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File No.LB- 0884

November 18, 2015

Via Xpresspost

Barry J. Mason,
Presse Mason,
1254 Bedford highway,
Bedford, NS,
B4A 1C6.

Dear Mr. Mason,

Re: Shannon Lee Nickerson - *Complainant*
-and-
Canadian Union of Public Employees, Local 3912 and Marianne Welsh - *Respondents*

Section 54A of the *Trade Union Act* - DUTY OF FAIR REPRESENTATION

Enclosed please find my decision with respect to the above-noted duty of fair representation complaint.

The *Trade Union Act* requires me to dismiss any complaint which does not contain sufficient evidence to satisfy me that the Labour Board could potentially find that the respondents breached the duty of fair representation in the situation which forms the basis of the complaint. I have carefully considered all of the material that has been filed in support of this complaint. I am not satisfied that the evidence on file would permit the Labour Board to potentially find that the duty of fair representation has been breached in this situation. Consequently, I have dismissed the complaint. My enclosed review decision provides my detailed reasons for reaching that conclusion.

All of the foregoing is for your information. I trust you find this to be in order.

Sincerely,

Brian Sharp
Review Officer

BS /jh

Enclosure: File No. 0884 Review Decision

Labour BOARD

File No. LB-0884

LABOUR BOARD

In the matter of a complaint under s. 54A of the *Trade Union Act* of Nova Scotia

By

Complainant 0884

Complainant

Against

Union and W

Respondents

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s. 56A(1) REVIEW DECISION

Complaint filed:	November 25, 2014
Representatives:	Barry J. Mason for the Complainant
Review Decision issued:	November 13, 2015
Review Officer:	Brian Sharp, B.Comm., M.B.A., LL.B.

BACKGROUND:

The Complainant was employed as a part-time professor at one of the province's universities (the "University") from September 2000 until September 2011. Her employment ended on September 16, 2011 when the University terminated her teaching appointment. The Union is a local of a larger national trade union, and the certified bargaining agent for a unit which includes the part-time professors the University employs. W is the national union's National Representative assigned to the Union.

This complaint arises from the Complainant's dissatisfaction with the Respondents' handling of two grievances filed in her regard. The first grievance (the "Harassment Grievance"), filed on March 23, 2011, alleged that the University had issued a disciplinary letter "without just cause" on March 21, 2011; and undertaken "a pattern of harassment pertaining to communications". The second grievance (the "Termination Grievance") was filed on October 6, 2011, and challenged the University's action of "denying re-appointment to teaching at (the University) which constitutes dismissal under the Collective Agreement."

Ultimately, the Respondents referred the Harassment Grievance and Termination Grievance to arbitration. The evidence is not particularly detailed about the progress of the Grievances once they had been referred to arbitration; however, at some point, the Respondents agreed to participate in a mediation on session on December 9, 2014. The Complainant disagreed with that decision, and (through counsel) refused to attend the session. The Respondents refused to adjourn the session. The Complainant, again through counsel, wrote to the mediator to make her aware of her objection to the session proceeding. The mediator adjourned the mediation session. Nevertheless, the Respondents and the University held settlement meetings and concluded an agreement settling both Grievances (see Settlement Agreement, dated December 18, 2014). I infer that the Complainant has never signed that agreement.

The Complainant's opposition to the mediation session was primarily based on health concerns. The Complainant started experiencing health problems in 2009 when she began experiencing debilitating symptoms related to a congenital ear condition. The ear condition required multiple surgeries, including one surgery outside of Nova Scotia. Around the same time, it appears that she was experiencing:

- early signs of depression; as well as
- conflicts with university administrators over her use of Facebook communicate with her students, altering examination timing, and submitting her dossier late.

Dr. E. M. Rosenberg assessed the Complainant on June 10, 2014. He believed that the combination of conflict with the University, external psychosocial stress, and physical stress, augmented and sustained her depressive symptomatology. [See Dr. Rosenberg's June 30, 2014 report.]

The Complainant's position is that she is physically and mentally disabled. She opposed the mediation session because she did not feel it adequately accommodated her disabilities. In particular, she believed that she needed "vindication" for the allegations made against her in a March 21, 2001 discipline letter. She believed that she could only obtain such vindication through arbitration of the Harassment Grievance, so she was not willing to consider settlement of that Grievance. She believes that the Respondents' refusals to either exclude the Harassment Grievance from the settlement discussions, or commit to taking that Grievance to arbitration, amounted to discrimination. She has complained to the Labour Board (the "Board") that the Respondents failed to represent her fairly when they dealt with her situation.

The file evidence does not include a full record of the events leading to the Complainant's termination. The earliest evidence of formal disciplinary action being taken against her is contained in a copy of a February 17, 2011 letter written to her by the University's Acting Dean of Science. The letter lists seven performance concerns which were discussed by University representatives, the Complainant, and Union representatives on February 10, 2011:

- not attending the final exam for one of her courses in December 2010 and leaving undergraduate teaching assistants in charge of the exam;
- offering makeup exams without checking with the Dean's office, contrary to Academic Regulations;
- being consistently late submitting final course grades, contrary to Academic Regulations;
- using Facebook to distribute grades to students;
- student complaints about an academic reference letter request;
- the ongoing nature of the Complainant's performance issues, including multiple discussions with respect to the use of Facebook; and
- compliance with Faculty of Science Policy on Social Media, and protection of university identity and personal privacy.

