibits filed. On September 6, 2024, the parties made additional oral arguments, and Mr. Livingston filed additional written submissions on September 11, 2024.

[3] Based on the evidence heard by the Board, the Board finds the following facts. Mr. Livingston was employed with the Employer from December 2008 until January 2019. Mr. Livingston was first employed as a Casual Investigator and in 2014 became a Permanent Part Time Investigator.

[4] Mr. Livingston is a person living with a disability and had accommodations provided by the Employer. The accommodations provided came into dispute in 2018, partially in relation to an office move to Room 827. The accommodations sought are set out in a letter of Dr. Hosain dated March 19, 2018.

[5] Mr. Livingston, the Union, and the Employer discussed the accommodations request following the medical letter. The accommodations issue was not resolved to the satisfaction of Mr. Livingston and an accommodations grievance was filed on July 25, 2018 ("the Accommodations Grievance").

[6] Discussions between the parties on accommodations continued through 2018, although no resolution was reached and Mr. Livingston did not return to work.

[7] In January 2019, the Employer deemed Mr. Livingston to have lost seniority due to failure to report to work at the conclusion of a leave. The record also includes letters from PEPP and the Government of Saskatchewan referencing a termination date of December 31, 2018, but there is no termination letter separate from the January notification of loss of seniority.

[8] On January 22, 2019, the Union filed a grievance against the end of Mr. Livingston's employment ("the Termination Grievance").

[9] April 18, 2019, the Employer filed a grievance against the Union and Mr. Livingston.

[10] The Termination Grievance and the Accommodations Grievance were referred to arbitration in 2019. The arbitration was eventually set to proceed for May 2021.

[11] In the lead up to the arbitration there were efforts at settlement, including pre-hearing mediation and the exchange of settlement offers. The Union also prepared for the arbitration which included a meeting between outside counsel and the grievance committee. The grievance committee of the local of the Union at that time consisted of Meghan Seidle, Andrea Halstead, and Paula Jane Remlinger. Outside counsel and the grievance committee had differing views on the strength of the case at this time, but the Union decided to continue proceeding to arbitration.

[12] The formalized offers exchanged were on May 8, 2021, the Union made an offer to the Employer to settle seeking reinstatement of position and accommodations, and payment of $129,000.

[13] On May 10, 2021, the Employer rejected the Union's offer and made an offer of $30,000 for a full release and discontinuance of all claims. The Union rejected this offer.

[14] The arbitration began on May 17, 2021. Mr. Livingston was the first witness of the arbitration. Mr. Livingston's direct examination was conducted on May 17 and 18, 2021. A member of the grievance committee was present to observe all of Mr. Livingston's testimony.

[15] The Employer's cross examination of Mr. Livingston began on May 19, 2021.

[16] On May 19, 2021, the Employer made an offer to settle on the same terms as the May 10, 2021 offer.

[17] The arbitration on May 20, 2021, was adjourned for the Union to consider the Employer's offer. The first meeting of the grievance committee did not include outside counsel. The second meeting included outside counsel and Mr. Bauer. The grievance committee and outside counsel had differing views on how the Union's case in the arbitration was going, with Mr. Bauer's assessment falling somewhere between the two. The Union subsequent to this meeting engaged with the Employer on the possibility of reinstatement. The Employer was not interested in reinstatement.

[18] The grievance committee met for a third time and considered the merits of the case based on the testimony observed and the documents intended to be used as evidence at the hearing and decided that the grievances were unlikely to have a positive outcome. The grievance committee decided to make an offer of $65,000 without reinstatement based on its view of the case.

[19] Outside counsel was instructed to make the offer for settlement. After receiving the instructions, outside counsel sent a letter to the committee raising concerns about the Union's instructions and whether settlement was advisable. The Union maintained its instructions and outside counsel made the settlement of $65,000 to the Employer.

[20] The Employer did not accept the offer, and on May 21, 2021, the arbitration resumed. However, at the outset of the resumption, outside counsel for the Union withdrew. The arbitration panel offered to engage in voluntary mediation with the parties. The Employer and the Union agreed, Mr. Bauer acted as the Union's representative.

[21] Mr. Livingston felt that he was forced to participate in the mediation. Mr. Livingston viewed mid-hearing mediation as inappropriate, especially as his testimony had not concluded. Mr. Livingston withdrew from the mediation before it concluded on the attendance and advice of Dr. Hosain.

[22] The Union and the Employer participated in further discussions with the arbitration panel after Mr. Livingston withdrew. Members of the arbitration panel, including the Union's nominee, provided a view that the Union was unlikely to be successful on the merits based on the case presented to that point in the arbitration. The issue of a mediated settlement involving reinstatement was discussed as part of the interactions between the arbitration panel and the witnesses.

[23] Following the adjournment of the arbitration, the grievance committee decided to pursue settlement of the grievances instead of proceeding further with the arbitration. Based on the events of May 21, 2021, the Union believed it might be possible to reach a settlement that included reinstatement.

[24] On May 25, 2021, the grievance committee met and discussed the grievances and the expectations of Mr. Livingston in a settlement. Following this meeting, Mr. Bauer engaged with Mr. Livingston about pursuing further mediation. Mr. Bauer and Mr. Livingston were unable to reach an agreement on proceeding to further mediation.

[25] On June 6, 2021, new counsel for the Union, Ms. Harvey, was assigned to the file.

[26] On June 11, 2021, Ms. Harvey and Mr. Bauer met with Mr. Livingston and discussed the grievances and possible settlement.

[27] On June 12, 2021, the Employer advised the Union that reinstatement was no longer being considered by the Employer.

[28] On June 17, 2021, the Employer made a final offer to the Union of $25,000 in full and final settlement.

[29] On June 23, 2021, Ms. Harvey and Mr. Bauer met with Mr. Livingston to review the settlement the Union had decided to accept. Mr. Livingston did not agree with the settlement and voiced his objection to it and desire to appeal it within the Union.

[30] The Employer offer expired before it was accepted, and on June 28, 2021, the Union decided to make the same offer back to the Employer, subject to Mr. Livingston having a right to appeal before it could be finalized.