At the close of his letter, the Acting Dean notified the Complainant that the letter was a formal notification of discipline as per the collective agreement.

The copy of the February 17, 2011 letter provides the only direct documentary evidence of the disciplinary process leading to the Complainant's termination. However, I have noted that the Harassment Grievance was based, in part, on the University having issued a further disciplinary letter to the Complainant on March 21, 2011 - approximately one month after the February 17, 2011 disciplinary letter. As I have already noted, the grievance challenged "a pattern of harassment pertaining to communications and the issuance of a disciplinary letter dated March 21, 2011 without just cause." (See Union Grievance Form initiating Case No. 2011 – 01.) I have noted that two of the seven performance concerns listed in the February 17, 2011 letter related to the Complainant's use of Facebook to communicate with her students. Since the grievance referred to "harassment pertaining to communications", I infer that aspects of the March 21, 2011 and February 17, 2011 discipline letters were related.

The evidence reflects that at least two more performance/discipline related documents were issued to the Complainant in September 2011. The first was a memo written by the Acting Chairperson, Department of Psychology, dated September 6, 2011. The second was a memo written by the Acting Dean of Science, dated September 16, 2011 terminating the Complainant's appointment. I infer the memos were disciplinary since the Union wanted both documents removed from the Complainant's file as part of a grievance settlement. (See Union counsel's letter to University counsel dated May 9, 2014.)

ISSUE:

Is this complaint supported by sufficient evidence to satisfy me that the Board could potentially find that the Respondents failed to represent the Complainant fairly?

ANALYSIS:

I have conducted this review pursuant to s. 56A(1) of the *Trade Union Act* (the "*Act*"), following my appointment as Review Officer by the Board. Subsection 54A(3) establishes the duty of fair representation for the purposes of the *Act*. It prohibits trade unions, and persons acting on behalf of trade unions, from representing bargaining unit members in a manner that is:

- arbitrary;
- discriminatory; or
- in bad faith;

with respect to their rights under collective agreements.

Subsection s. 56A(2) of the *Act* requires me to dismiss any duty of fair representation complaint if I am not satisfied that the evidence would potentially permit the Board to find that the Respondent has failed to comply with s. 54A(3) of the *Act*. I have adopted the definitions for arbitrary, discriminatory, and bad faith representation established by the British Columbia Labour Relations Board in *Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000, 2003 CanLII 62912 (BC L.R.B.)* for reviewing s. 54A(3) complaints.

It is critical to understand the nature of the trade union duty of fair representation to review complaints that s. 54A(3) has been breached. When employees decide to have a union represent them, they give the union exclusive authority to represent their interests with regard to the terms and conditions of their employment. That exclusive authority encompasses the power to administer collective agreements, which includes control of the grievance process through to settlement.

The duty of fair representation originated as a common law concept. It arose from the need to protect bargaining unit members from unions abusing the authority they are entitled to exercise in workplaces. With time, many jurisdictions imposed a duty of fair representation

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within their labour relations statutes. Gradually, jurisdiction over the duty of fair representation moved from the Courts to specialized labour relations tribunals, such as the Board. In Nova Scotia, the Courts held jurisdiction over the duty of fair representation until October 1, 2006, when that jurisdiction was transferred to the Board.

Scanlan, J., of the Nova Scotia Supreme Court provides a useful history of the development of the duty of fair representation in his decision in *Davison et. al. v. NSGEU*, (2004), 220 N.S.R. (2d) 365 (NSSC). At paragraph 64 of his decision, Scanlan, J. addressed the scope of union's power over the grievance process, and how the duty of fair representation impacts how unions use their power:

> Grievances, including policy grievances, are ultimately controlled by the Union. Individual members do not have any entitlement to dictate how grievances are resolved. The duty on a union is to exercise its discretion in settling grievances in good faith, objectively and honestly, after a thorough review of the grievance in the case, taking into account the significance of the grievance and of its consequence for the employee on the one hand and the legitimate interests of the Union on the other hand.

The Nova Scotia Court of Appeal upheld Scanlan, J.'s decision on appeal. [See *Davison et. al. v. NSGEU*, (2005), 231 N.S.R. (2d) 253 (NSCA).] Cromwell, J. wrote about the duty of fair representation, the union's role in representing employees in bargaining units, and the union's discretion to balance the interests of the bargaining unit with the interests of individual unit members, at paragraphs 68 and 69 of the Court's decision:

> The common law duty of fair representation arises from the union's exclusive power to speak for the members of the bargaining unit: [**Canadian Merchant Service Guild v. Gagnon,** [1984] 1 S.C.R. 509 (SCC)] at 526. The focus of this duty of fair representation, therefore, is the employment relationship regulated by the collective agreement. The employee's rights and responsibilities in all matters which in their essential character arise out of the interpretation, administration or alleged violation of the collective agreement are to be determined in the dispute resolution processes established by the collective agreement: see, eg., **Weber v. Ontario Hydro**, [1995] 2 S.C.R. 929 (SCC). In such matters, the union is generally both the exclusive spokesperson for the employee and the ultimate decision maker about whether and how a grievance will be pursued. While unions often undertake a much broader mandate to serve the interests of their members, the union's duty of fair representation is anchored in the collective agreement.
>
> The duty of fair representation balances the overall interests of the membership with those of individuals. It is the nature of collective bargaining that what is in the overall best interests of the unit will be contentious and may conflict with the personal interests of some individual members. The union's duty is to fairly represent the interests of all the members of the bargaining unit. Where the

> interests of individual members must be balanced with those of the bargaining unit as a whole, the union has considerable discretion as to how this should be done. And, as **Gagnon** makes clear, the standard is not perfection. The union is free to exercise its judgement concerning the best interests of the bargaining unit provided that it does so in good faith, objectively and honestly. ... What is in the best interests of the bargaining unit is generally a multi-faceted question with no one, right answer. The duty of fair representation is imposed to prevent abuse of the union's exclusive power to represent the members of the unit, not to allow courts to second guess the union's judgement calls.

Neither Scanlan, J. nor Cromwell, J. was addressing s. 54A(3) of the *Act* in the *Davison* decisions. However, I am satisfied that the general principles they established in the decisions apply to s. 54A(3). As such, I am satisfied that the nature of duty of fair representation, as expressed by s. 54A(3), establishes a standard of conduct trade unions and trade union representatives must meet when they represent bargaining unit members. It provides a means for ensuring that trade unions exercise their exclusive authority to represent employees on the basis of employment considerations that are relevant to the bargaining unit as a whole. I am further satisfied that the *Davison* decisions, as well as the Supreme Court of Canada decisions in *Weber* and *Gagnon*, provide principles which help define the scope of the duty of fair representation, namely:

- unions, not grievors, control the grievance process;
- unions must place priority on the interests of the bargaining unit as a whole when they deal with and resolve grievances;
- the duty of fair representation does not require unions to make correct decisions, rather they must make decisions that are in good faith, objective, and honest; and
- when the interests of the bargaining unit conflict with the interests of an individual member or members, the union must act in the interests of the bargaining unit.

Complainant's counsel argues that the Complainant's physical and mental disabilities impact upon the standard of representation required of the Respondents. He argues that the *Human Rights Act* requires the Respondents to accommodate the Complainant's disabilities to the point of undue hardship when they represent her. Therefore, the conduct of the grievance process, and any resolution attained through that process, must adequately accommodate any needs arising from her disabilities.

Similarly, counsel argues that the Complainant's disabilities impact upon how the Respondents should balance competing interests of the bargaining unit and the Complainant. He maintains that the bargaining unit must accommodate the Complainant to the point of undue hardship. That means that the Respondents must apply the undue hardship standard if they choose the interests of the bargaining unit over the interests of the Complainant. In particular, he argues that the Union may only refuse to arbitrate the Harassment Grievance if it can show that such an arbitration would impose an undue hardship on the bargaining unit.

The Complainant has argued that there is sufficient medical evidence for the Board to find that, at the time of the mediation, she was physically and mentally disabled. Her argument is based on medical evidence contained in Dr. Rosenberg's opinion noted above, and Dr. F. McGrath's October 20, 2014 report. Dr. McGrath is the Complainant's family physician. The Complainant maintains that the combined evidence in their reports establishes that her best mental interests required that she have extensive input into any resolution of the grievances; and that she needed to attain vindication through arbitration of the Harassment Grievance, or she would risk exacerbation of her mental health problems. In light of this evidence, she asserts that the Respondents could only have refused to arbitrate the Harassment Grievance if they could show that the arbitration would cause undue hardship to the bargaining unit.

With all respect to the Complainant and her counsel, I am not satisfied that the Board could accept their argument.

The Complainant's argument relies initially on her being able to provide sufficient expert medical evidence to establish that:

- she is physically and mentally disabled; and
- the manner in which her grievances proceed directly impacts on her impairments.

I am satisfied that there is sufficient evidence in Drs. Rosenberg's and McGrath's reports to permit the Board to potentially conclude that the Complainant was physically and mentally disabled at the times relevant to this complaint. I am not satisfied that those reports provide sufficient evidence to potentially permit the Board to find that the way the Complainant's grievances proceeded would directly impact on either of her disabilities. Consequently, even if I were to agree with the Complainant about how the *Human Rights Act* interplays with s. 54A(3) (and I make no comment to that effect), I am not satisfied that the Complainant has provided sufficient evidence to permit the Board to find that the modified test she has proposed applies in this situation.