[31] On July 2, 2021, the grievance committee sent a letter to Mr. Livingston outlining its decision to settle the grievances:

> *June 30, 2021*
> *Dear Andy,*
> *This is to confirm information that has previously been provided to you by Will Bauer, CUPE National, and Val Harvey, CUPE counsel. It is the decision of the Grievance Committee to pursue a settlement with the Employer to resolve all of the grievances relating to you.*
>
> *In without prejudice discussions with the Employer, the Employer has agreed to pay you the gross amount of $25,000 attributed as follows:*
>
> > *a. In settlement of Grievance Case #002/18, $15,000, without deduction, as compensation for Livingston's claim under s. 40 of The Saskatchewan Human Rights Code, 2018; and*
> > *b. In settlement of Grievance Case #01-2019, $10,000, less statutory withholdings, paid as a retiring allowance, in compensation for Livingston's claims for loss of income, benefits and seniority rights.*
>
> *The $15,000 represents what would be considered a reasonable "damage to dignity" amount in a duty to accommodate case. The amount is without deduction, which we see as a clear benefit to you.*
>
> *Using the severance calculation from the CBA based on 1/3 of a month's salary for each year of service and considering that your employment spanned a range from casual employee to 0.4 and 0.6, the amount of $10,000 represents a reasonable claim for loss of income, benefits, and seniority rights.*
>
> *The Committee has met on numerous occasions to consider the Grievances and have determined that our case is not strong and not likely to result in a favourable arbitration decision. This determination has been further informed by four days of testimony, and feedback from members of the arbitration panel. While we sought to return you to work, it became clear that this was not a tenable solution. In seeking the best outcome on your behalf, the Grievance Committee has determined that a settlement is the best available option.*
>
> *The union understands you wish to pursue other avenues of complaint.*
>
> *No decision has been entered into lightly or without considerable thought to the good of the union and the good of yourself.*
>
> *We understand that you have already indicated that you wish to appeal this decision. The Executive Board will contact you with information regarding that process.*
>
> *With best wishes,*
>
> *Paula Jane Remlinger*
> *Meghan Seidle*
> *Andrea Halstead*

[32] On July 14, 2021, the appeal committee of the local of the Union heard Mr. Livingston's appeal of the Union's decision to settle. Mr. Livingston was provided with an opportunity to file written submissions and appear before the appeal committee. The grievance committee also made a presentation to the appeal committee and Mr. Bauer appeared before it as well. Mr. Livingston was not present for the grievance committee or Mr. Bauer's appearances before the appeal committee. After deliberation, the appeal committee dismissed Mr. Livingston's appeal.

[33] On July 16, 2021, the Union and the Employer settled the Termination and the Accommodations Grievances for $25,000 and the following terms:

> *1. The Grievances shall be considered settled. The Grievances are hereby withdrawn.*
> *2. The Employer shall pay Livingston the gross amount of $25,000 attributed as follows:*
> *a. In settlement of Grievance Case #002/18, $15,000, without deduction, as compensation for Livingston's claim under s. 40 of The Saskatchewan Human Rights Code, 2018; and*
> *b. In settlement of Grievance Case #01-2019, $10,000, less statutory withholdings, paid as a retiring allowance, in compensation for Livingston's claims for loss of income, benefits and seniority rights.*
> *3. The Union shall not pursue any other grievance, complaint or other action on behalf of Livingston.*
> *4. This agreement does not constitute any admission of liability or wrongdoing by either party.*
> *5. The parties agree that the contents of this agreement apply with prejudice to Livingston, but will be considered without prejudice and without precedent to the rights and obligations of any other member of the bargaining unit.*

Witnesses:

[34] Mr. Livingston called five witnesses: Mr. Livingston, Anne Iwanchuk, Brenda Robertson, Dianne Jones, and Dr. Jason Hosain. Mr. Livingston testified to his history with the Employer and how his position and accommodations changed over time. Mr. Livingston also testified to the events leading up to his termination and the interactions with the Union related to processing the grievances up until arbitration.

[35] Mr. Livingston gave detailed testimony on the arbitration itself, the mediation, the settlement and the appeal. Mr. Livingston provided his perspective on the Union's decision making and the perceived motivations of various individuals involved.

[36] Anne Iwanchuk is a national representative with the Union. Ms. Iwanchuk provided testimony on her initial assessment of the grievances and involvement in the grievances and accommodations issues. Ms. Iwanchuk's substantive involvement ended in 2020 prior to the matter proceeding to arbitration.

[37] Brenda Robertson worked at the Employer for some of the time that Mr. Livingston was employed there. Ms. Robertson provided testimony related to Mr. Livingston's accommodations and his work, including time spent at work, for the Employer.

[38] Dianne Jones worked at the Employer during Mr. Livingston's time at the Employer. Ms. Jones provided testimony in relation to Mr. Livingston's accommodations and his work at the Employer.

[39] Dr. Jason Hosain was Mr. Livingston's physician at the relevant time. Dr. Hosain was involved in the accommodations process that preceded the termination and was treating Mr. Livingston at the time of the arbitration. Dr. Hosain provided his opinion on the necessary accommodations of Mr. Livingston in the workplace.

[40] The Union called Will Bauer, Robin Mowat, Meghan Seidle. Will Bauer is employed by the national office of CUPE. Mr. Bauer testified to his involvement leading up to the arbitration in 2021 and in the settlement and appeal following the arbitration.

[41] Mr. Mowat was the president of the local of the Union in 2021. Mr. Mowat testified to his involvement with Mr. Livingston's accommodations in 2018. Mr. Mowat became reinvolved in 2021 and was involved in the preparation for the arbitration along with participating in the Union's deliberations on proceeding with the grievances and settling the grievances. Mr. Mowat also was a member of the appeal committee and provided testimony related to that proceeding.

[42] Ms. Seidle at the time of the arbitration was a lawyer with the Employer and a member of the grievance committee. Ms. Seidle provided testimony about her involvement in preparing for the arbitration, attending the arbitration, the deliberations of the grievance committee, and the settlement decision. Ms. Seidle explained the reasoning process of the grievance committee and the documents, testimony, and other factors considered in reaching the decision to settle.

[43] The parties tendered numerous Exhibits through the witnesses, Mr. Livingston entered 58 Exhibits, the Union entered 57, and the Employer entered 29 (although some are not full exhibits).

[44] The Board found the witnesses to be credible. The Board prefers the testimony of the Union witnesses over Mr. Livingston to the extent of conflict. However, most of the conflict relates to Mr. Livingston's interpretation of events and motives and not to the recollection of specific events. The Board prefers the Union's witnesses' interpretation of the motives of various union

members and officials as it is consistent with the contemporaneous notes and emails of the individuals involved.

[45] The Board does not view the conflict in the evaluation of the merits between employees of the national of the Union with members of the local of the Union to be a matter of credibility. Different individuals can evaluate a matter differently and still honestly believe in that evaluation. It is accepted that while members of the local had reservations from prior to the arbitration, those reservations were not shared by representatives of the national of the Union.