The Board must consider several factors when it assigns weight to opinion evidence. Amongst other factors, it must consider the relevance and extent of the author's qualifications. Even if the Board is satisfied that the author is duly qualified to provide opinions on the subject in question, it must also examine the quality of the information which was provided to the expert as a basis for their opinion.

I am not satisfied that the Board could conclude that Dr. McGrath's opinion was based on sufficiently accurate information about the legal process in which the Complainant was engaged for it to rely on her opinion about how the mediation process would affect the Complainant's health.

The opening paragraph of Dr. McGraw's letter reveals that she was providing her opinion in relation to the Complainant's legal situation:

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> (The Complainant) has asked me to write a letter in support of her case going to arbitration rather that (sic) mediation. I gather that arbitration allows for (the Complainant) to be involved, represented, and given access to the process whereas mediation shuts her out.

I am not satisfied that the opening paragraph of Dr. McGrath's letter would permit the Board to find that she based her opinion on accurate information about the legal process in which the Complainant was involved. In particular, I am not satisfied that the evidence would permit the Board to find that the mediation process shut the Complainant out. Therefore, I am not satisfied that the Board could find that Dr. McGrath was able to prepare her opinion about how the mediation process would affect the Complainant's mental health on the basis of accurate information.

Given the circumstances, particularly of the Termination Grievance, I infer that it is highly unlikely that the University would have agreed to any mediated settlement without the Complainant's personal agreement. The copy of the draft Settlement Agreement included in the evidence is consistent with that inference. It clearly reflects that the Complainant would have had to personally accept its terms for the agreement to have been effective. [See Clauses 9, 10, 12, 13, and signature line.] Moreover, as with virtually any settlement, several aspects of the agreement required the Complainant's personal commitment and compliance for the settlement to have any prospect of being successfully implemented. I cannot accept that the Board could find that the Complainant would have been shut out of the mediation process when:

- a mediated settlement would have required her personal agreement;
- she is the only person who could have informed the University and the Respondents about which settlement provisions she considered acceptable or unacceptable; and
- there is no evidence suggesting that she was anything but welcome at the mediation session.

I am satisfied that the Board would also have significant concerns with relying significantly on Dr. Rosenberg's opinion. Dr. Rosenberg's report reveals that he based his opinions on:

- the Complainant's description of her situation during her consultation and examination;
- covering letters from the Complainant's counsel;
- copies of correspondence between the Complainant and the union;
- copies of medical records from Dr. McGrath's files; and
- copies of the Complainant's student evaluation reports.

His report includes a summary of his understanding of the contentious issues between the University and the Complainant:

- the use of Facebook to post lecture notes for her students;

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- allegations that the Complainant had altered exam timing;
- allegations that the Complainant had submitted her dossier late.

He noted his understanding that the Complainant had been "verbally accosted" by the Acting Chair of her Department over the Facebook issue, even though her use of Facebook was not contrary to University policy, and the University's administration had dismissed Facebook-related privacy concerns. He also noted that the Complainant had "refuted" the non-Facebook related allegations against her. At page 8 of his report he wrote:

> Rather, it is my understanding that as a union member, (the Complainant) is entitled to full benefits of membership, including legal and other support. Further it is my understanding that (the Complainant) should be able to receive the benefit of any doubt in a disharmonious situation involving her employer, particularly when the evidence (as reviewed in the documentation received) does not support the employer's position. [It is my assumption, having reviewed the documentation forwarded to me, that the basis for dismissal of (the Complainant) from her university position is tenuous.]
>
> It seems reasonable that (the Complainant) should have considerable input into any dealings that her union has with her employer. Further, it is (the Complainant's) view (and I can find no contraindication to this view) that her behaviour involving transgressions of University policy were not as alleged by the University. Vindication will be of prime importance in the relief of any present depressive symptomatology, and in maintaining a sense of personal integrity and dignity. The actions of (the Complainant's) employer - described by her as "bullying and harassment," and the inaction of her union in not actively pursuing her grievance for three years has, in my opinion, contributed to the sustaining of (the Complainant's) depressive symptomatology.

I am not satisfied that Dr. Rosenberg's evidence would potentially permit the Board to find that requiring the Union to take the Harassment Grievance to arbitration was necessary or advisable to safeguard the Complainant's mental health.

The opinions Dr. Rosenberg expressed about the Complainant were medical/legal opinions, not purely medical opinions. For example, his opinion that vindication would benefit the Complainant's mental health was a medical opinion. However, his opinion that the University's basis for dismissing the Complainant was "tenuous" was a legal opinion. Similarly, his opinion that the Complainant could "refute" the University's non-Facebook disciplinary allegations was also a legal opinion. I am not satisfied that the Board could escape the inference that Dr. Rosenberg's understanding of the Complainant's legal position suggested that her Grievances would be upheld at arbitration. Similarly, I am not satisfied that the Board could escape the further inference that Dr. Rosenberg's opinion that the Complainant would obtain the benefits of vindication through arbitration was influenced by his understanding that the arbitration would be successful. As a result, I am satisfied that the Board could only conclude that Dr.

Rosenberg's opinion that the Grievances must be taken to arbitration was largely based on his legal opinions about her situation.

Notably, there is no evidence that Dr. Rosenberg was provided with copies of:

- the Complainant's complete disciplinary record;
- any of the disciplinary letters issued to the Complainant;
- her dismissal memo; or
- copies of any relevant University policies, such as its Social Media Policy or its Examination Policies/Regulations.

why not ask her?

I am not satisfied that the Board could potentially find that there is sufficient evidence to establish that the legal elements of Dr. Rosenberg's medical/legal opinions are reliable or persuasive.

I am not satisfied that there is sufficient evidence to permit the Board to find that is qualified to give persuasive legal opinions. The evidence a copy of Dr. Rosenberg's curriculum vitae. That document establishes that Dr. Rosenberg is a psychiatrist, but does not establish that he is legally trained, or an arbitrator or adjudicator. the Board could not ignore that the evidence establishes that Dr. Rosenberg is a psychiatrist, but does not establish that he is legally trained, or has acted as anything other than a witness in a legal proceeding.

Even if the evidence established that Dr. Rosenberg was qualified to give legal opinions, I am not satisfied that the Board could potentially find that the legal aspects of his opinions were based on a sufficient body of balanced information to be persuasive. The Board could not ignore the lack of evidence establishing that Dr. Rosenberg was provided with a full body of evidence respecting Complainant's disciplinary record. The Board also could not ignore that Dr. Rosenberg relied solely on the Complainant's descriptions to form his opinion about the nature of her relationships and interactions with her supervisors.

Since I am not satisfied that the Board could potentially rely on the legal aspects of either Dr. McGrath's or Dr. Rosenberg's opinions, I am not satisfied that the Board could rely on either of opinion to find that the way that her grievances proceeded would directly impact her physical or mental impairments. As such, I am not satisfied that the Board could potentially find that the evidentiary basis has been established to impose an undue hardship standard of representation on the Respondents, even if it were to agree that the *Human Rights Act* has application to s. 54A(3) complaints.

Is this complaint supported by sufficient evidence to satisfy me that the Labour Board (the "Board") could potentially find that the Respondents represented the Complainant in an arbitrary manner?

Based on *Judd*, I consider "arbitrary" representation to have occurred when an employee's collective agreement interests have been represented in a manner which was ill-informed, or

treated recklessly or indifferently. In her complaint, the Complainant alleged that the Respondents represented her in an arbitrary manner by:

- making decisions about her grievances without showing adequate concern for her legitimate interests;
- failing to adequately investigate and discover the circumstances surrounding her grievances;
- imposing unreasonable deadlines for her to respond to documents;
- displaying a non-caring attitude toward her interests.

Turning first to the Complainant's allegation that the Respondents failed to adequately investigate her situation, I am not satisfied the Board could potentially find that her allegation is valid.

Taken as a whole, the evidence demonstrates ongoing differences of opinion about the adequacy of the information, particularly medical information, which the Complainant was willing to provide to the Union. Without commenting on the reasonableness of either side's positions, I am satisfied that the evidence shows that the Union, W, and a number of Union representatives took considerable steps to obtain information relevant to representing the Complainant. These efforts are perhaps most clearly summarized in the Union Legal & Legislative Representative's April 16, 2013 letter to W.

The Legal & Legislative Representative is a Union staff lawyer. Her April 16, 2013 letter provides her legal opinion about where the Harassment and Termination Grievances stood in advance of an arbitration session which was subsequently adjourned. It reflects that the Representative considered a broad range of information and factors when she prepared her opinion, including:

- information W had obtained from the Centre for Academic and Instructional Development relevant to current thought about academic use of social media;
- information respecting complaints against the Chair of the Department of Psychology, and their relevance to pursuit of the harassment grievance;
- a 2012 text entitled "*Preventing Violence and Harassment in the Workplace*";
- the sufficiency of the medical evidence the Complainant had made available to the Union;
- how late disclosure of medical evidence could affect how the Union could present the grievances to an arbitrator;
- lack of clarity over whether the Complainant wished to return to her job; and
- how the Complainant's intention to express dissatisfaction with Union's representation to the arbitrator could affect the case.

I am not satisfied that the Board could potentially find that the Respondents were ill-informed when they represented the Complainant in light of the evidence showing the breadth of

relevant information they obtained, attempted to obtain, and considered in preparation for arbitration.

Turning to the balance of the Complainant's allegations of arbitrary conduct, I am not satisfied that the Board could potentially find that the Respondents failed to show due regard for her interests when they represented her.

The evidence, as a whole, reflects that the Complainant and her counsel misunderstood the nature of the grievance process. They appear to view the Complainant as a full party within the process, who has the authority to direct the case. This understanding is perhaps best reflected by the following from Complainant counsel's December 11, 2014 letter to W:

> (The Union's) actions over last week have irreparably damaged an already strained relationship with its Member. Its actions are a serious violation of (the Complainant's) human rights and a breach of its duty to its Member. It is incumbent that you step aside now and fund independent counsel for (the Complainant) so that her grievance can proceed to Arbitration. Under no circumstances do you have authority to settle (the Complainant's) grievance without her consent. I will be copying (the University's counsel) so she is aware of our position on this matter.