Argument on behalf of Mr. Livingston:

[46] Mr. Livingston argues that the Union acted in a manner that was arbitrary, discriminatory, and in bad faith. Mr. Livingston's fundamental argument is that the Union should not have settled over his objection, should not have granted the breadth of release that it did, and failed to consider the impact of not getting reinstatement in the settlement.

[47] Mr. Livingston also argues that the Union fundamentally failed at every point after the arbitration began. The matters Mr. Livingston takes issue with include:

a. Mr. Mowat's participation in the grievance committee and the appeal committee;
b. Ms. Seidle's participation and interactions with the grievance committee;
c. the actions of the arbitration panel in engaging in mediation;
d. the interactions between Ms. Seidle and general counsel for the Employer;
e. the local of the Union not following the advice of outside counsel;
f. the local of the Union preferring its view of the case over the view of the national of the Union;
g. the grievance committee being involved in the grievance after it was referred to arbitration; and
h. the process that the local chose to hear Mr. Livingston's appeal of the settlement.

[48] Mr. Livingston cities *Hargrave v. Canadian Union of Public Employees, Local 3833*, 2003 CanLII 62883 (SK LRB); *Hunt v. The Owners, Strata Plan LMS 2556*, 2018 BCCA 159 (CanLII) (BCCA); and *Prebushewski v. Canadian Union of Public Employees, Local No. 4777,* 2010 CanLII 20515 (SK LRB), in support of his position.

Argument on behalf of the Union:

[49] The Union argues that Mr. Livingston bears the onus of establishing a breach of the duty of fair representation and that Mr. Livingston has not met his onus. The Union argues that the Board should rely on various decisions of this Board in applying the duty of fair representation in this case including: *Lucyshyn v. Amalgamated Transit Union, Local 615*, 2010 CanLII 15756 (SK LRB); *Leblanc v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555*, 2007 CanLII 68758 (SK LRB); *Connell v. Saskatchewan Government and General Employees' Union,* 2005 CanLII 63105 (SK LRB); and *Chabot v. Canadian Union of Public Employees, Local 4777*, 2007 CanLII 68749 (SK LRB).

[50] The Union argues that based on these cases and the evidence that it is established that the Union did not breach the duty of fair representation.

Argument on behalf of the Employer:

[51] The Employer argues that the Union did not breach the duty of fair representation. The Employer argues there was nothing improper in the Union and the Employer participating in discussions with the arbitration panel. Further, to the extent that Mr. Livingston has alleged collusion against the Employer, the Employer argues that that has not been proven on the facts of this case.

[52] The Employer cites *Lewyk v Natural Gas Employees' Association*, 2022 CanLII 76449 (AB LRB); *David B. Lapchuk v. Saskatchewan Government and General Employees' Union*, 2022 CanLII 21656 (SK LRB); and *Lapchuk v Saskatchewan Government and General Employees' Union*, 2023 CanLII 10988 (SK LRB).

Relevant Statutory Provisions:

[53] This case is filed pursuant to s. 6-59, which reads:

> ***Fair representation***
> ***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.*

[54] The issues in the case also raise the scope of arbitrations pursuant to s. 6-45:

Arbitration to settle disputes
6-45*(1) Subject to subsections (2) and (3), all disputes between the parties to a collective agreement or persons bound by the collective agreement or on whose behalf the collective agreement was entered into respecting its meaning, application or alleged contravention, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective agreement.*

(2) Subsection (1) does not prevent the director of employment standards as defined in Part II or the director of occupational health and safety as defined in Part III from exercising that director's powers pursuant to this Act.

(3) Without restricting the generality of subsection (2), the director of employment standards may issue wage assessments, issue hearing notices, take action to collect outstanding wages or take any other action authorized pursuant to Part II that the director of employment standards considers appropriate to enforce the claim of an employee who is bound by a collective agreement.

[55] Mr. Livingston also takes issue with actions taken in the arbitration, which engages the powers granted by s. 6-49:

Rules of arbitration
6-49*(1) Subsections (2) to (4) apply to all arbitrations required to be conducted in accordance with sections 6-45 to 6-48.*

(2) The finding of an arbitrator or arbitration board:

(a) is final and conclusive;
(b) is binding on the parties with respect to all matters within the legislative jurisdiction of Saskatchewan; and
(c) is enforceable in the same manner as a board order made pursuant to this Part.

(3) An arbitrator or an arbitration board may:
(a) exercise the powers that are vested in the Court of King's Bench for the trial of civil actions:
(i) to summon and enforce the attendance of witnesses;
(ii) to compel witnesses to give evidence on oath or otherwise; and
(iii) to compel witnesses to produce documents or things;
(b) administer oaths and affirmations;
(c) receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the arbitrator or arbitration board considers appropriate, whether admissible in a court of law or not;
(d) enter any premises where work is being done or has been done by the employees or in which the employer carries on business, or where anything is taking place or has taken place concerning any disputes submitted to the arbitrator or arbitration board and:
(i) inspect and view any work, material, machinery, appliance or article in that place; and
(ii) question any person respecting any thing or any matter;
(e) authorize any person to do anything that the arbitrator or arbitration board may do pursuant to clause (d) and report to the arbitrator or arbitration board on anything done;

> *(f) relieve, on terms that in the arbitrator's or arbitration board's opinion are just and reasonable, against breaches of time limits set out in the collective agreement with respect to a grievance procedure or an arbitration procedure;*
> *(g) dismiss or reject an application or grievance or refuse to settle a dispute if, in the opinion of the arbitrator or arbitration board:*
> *(i) there has been unreasonable delay by the person bringing the application or grievance or requesting the settlement; and*
> *(ii) the delay has operated to the prejudice or detriment of the other party; and*
> *(h) encourage settlement of the dispute and, with the agreement of the parties, may use mediation or other procedures to encourage settlement at any time during the arbitration.*
>
> *(4) An arbitrator or arbitration board may substitute any other penalty for the termination or discipline of an employee that the arbitrator or arbitration board considers just and reasonable in the circumstances if:*
> *(a) the arbitrator or arbitration board determines that an employee has been terminated or otherwise disciplined by an employer; and*
> *(b) the collective agreement governing in whole or in part the employment of the employee by the employer does not contain a specific penalty for the infraction that is the subject-matter of the arbitration.*

Analysis and Decision:

Test for Duty of Fair Representation

[56] The duty of fair representation is codified in s. 6-59 of the Act. As discussed in *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*, 2017 CanLII 20060 (SK LRB), and *SGEU v Lapchuk*, 2025 SKKB 53 ("Lapchuk"), the duty originates in American common law and was later brought into Canadian common law. As stated by Justice Megaw in *Lapchuk*:

> *[101] This rich history then led to the development of the principles of the duty of fair representation as set forth by the Supreme Court of Canada in the oft-cited decision of Canadian Merchant Service Guild v Gagnon, [1984] 1 SCR 509 at 527[Gagnon]:*
>
> > *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
> >
> > *1. The exclusive power conferred on a union to act as 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 no merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*
>
> *[102] The duty of fair representation does not compel a detailed evaluation of the actions of the union nor does it envision necessarily a second guessing of the decisions of the union. As well, that duty does not elevate the Union's actions to a requirement of achieving perfection or even of acting without negligence. As a result, the SLRB is not to merely sit in appeal of any decisions taken by SGEU. In Haley v C.A.L.E.A. (No. 1), 1981 CarswellNat 602 (WL) (Can LRB), this principle was put as follows:*
>
> > *30 It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.*
> >
> > *31 But the law does not condone all good faith action. Some action or inaction is such a total abdication of responsibility it is no longer mere incompetence — it is a total failure to represent (e.g. Forestell and Hall [41 di 179, [1980] 3 Can LRBR 491], supra. Some conduct is so arbitrary or seriously (or grossly) negligent it cannot be viewed as fair. This is especially so when a critical job interest of an individual is at stake.*

[57] The Board discussed what constitutes arbitrary, discriminatory and bad faith conduct in *Saskatchewan Government and General Employees' Union v Rodney Wilchuck*, 2023 CanLII 50900 (SK LRB):

> *[39] In Ward, the Board described the meaning to attribute to the terms "arbitrary", "discriminatory" and "in bad faith", in the context of s. 25.1 of The Trade Union Act:*
>
> > *Section 25.1 of The Trade Union Act obligates 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. So long as it does so, it will not violate section 25.1 by making an honest mistake or an error in judgment.[20]*

> *[40] The Board also routinely relies on the following descriptions established by the Ontario Labour Relations Board:*
>
> > *. . . a complainant must demonstrate that the union's actions are:*
> >
> > *(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.[21]*
>
> *[41] A refusal to file a grievance on behalf of a member does not necessarily equate to a union acting in an arbitrary, discriminatory or bad faith manner. A union is entitled to form its own opinion separate and apart from a member's about whether to file a grievance, provided it has turned its mind to the merits and made a reasoned judgment. The Board commented as follows, in Klippenstein:*
>
> > *[43] A union is entitled to weigh the likelihood of success at arbitration in deciding whether to file a grievance. The fact that one or more arbitrators have found specific workplace vaccination policies to be unreasonable does not mean that a union is required to challenge a vaccination policy. The question is not whether the union has looked under every rock for an entry point into a grievance proceeding, but rather, whether the union has turned its mind to the merits and made a reasoned judgment. There is certainly no glaring error in CUPE's decision not to file a policy grievance. On the contrary, it was an entirely reasonable course of action.*

[58] In *Ha v SPFA*, 2024 CanLII 126796 (SK LRB), the Board discussed specific tests for discriminatory, bad faith, and arbitrary conduct:

> *[26] This distinction between non-actionable errors and gross negligence was drawn by this Board in Hargrave v. Canadian Union of Public Employees, Local 3833, 2003 CanLII 62883 (SK LRB):*
>
> > *[34] There have been many pronouncements in the case law with respect to negligent action or omission by a trade union as it relates to the concept of arbitrariness in cases of alleged violation of the duty of fair representation. While most of the cases involve a refusal to accept or to progress a grievance after it is filed, in general, the cases establish that to constitute arbitrariness, mistakes, errors in judgment and "mere negligence" will not suffice, but rather, "gross negligence" is the benchmark. Examples in the jurisprudence of the Board include Chrispen, supra, where the Board found that the union's efforts "were undertaken with integrity and competence and without serious or major negligence. . . ." In Radke v. Canadian Paperworkers Union, Local 1120, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, at 64 and 65, the Board stated:*
> >
> > > *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests*

> *of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake.*

[27] Similarly, the Alberta Board noted the distinction between mere negligence and arbitrary conduct in Leduc v United Mine Workers of America, Local 2009, 2016 CanLII 156707 (AB LRB) at para 31:

> *[31] A myriad of cases across Canada have adopted the position that "mere negligence" is not sufficient to trigger a breach of the duty of fair representation. (See Canadian Labour Law Second Edition, George Adams, starting at 13-40.1 as well as Trade Union Law in Canada, Michael MacNeil, Michael Lynk, Peter Engelmann at 7.200). As reviewed by Adams at 13-40.2, "gross negligence" was commented upon by the British Columbia Labour Relations Board in Morgan v. Registered Psychiatric Nurses Association of British Columbia, [1980] 1 Can. L.R.B.R. 441, where the Board emphasized that a simple mistake or even handling a matter poorly does not breach the union's duty. Rather, "it is only when the alleged carelessness reaches that of a blatant or reckless disregard for an employee's interests that the duty of fair representation will be violated if the trade union is responsible for 'serious negligence'". The Ontario Labour Relations Board also looked at gross negligence as opposed to simple negligence. In Prinesdomu v. CUPE, Local 1000 (1975), 75 C.L.L.C. 16,196, the Board states at p. 1354: "flagrant errors in processing grievances – errors consistent with a 'not caring' attitude – must be inconsistent with the duty of fair representation".*

…

[39] Discriminatory conduct is based on invidious distinctions without proper justification or rationale. The Board discussed what discriminatory conduct includes in Deck v SEIU-WEST, 2018 CanLII 127658 (SK LRB) at para 149:

> *[149] Turning first to discriminatory treatment, the consensus emerging from the decisions of this Board as well as other Canadian labour relations boards is that for purposes of duty of fair representation claims the prohibition against discriminatory treatment by a union of one or more its members means 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". See: Rayonier Canada (B.C.) Ltd, supra, at p. 201. See also: Glynna Ward v Saskatchewan Union of Nurses, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, at p. 47, and most recently, Hartmier v Saskatchewan Joint Board Retail, Wholesale and Department Store Union, and Retail, Wholesale and Department Store Union, Local 955, 2017 CanLII 20060, 290 CLRBR (2d) 1, LRB File Nos. 226-14 & 016-15, at para. 180. As proscribed grounds of discrimination have been enlarged over the years by subsequent revisions to provincial and federal human rights legislation as well as the proclamation of section 15 (1) of the Canadian Charter of Rights and Freedoms [Charter], the ability of a complainant to base a duty of fair representation claim on other enumerated and analogous grounds of discrimination – sexual orientation, being a good example – has increased.*