It is also reflected in Complainant counsel's May 12, 2014 letter to W. In part of his letter, counsel addresses a letter the Legal & Legislative Representative had written to the University's counsel on May 9, 2014. That letter set out terms the Union would require in an agreement settling the Harassment Grievance, ijncluding removal of the March 21, 2011 discipline letter from the Complainant's personnel file, and a letter from the University acknowledging that "the timing and tone" of certain communication from the Chairperson of the Psychology Department was inappropriate. Counsel wrote:

> (Legal & Legislative Representative's) letter to (the University's counsel) dated May 9, 2014 [setting out an offer to settle (the Harassment Grievance)] came as a complete shock. Incredibly, neither (the Complainant) nor I were consulted before this offer to settle was put forward. As a matter of professional courtesy I would have expected (the Legal & Legislative Representative) to forward this offer to me before it was communicated to the University. It was disappointing not to be extended that courtesy.
>
> However, and more importantly, it is a clear breach of the Union's duty to (the Complainant) to send out an offer to the University without first consulting with her. Attempting to settle (the Complainant's) grievance without even reviewing the offer with her demonstrate the Union's complete lack of interest in taking into account anything that (the Complainant) has to say. Given that we are dealing with human rights issues in both grievances [and you have no medical evidence to support that the proposed resolution will accommodate (the Complainant's) disability], the violation is even more egregious.

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As noted above, when trade unions are certified as bargaining agents under the *Act*, they are given exclusive authority to negotiate the terms and conditions of employment with employers. The terms and conditions which they negotiate are contained in collective agreements. Grievance provisions within those agreements provide the mechanism the parties use to enforce the terms and conditions. Only the union and the employer are able to enforce the terms of the collective agreement. They are the only parties to the agreement. Individual employees are not parties to the agreement, so they have no standing to enforce its terms. Rather, the Union enforces the agreement on behalf of the individual employee and the other members the bargaining unit.

Since the Union has standing under the collective agreement and represents both the aggrieved employee and the bargaining unit, it exclusively controls how grievances are conducted. As a result, in this situation, the Union had the right to make decisions about how the Harassment and Termination Grievances were to proceed. It also had the right to assess whether a potential settlement adequately addressed the breaches of the collective agreement grievance it alleged. Further, it had the right to withdraw either or both grievances if an acceptable settlement was available, but the aggrieved employee refused to participate in the settlement. In other words, the aggrieved employee does not have the right to force the Union to arbitrate a grievance, particularly when an acceptable settlement is available.

I am not satisfied that the Board could potentially find that the Respondents showed insufficient regard for the Complainant's interests because they did not provide her with the amount of time she considered sufficient to review documents to be used in the mediation. The Respondents controlled how the mediation was to be conducted, including:

- which documents were to be used in advancing the case;
- when the documents were to be used, including in the mediation; and
- how they were to be used.

I am not satisfied that the Board could potentially find that s. 54A(3) imposed a duty on the Respondents to accommodate the Complainant's time requirements by delaying the mediation.

It would have been in both the Respondents' and the Complainant's best interests to cooperate with respect to the assembly and use of evidence. However, it is clear from the evidence that there was no such cooperative relationship present in this situation. Rather, there were disputes over:

- access to information;
- which Union officials were permitted to have access to information after it had been gathered;
- the information which the Union should have demanded from the University;
- the adequacy of evidence which had been gathered; and

- the use/disclosure of medical evidence.

Examples of these disputes may be found in:

- the Legal & Legislative Representative's April 16, 2013 and March 3, 2014 letters;
- W's May 28, 2014, October 23, 2014, and November 14, 2014 letters; and
- Complainant counsel's letters dated October 30, 2014 and November 21, 2014.

The Respondents had control over how the Grievances were to proceed, and how they were to be presented to either a mediator or an arbitrator. While they had no obligation to seek the Complainant's input or approval over the documentary aspects of the case, there is no dispute that they provided her with advance access to documents and invited her comments. However, there is no evidence suggesting that, in doing so, they intended to relinquish control over the documentary or any other aspects of the case. As such, I am not satisfied that, notwithstanding Dr. Rosenberg's recommendation that she be involved in the conduct of the matter, there was any basis for the Complainant or her counsel to understand that they had any right to approve or control the use of documentary evidence in the case. As such, I further am not satisfied that the Board could potentially find that the Respondents showed on due regard for the Complainant's interests by delaying the progress of the case to allow her the amount of time she desired you documents.

I have considered all of the Complainant's allegations that the Respondents represented her in an arbitrary manner. I am not satisfied that there is sufficient evidence for the Board to potentially find that the Respondents either failed to inform themselves adequately, or show due regard for the Respondent's interests when they represented her. Consequently, I am not satisfied that the file evidence potentially permit the Board to find that the Respondents represented her in an arbitrary manner.

Is this complaint supported by sufficient evidence to satisfy me that the Board could potentially find that the Respondents represented the Complainant in a discriminatory manner?

Based on *Judd*, I consider "discriminatory" representation to have occurred when an employee's interests are treated differently than other bargaining unit members in comparable circumstances because of a protected personal characteristic, such as race or religion; or personal favouritism. In her complaint, the Complainant alleged that the Respondents represented her in a discriminatory manner by:

- failing to pursue an apology from the University for mental anguish;
- failing to provide a policy that accommodates her disabilities;
- imposing unreasonable deadlines for her to respond to documents;
- circumscribing her from the grievance process;

(14)

- failing to take adequate steps to determine if an offer to settle was in her best mental health interests.

I am not satisfied that the Complainant has provided sufficient evidence to permit the Board to potentially find that the Respondents represented her in a discriminatory manner.

Subsection 54A(3) applies to "representation of any employee in a bargaining ... with respect to the employee's rights under a collective agreement." Since s. 54A(3) has very specific, limited application, allegations of discriminatory representation pursuant to s. 54A(3) must be viewed within the context of the bargaining unit, not the broader community. Therefore, for representation to be discriminatory for the purposes of s. 54A(3), the evidence must first show that different bargaining unit members received different representation; and then show that the reason for the difference was a protected personal characteristic.

In this situation, the Complainant has provided a significant body of evidence showing that she was disabled. She has not provided any evidence showing how other bargaining unit employees, disabled or able, have been represented. For example, she has alleged that the Respondents "circumscribed" her from the grievance process. However, she has not provided evidence showing that other members were permitted to have greater engagement in the grievance process. As a result, I am not satisfied that she has provided sufficient evidence for the Board to potentially find that she was represented differently than other members. Since she has not provided evidence which would permit the Board compare her representation with another bargaining unit member's representation, I am not satisfied that Board would be able to potentially find that she was represented in a discriminatory manner.

Turning to the Complainant's specific allegations, I am not satisfied that she has provided sufficient evidence to permit the Board to potentially find that they are valid.

With respect to failing to pursue an apology from the University, I note that the Legal & Legislative Representative included an apology letter as one of the required elements for a satisfactory settlement of the harassment grievance. [See paragraph 2 of the Legal & Legislative Representative's May 9, 2014 letter to the University's legal counsel.] I am not satisfied that the Board could potentially find that the Respondents failed to pursue an apology from the University in light of that evidence.

With respect to failing to provide a policy that accommodates the Complainant's disabilities, it is not clear what the Complainant means by such a policy. If she means a Union policy applying to the representation of disabled members, such a policy would be an internal Union matter and beyond the scope of s. 54A(3). If she means a set of accommodations provided for her personally within her dispute with University, I am not satisfied that the Board could potentially find that her allegation is valid.

The evidence shows that the Respondents asked the Complainant to inform them about any specific accommodation she would need at the mediation session. [See W's October 23, 2014

letter to the Complainant.] The Complainant's counsel responded to W's letter on October 31, 2014. He did not describe any specific accommodations for the Complainant. Rather, he accused the Respondents of "deliberately refusing the form of accommodation (the Complainant) medically requires." He then proceeded to indicate that the only accommodation the Complainant required to accommodate her disability was "to be vindicated." I am not satisfied that the Board could ignore W's efforts to determine measures which could be taken to help the Complainant participate in the mediation. I also am not satisfied that the Board could require the Respondents to provide an accommodation which was beyond their control. They had no way of guaranteeing that the Complainant would ultimately be "vindicated" if either or both Grievances were taken to arbitration.

With respect to imposing unreasonable deadlines on the Complainant to respond to documents, as I have already noted above, the Respondents did not require the Complainant's approval to use documents or move the case forward.

With respect to taking adequate steps to determine if an offer to settle was in the Complainant's best interests, I am not satisfied that the Board could potentially require the Respondents to ignore an acceptable settlement offer when the outcome of arbitration would have been, at best, unclear. While Dr. Rosenberg felt that "vindication" would be the best way for the Complainant's mental disability to be addressed, the Respondents had no way to guarantee that an arbitrator would provide that vindication. On the other hand, the draft settlement agreement which the Respondents negotiated:

- provided the Complainant with a two-year reappointment to her previous position;
- reinstated her to the precedence list at the same level she had attained when she was dismissed;
- required the University to withdraw the March 21, 2011 disciplinary letter; and
- required the University to pay her monetary compensation.

In return, the Complainant was required to:

- provide medical clearance that she was physically able to return to her position;
- comply with the University Policy on Social Media and Personal Privacy;
- comply with University Regulations regarding submission of marks;
- be responsive to students who she is advising or for whom she is providing letters of reference;
- notify administration of absences with as much advance notice as possible;
- submit an updated dossier;
- execute a full and final release; and
- agree to a confidentiality clause.