[40] The British Columbia Board defined discriminatory representation similarly in Judd v Communications, Energy and Paperworkers Union of Canada, Local 2000, 2003 CanLII 62912 (BC LRB), at paras 55-57:

> *. . .*
> *(b) Discriminatory Representation*

> *[55] Rayonier gives examples of grounds on which representation could be considered discriminatory; one is unequal treatment on the basis of race or sex or any of the other prohibited grounds set out in the Human Rights Code. It is important to note that both the Labour Relations Board and the B.C. Human Rights Tribunal have jurisdiction over discriminatory representation on the basis of the prohibited grounds set out in the Human Rights Code. The Board's policy is, if a complaint is filed with both the Board and the Tribunal and is primarily an allegation that the union discriminated on the basis of one of those grounds, the Board will hold its complaint in abeyance until the Tribunal renders its decision provided the Board is satisfied that the Tribunal's decision is likely to resolve any outstanding issues before the Board and the complainant will have access to an effective remedy: Carol Ilicic, BCLRB No. B235/95; Julie Sutherland, BCLRB No. B63/99.*
>
> *[56] However, the prohibition against discriminatory representation in Section 12 is not restricted to discrimination on grounds that contravene the Human Rights Code. As noted in Rayonier, it also includes discrimination based on personal favouritism. Of course, not every instance where people are treated differently amounts to discrimination. The different treatment may be due to some relevant difference in their circumstances. Thus, it is not discrimination to arbitrate one employee's grievance but not another's where there are relevant considerations supporting that distinction (e.g., the other employee's case is weaker).*
>
> *[57] Also, the union is not guilty of discriminatory representation merely because it may reach an agreement with the employer which leaves some employees in a better position and others in a worse position than they were before. This is generally recognized as part of the give-and-take of collective bargaining and the union-employer relationship in the union's representation of the employees. The Board does not substitute its judgment for the union's and the employer's as to what adjustments should be made at their workplace.*

…

[43] Bad faith conduct is conduct motivated by ill-will, malice or dishonesty. This case raises a distinct issue about the potential distinction between actual bias and an apprehension of bias. An apprehension of bias is not bad faith. On that issue, the Board adopts the approach of the Alberta Board in Andrew v Canadian Energy Workers Association, Local 10, 2017 CanLII 46721 (AB LRB):

> *[53] In Douglas, the British Columbia Labour Relations Board set out its test for the evidence required to establish bad faith as follows:*
>
> > *38 The Board in Olychick v. IBEW, Local 258, [(April 29, 1999), Doc. B167/99 (B.C. L.R.B.)], BCLRB No. B167/99 stated (at para. 49):*
> >
> > > *An allegation of bad faith is a serious allegation and involves personal animosity or hostility, absent which a decision would not have been made. The proof required to support an allegation of bad faith is summarized in Gloria Cain et al., IRC No. C50/87, as cited in Brian Rosie, supra:*
> > >
> > > > *The test imposed to determine if there has been a violation of this branch of the duty of fair representation is a stringent one. Mere speculation of bad faith will not suffice. The Council, like the Labour Relations Board, requires objective evidence that the Union handled the grievances in the way it did because of political revenge or personal animosity, or, at the very least, that there is no other reasonable explanation for the way in which the*

> *Union handled the complaint, see Ross Kulak, BCLRB No. 18/86.*
>
> *As the Labour Relations Board stated in Brian Davies, BCLRB No. L81/83, the duty of fair representation is not violated simply because the Union member has a reasonable apprehension of bias on the part of the union officers; it must be shown that union representatives actually acted in bad faith. (pp. 12-13)*

[59] As it relates to the allegation of a failure to consider the merits in reaching a settlement, the Board notes the decision of the British Columbia Board in *Mielke v Amalgamated Transit Union, Local 1724*, 2015 CanLII 73517 (BC LRB) ("Mielke"). In *Mielke*, the British Columbia Board commented on the duty of fair representation and found that effecting a reduction in the suspension supported a finding of conducting an adequate investigation:

> *22 In James W.D. Judd, BCLRB No. B63/2003, 91 C.L.R.B.R. (2d) 33 ("Judd"), the Board addressed the rights, obligations, and processes under Sections 12 and 13 of the Code, concluding:*
>
> > *A union's exclusive bargaining agency gives it the right to make all decisions concerning a collective agreement on behalf of the employees. Matters such as whether to proceed with a grievance, whether to settle or drop the grievance, and whether to take the grievance to arbitration are all decisions for the union to make. When a union decides not to proceed with a grievance because of relevant workplace considerations -- for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit -- it is doing its job of representing the employees.*
> >
> > *Section 12 prohibits a union from representing an employee in the bargaining unit in a manner that is arbitrary, discriminatory, or in bad faith. To meet its duty, the union must ensure it is aware of the relevant information when making a decision concerning an employee's representation. Its decision must be based on reasoned judgment and not on improper factors. Lastly, it must carry out an employee's representation in a manner that does not show blatant or reckless disregard for the employee's interests. If a union does these things, it has not violated Section 12. The fact that a complainant may disagree with a union's reasons for dropping or settling a grievance does not demonstrate a failure to consider the relevant circumstances, nor blatant or reckless disregard.*
> >
> > *In order to advance past Section 13, a Section 12 complaint must disclose sufficient evidence to establish that a contravention of Section 12 has apparently occurred. If it does not, the complaint will be dismissed. The Board will endeavour to give effect to the legislative direction in Section 13 and render quicker, shorter decisions that allow the parties to get on with their affairs with certainty. (paras. 113-115)*
>
> *23 The Complainant submits the Union represented him in an arbitrary manner because the Union did not conduct an investigation. In Judd, the Board stated:*
>
> > *The requirement that the union must "make sure it is aware of the circumstances [and] the possible merits of the grievance" is often referred to in shorthand form as "conducting an adequate investigation". It is*

> *important to note, however, that not every case will necessarily require an "investigation". There may be some grievances where the relevant information is already in the union's possession.*
>
> *In the more typical case, however -- for example, when an employee is suspended for alleged misconduct -- gathering the relevant information will require an "investigation". An adequate investigation may include considering the sequence of events, learning the grievor's point of view, obtaining information from potential witnesses, and offering the grievor a chance to respond. There may also be, depending on the circumstances, other ways of testing the employer's assertions. An employee is expected to cooperate and participate with the union in the investigation. (paras. 62-63)*
>
> *…*
>
> *25 The Complainant submits the Union did not make a reasoned decision because it had not conducted an investigation. In this case the Union resolved the grievance through a reduction of the suspension from ten days to three days. The Union's email to the Complainant is brief, however it refers to the Employer being unable to produce a piece of evidence, the second phone call. I find the fact of a settlement reducing a ten-day suspension to three days demonstrates the Union put its mind to the case and came to a reasoned decision whether to proceed ..*

[60] Thus, the Board does not sit in appeal of the Union's decision in this case, nor does the Board consider whether the Union was negligent or made errors in considering, conducting, and settling the grievance. The Board only considers whether the Union acted in a manner that was arbitrary, discriminatory or in bad faith. As relates to whether gross negligence constitutes its own head of liability, the Board considers grossly negligent conduct to be inherently arbitrary and is considered under that heading. It is Mr. Livingston that bears that onus of establishing that the Union breached its duty.

[61] The Board will address specific issues below; however, the Board's general conclusion is that Mr. Livingston has not established a breach of s. 6-59 based the test as set out in the caselaw. The Union originally assessed the grievance as being worth pursuing. The Union engaged the Employer on accommodations issues and filed a grievance. The accommodations issue eventually lead to the termination and the Union grieved the termination. The Union referred the matters to arbitration and retained outside counsel to run the grievances. The Union attempted to seek a settlement prior to the arbitration but was unable to reach one acceptable to Mr. Livingston.

[62] After the arbitration began and Mr. Livingston testified in direct and was subject to cross examination, the Union reconsidered the merits of the grievances based on its review of Mr. Livingston's testimony and the documents that were to be tendered at arbitration. The documents had not been provided to the grievance committee prior to the commencement of the arbitration.

Members of the Union's grievance committee attended the hearing and reviewed the documents that were to be tendered at the hearing. The Union's grievance committee concluded based on this review that settlement was the best outcome achievable and proceeding with the grievance could negatively impact labour relations and likely lead to an unfavourable ruling for Mr. Livingston. The Board accepts the Union's testimony and evidence that this was the basis of the decision, including the consideration of opinions expressed by members of the arbitration panel.

[63] The arbitration hearing was adjourned after the withdrawal of outside counsel and the parties engaged in mediation with the arbitration panel. The arbitration panel provided information that confirmed the Union's concerns with the merits of proceeding further with the arbitration.

[64] A review of the merits and other labour relations concerns were the basis of the Union's decision. The Board accepts this from the testimony of the Union witnesses, and it is supported by the email communications filed in evidence and the grievance committee minutes filed, and lastly in the decision provided to Mr. Livingston by the grievance committee. This concern is contemporaneous with the arbitration. For example, on May 17, 2021, Ms. Seidl's email on the first day of evidence reads in part:

> *…*
> *He definitely describes a lot of issues and some dysfunction with technology etc., but I'm not sure how clearly they tie to his medical / disability, if at all .... When we left off Andy was describing going off work in April of 2018 - I think much of the important evidence will come tomorrow. He seemed to suggest that his leave was related to lack of accommodation, but the medical note does not say that, and I'm not sure the evidence is there to make this link ....*

[65] In a May 19, 2021, email after receiving the Employer's settlement offer, Ms. Seidl's email to the other members of the grievance committee reads in part:

> *…The case is not a winner. It's ugly and doesn't feel good that the Union's case is, at times, turning into somewhat of a personal attack on Norma. I guess if offensive comments were actually made that's one thing, but there is nothing about that in the grievances or the documents. Nothing about it in the human rights case. It's not a harassment case. This type of thing is damaging to labour relations. Other witnesses with potentially damaging things to say haven't even hit the stand yet. If the case were strong, it might be worth it, but in this case it just feels icky. I think we need to make the tough decision and own it…*

[66] The details of the analysis changed as further information was gained, including the comments of the arbitration panel, but the focus was always on the evidence and the merits of the grievances being advanced by the Union.

[67] There were diverging opinions on the relative merits of the grievance. At the time the grievance was occurring, the grievance committee had a pessimistic view of the merits, and the national representatives of the Union, outside counsel and Mr. Livingston had a more optimistic view. However, a divergence in opinion does not mean that the local of the Union failed to evaluate the grievance on its merits. Based on both the testimony and the documentary record, the local of Union reviewed the merits of the grievances and acted based on its view of the merits of the grievances. The divergence of views establishes, for the purpose of the Duty of Fair Representation, that the merits were considered fully as the local had their view and considered the opposing view in reaching a conclusion. The Board will not consider which view of the evidence was correct as the Union is permitted to make errors.

[68] The Union decided a settlement was the best outcome even though Mr. Livingston objected to the terms of the settlement. The disagreement with the advice of counsel conducting the grievances, the decision to force settlement over the objection of Mr. Livingston rather than just discontinuing, and the appeal process chosen are matters that could have lead to a different result on negligence standard. The arguments and evidence of Mr. Livingston asks the Board to review the Union's evaluation of the evidence in detail.

[69] However, the Board must apply the standard of arbitrary, discriminatory, or in bad faith. The Union turned its attention to the merits of the case and made its decisions based on its reasoned and detailed assessment of the merits and sought settlement as what it viewed as the best possible outcome. The Union may not have made the correct decision as is asserted by Mr. Livingston, but the Board declines to enter into that analysis. The Board does not find that the Union's reasoning was tainted by improper considerations and the Board finds that the Union has met its duty of fair representation.

[70] The Board will now more specifically comment on several allegations raised by Mr. Livingston and why the Board does not find those allegations to constitute a breach of the duty of fair representation.

Disagreement with outside Counsel on whether to Proceed

[71] Mr. Livingstone takes significant issue with the Union's decision to discontinue the arbitration and seek a settlement against the advice of outside counsel. The Union called significant evidence as to the basis of its decision making. While the Union received advice from outside counsel, its grievance committee members evaluated the testimony of Mr. Livingston differently as well as the overall strength of the case. The Union was not required to follow outside

counsel's advice. Under the duty of fair representation, the Union is required to consider the merits of the case. The Union did this. The Union came to a different conclusion on the merits than outside counsel, however, without evidence of impermissible reasoning, or a failure to conduct a proper review of the merits to the extent of being arbitrary, this does not constitute a breach of the duty of fair representation.

[72] The Board would also note that the Union retained counsel to assist on the file subsequent to the withdrawal of outside counsel. One of the grievance committee members was also a lawyer. The Union was clearly aware of the legal implications of its decision. Lawyers can have disagreements on the merits of a case without it constituting negligence, let alone gross negligence or arbitrary conduct. The Board finds no concerns as far as the duty of fair representation is concerned in disagreeing with the advice of outside counsel.

Negotiations that did not involve outside counsel

[73] Mr. Livingston objects to the direct negotiations between members of the grievance committee and the Employer. It is Mr. Livingston's position that negotiations had to involve outside counsel. With respect, this ground is without merit. Counsel are agents for principals, principals are always allowed to negotiate with each other. The Board does not see a breach of the duty of fair representation in client to client negotiation without the involvement of outside counsel.

Did the Union Breach its Duty in How it Interacted with the arbitration panel?

[74] Mr. Livingston takes issue with the parties' interactions with the arbitration panel, particularly as it relates to discussing the merits of the case. Mr. Livingston relies on *Hunt v. The Owners, Strata Plan LMS 2556* to argue the impropriety of *ex parte* communication. However, there was no *ex parte* communication. Mr. Livingston was not a party to the arbitration; the parties were the Union and the Employer and they were both present and engaged with the arbitration panel.

[75] Under s. 6-49(3)(h), an arbitration panel may engage parties in mediation by agreement. The Union and the Employer agreed to that process. The Board does not see an issue on the duty of fair representation in the Union agreeing to mediate.

[76] As it relates to the Union's conduct, the Board finds nothing arbitrary, discriminatory, or in bad faith, in the Union engaging in discussions and mediation with the arbitration panel. There is

also no breach of the duty in engaging in these discussions without the presence of Mr. Livingston as the Union has carriage of and ownership of the grievance.

[77] The Alberta Board in *Lewyk v Natural Gas Employees' Association* found it would be appropriate for a union to give weight to an arbitrator's comments on the merits of a grievance in determining whether to settle:

> *[24] It is clear the Complainant does not agree with the comments of the Arbitrator, or the Arbitrator's view of the grievance. However, the Arbitrator's comments to the parties have significant weight. After describing its evidence and argument, NGEA was told by the individuals who would be deciding the grievance that the grievance would not succeed. The recommendations were also then provided by the neutral Arbitrator who had heard the parties' submissions. Moreover, NGEA was aware the Arbitrator's views were supported by at least two arbitral decisions. In these circumstances, NGEA was not required to ask the affected employees if they wanted to settle the grievance: Dezentje et al. v IBEW, Local 424 et al., [1999] Alta. L.R.B.R. 267 at page 400, affirmed 2002 ABCA 249.*

[78] The Board agrees that a Union should give significant weight to a panelist comments. It is the view of a neutral disinterested party and should be considered in an evaluation of settlement.

[79] Mr. Livingston asks the Board to disregard the conversations with the panel as they were not recorded. The Board finds that the conversations between the panelists and the Union did happen despite the lack of a recording as they were part of testimony that are accepted and are referenced in the documentary record. The Union considering the comments of the panel is a valid consideration in determining the merits of proceeding with the arbitration or seeking settlement.

Did the Grievance Committee Exceed its Authority?

[80] Mr. Livingston argues that the grievance committee acted beyond its authority for remaining involved in the grievance during the arbitration process. The grievance committee is constituted pursuant to clause 16(b)(2) of the Union's bylaws, which reads:

> *2. Grievance Committee*
>
> *This committee will:*
>
> *• Consist of three (3) members.*
>
> *• Oversee the handling of all local grievances.*
>
> *• Receive copies of all grievances.*

> *• Prepare a report on the status of all grievances to be submitted to the CUPE Representative, and to the membership meeting.*
>
> *• When a grievance is not settled in the initial steps provided for in the collective agreement, this committee will decide whether or not the grievance should proceed to arbitration.*
>
> *• If the decision is to not proceed, the grievor(s) may appeal the decision to the Executive Board.*

[81] Mr. Livingston has argued that the delegation is limited so that if a matter is directed to arbitration, the grievance committee essentially no longer has any role in the grievance. The committee has arguably been delegated the authority to oversee all grievances and decide whether matters proceed to arbitration. There is no limitation in either delegation such that the committee is not responsible for grievances referred to arbitration. The Union has delegating decision making in relation to these issues, the reservation of power to the executive is through the appeal mechanism in the bylaws.

[82] This appeal mechanism was utilized and the executive agreed with committee's decision to settle through Mr. Livingston's appeal. There is no breach of the duty in the grievance committee making decisions based on authority delegated pursuant to the bylaws.

[83] As it relates to the composition of the grievance committee and the interactions between the members, the Board does not see any issues related to fair representation. Union committees and executives are elected members of the Union, and the makeup of an individual committee is a matter of democratic choice. How an elected body interacts is a function of individual personalities and skills. The Board only applies one standard regardless of the composition of a union executive or grievance committee. As noted by the Canada Board in *Haley v. C.A.L.E.A. (No. 1)*, 1981 CarswellNat 602:

> *…The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.*

[84] The individuals on the grievance committee discussed matters and considered the merits. The relative weight any individual member had in discussion is not for the Board to review unless that member convinced the committee and/or the Union to make decisions in a manner that was discriminatory, arbitrary or in bad faith.

Settlement over the objection of Mr. Livingston

[85] The primary issue on this appeal is the Union's decision to settle the grievances over the objection of Mr. Livingston. The Board finds that the Union did not breach the duty of fair representation in settling the grievances.

[86] The duty of fair representation can be heightened in disciplinary cases, and a union must specifically consider the impact of not proceeding to either file a grievance or through arbitration on a grievor. As noted by the Supreme Court of Canada in *Centre Hospitalier Régina Ltée v. Labour Court,* 1990 CanLII 111 (SCC), [1990] 1 SCR 1330

> *…a union must recognize the importance of an employee's individual interest when exercising its discretion whether or not to proceed with a grievance against a dismissal or disciplinary sanctions.*

[87] The Union must not just recognize the importance of an individual's interest but demonstrate that the related reasoning did not consider inappropriate factors. The Union's evidence establishes that it did recognize the importance to Mr. Livingston. The Union did not put the weight on reinstatement that Mr. Livingston thought that the Union should, however, they are not required to accept Mr. Livingston's perspective. The Union did repeatedly engage the Employer on the issue of reinstatement and only accepted settling without reinstatement after the Employer made it clear it was not on the table and the Union believed it was no longer achievable through arbitration.

[88] The Union realized Mr. Livingston wanted reinstatement, but did not believe based on its review of the case that it was a realistic possibility. The Union was trying to achieve the best outcome it could in the circumstances, while also considering the cost of proceeding all the way through would have on the union and overall labour relations. These are acceptable considerations.

[89] It is also within the Union's right to settle as the Union owns the grievances. *In Nutrien Ltd. v Unifor, Local 922*, 2023 CanLII 97057 (SK LA), Arbitrator Ish said:

> *[37] The authorities relied upon were cases where the issue was between the union and bargaining unit employees – as the exclusive bargaining agent for employees the union controls the grievance process not the affected employees. This is clear in Medicine Hat 1996 where at page 11 Arbitrator David Jones states:*
>
> > *… Further, it is traditional and makes "labour relation sense" to say that while either the employee or the sub-local may file a grievance, it is the Union or professional association which ultimately "owns the grievance" and is entitled to make the*

> *decision about whether to submit a particular grievance to arbitration and to incur the concomitant financial obligation of paying for the arbitration (including paying one-half of the arbitrator's cost: see Article 15.9.*

And in St. Peter's Hospital 2005 Arbitrator Surdykowski said:

> *12 As the exclusive bargaining agent for the bargaining unit employees, a union acts as both principal and agent in matters relating to the negotiation and administration of the collective agreement. As such, unless the collective agreement specifically provides otherwise, and very few do, it is the union and not the employees who "owns" the grievance and arbitration procedure under the agreement. This means that it is the union who decides whether or not to file a grievance, decides whether or not to refer a grievance to arbitration, chooses an arbitrator on agreement with the employer or requests that the Minister appoint one under section 49 of the Labour Relations Act, decides how to present the case at arbitration, and decides whether or not and on what terms to settle a grievance. The union may and usually does seek the input or advice of affected employees or others, but it is not bound to accept that advice or to proceed in accordance with any employee's wishes. The only limitation on the union's rights or powers in this respect is that it must act in a manner that is not arbitrary, discriminatory or in bad faith.*
> …

[90] Mr. Livingston believes that the Union failed to appreciate the importance of the position to him. The Union may not have understood the particular importance of this position; however, the Board accepts that the Union did consider the merits of the grievances and the impact of settlement on Mr. Livingston's rights.

[91] The Union has the right to settle grievances. Human rights are matters that fall within a union's representational duties, it is mainly a question of whether that is a matter of exclusive or concurrent jurisdiction: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 (CanLII), [2021] 3 SCR 107. The Board finds that it was within the Union's legal authority to settle other statutory claims arising from Mr. Livingston's employment.

[92] Whether it would have been preferable for the Union to withdraw the grievance and allow Mr. Livingston to individually pursue his rights is a matter beyond the scope of the duty of fair representation. It is not a breach for the Union to settle a grievance over the objection of a grievor as long as the union properly considers the grievance and the impact of settlement on the individual. The Board finds that the Union acted within its rights and the duty of fair representation in settling the grievance.

Did the Procedure on the Appeal Breach the Union's Duty?

[93] Mr. Livingston objects to the procedure that the Union adopted for his appeal. In particular, Mr. Livingston objects to the Union not allowing him to be present for the Union's presentation. The Board agrees it would be a preferable procedure to allow parties full participatory rights in a hearing, however, that standard is not required by the duty of fair representation. The duty of fair representation does not require internal appeals.

[94] This case is distinguishable from *Prebushewski v. Canadian Union of Public Employees, Local No. 4777* cited by Mr. Livingston. In that case, the grievor was not provided with reasons or notice of an ability to appeal. However, in Mr. Livingston's case, the grievance committee provided reasons and the local of the Union specifically organized an appeal process to allow Mr. Livingston to appeal. Mr. Livingston was provided with reasons for the decision, which accord with the previous internal deliberations, and an opportunity to be heard by a separate appeal panel.

[95] As it relates to Mr. Mowat being involved with the grievance committee and the appeal committee, the Board does not see that involvement as a breach. Mr. Mowat was not a member of the grievance committee despite his involvement. The Board accepts his testimony that the other members of the appeal committee reached the conclusion to dismiss the appeal independently.

[96] It would have been preferable for the Union to have produced a written decision of the appeal. However, these are policy decisions of unions, whether to allow appeals and the form the appeals are to take. Neither the Board nor the law requires a union to adopt a specific method of appeal. The law requires the Union to not act in breach of its duty of fair representation in any appeal that is granted. The Board finds that the procedure on appeal was not perfect but was not in breach of the Union's duty.

Was the Union's Analysis tainted by discrimination?

[97] Mr. Livingston asserts that the Union's reasoning and analysis is tainted by ableist discrimination. That is discrimination against persons living with disabilities. The Board disagrees with this assertion. The evidence does not establish that the Union's assessment of the grievances was based on discriminatory reasoning. It was based on a review of the evidence including testimony and the arbitrators' comments on that testimony. In addition to the oral

evidence, the documentary record does not support a finding of discriminatory reasoning on the part of the Union.

Did the Employer engage in Collusion?

[98] An employer can be liable for a union's breach of the duty of fair representation where it has colluded or participated in the Union's breach. The Board has not found that the Union has breached its duty in this case. Even if it had, the Employer did not engage in collusion with the Union. The Employer always acted in its own interest and at no point was acting in concert with the Union against Mr. Livingston. The communications between members of the grievance committee and the Employer have already been addressed. Direct negotiation to promote settlement is not collusion. Nor does Mr. Mowat changing positions after Mr. Livingston's termination, nor considering the impact of continuing the grievance on labour relations going forward. The Board does not consider any of these facts on their own or in combination to be evidence to infer collusion from in this case.

Conclusion:

[99] If the standard of duty of fair representation were a negligence standard, that Board may have reached a different conclusion. If it were a negligence standard, the Board would be answering the question of whether it is reasonable to settle a case against the advice of counsel and over the objection of the person whose rights are affected. However, as canvased above, that is not the question that the Board must answer in this case, and in this case the Board finds that the Union's conduct was not arbitrary, discriminatory, or in bad faith.

[100] As a result, with these Reasons, an Order will issue that the Application in LRB File No. 124-21 is dismissed.

[101] The Board thanks the parties for the helpful submissions they provided, all of which were reviewed and considered in making a determination in this matter.

DATED at Regina, Saskatchewan, this **11th** day of **April, 2025.**

LABOUR RELATIONS BOARD

Kyle McCreary
Chairperson