I am not satisfied that the Board could find that the Respondents represented the Complainant in a discriminatory manner when they refused to proceed to arbitration even though they had

negotiated a comprehensive settlement agreement reinstating her to her pre-dismissal position.

Is this complaint supported by sufficient evidence to satisfy me that the Board could potentially find that the Respondents represented the Complainant in bad faith?

Based on *Judd*, I consider "bad faith" representation to have occurred when an employee is represented differently than other bargaining unit members in comparable circumstances because of ill-will, hostility, or a desire to exact revenge against the employee. In her complaint, the Complainant alleged that the Respondents represented her in a bad faith manner by:

- failing to move her grievances forward in a timely manner;
- threatening to stop her active involvement in the grievances when she complained that she required more time;
- requiring her to undergo an assessment to determine if she had High Conflict Personality Disorder before moving her grievances forward.

I am not satisfied that the present evidence would permit the Board to potentially find that the Respondents represented the Complainant in bad faith.

As with discriminatory representation, allegations of bad faith representation must be analyzed in the context of the bargaining unit and representation provided to other bargaining unit members. The Complainant has not provided evidence showing how the Respondents represented other bargaining unit members. Consequently, the Board has not been provided with the evidence it would need to find that the Complainant was represented differently than other members. As a result, I am not satisfied that the Board has been provided with the evidence it needs to potentially find that the Complainant was represented in bad faith.

Turning to the Complainant's specific allegations of bad faith representation, I am not satisfied that the Board could find that the Respondents represented the Complainant in bad faith by failing to move her grievances forward in a timely manner.

Over three years elapsed between the date the Complainant was dismissed, and the date when the mediation was scheduled to take place. While that is a troubling length of time, I am not satisfied that the Board could potentially find that the Respondents were solely responsible for that delay. Rather, I am satisfied that the Board could only find that the Complainant also played a significant role in delaying the progress of the Grievances. Since the evidence reflects that the parties were at least jointly responsible for the delay the progress of the Grievances, I am not satisfied that the Board could potentially find that the delay amounted to bad faith representation on the Respondents' part.

As I have already noted, the evidence shows that the Complainant/Respondent relationship was strained throughout the representation period, and that the strain interfered with the Union's collection of evidence and ability to schedule case related dates. For example, the

evidence shows that the Legal & Legislative Representative was actively attempting to gather medical evidence in early 2012. However, due at least in part to disagreements with the Complainant, the Representative had not received that evidence by April 16, 2013, when she prepared a legal opinion for W. Moreover, Complainant counsel's October 30, 2014 letter to W reflects that the Representative's 2012 request still had not been satisfied in late 2014, and that the Complainant was still disputing aspects of that request.

Other evidence reflects that the evidentiary disputes affected the overall progress of the case. For example, in her March 3, 2014 letter to W, the Legal & Legislative Representative explains that the Union could not set arbitration dates because the Complainant had not made decisions about disclosing medical evidence.

Even if the Board could find that delays in pursuing a grievance amount to bad faith representation, I am not satisfied that the file evidence would potentially permit the Board to reach that conclusion in this situation.

The Board could not ignore the evidence that disagreements between the Complainant and Respondents negatively affected the progress of the Grievances. Therefore, I am satisfied that the Board could only potentially find that the Complainant was at least partially responsible for the amount of time it took for the grievances to progress to mediation. Since the Board could not find that the Respondents were solely responsible for delays in the resolution of the Grievances, I am not satisfied that the Board could potentially find that evidence of the age of the grievances provided an acceptable basis for a further finding that the Respondents represented the Complainant in bad faith.

I am not satisfied that the file evidence would permit the Board to potentially find that the Respondents represented the Complainant in bad faith by threatening to curtail her involvement in the case because she needed more time. With all respect to the Complainant, the evidence does not suggest that this allegation is valid.

The evidence includes a copy of the letter W wrote to the Complainant on November 14, 2014. Amongst other things, the letter accompanied documents to be used during the December mediation. The letter informed the Complainant that the Union's documents needed to be filed on November 18, 2014; and asked her to provide her "comments and suggestions" by 4:00 p.m. on November 17. The letter also reminded the Complainant that she had been provided with an early draft of the Union's submission on November 7, but the Union had not received her feedback. The letter further reiterated that Union would continue to provide documents and submissions to the Complainant for her "review and/or information as appropriate."

Having reviewed W's letter carefully, I am unable to see anything indicating that the Respondents would curtail the Complainant's involvement in the case if she did not provide her feedback on the Union's documents. Moreover, I can see nothing Complainant could reasonably interpret as indicating that she would not be welcome at the mediation regardless of whether she commented on the documents.

(18)

I am not satisfied that there is sufficient evidence to permit the Board to find that the Respondents represented the Complainant in bad faith by requiring her to undergo an assessment to determine if she had "High Conflict Personality Disorder" before moving her grievances forward.

The evidence shows that High Conflict Personality Disorder issue arose in the Legal & Legislative Representative's April 16, 2013 legal opinion referred to above. Under the heading "Medical information/file not provided", the Representative wrote:

> I also reviewed the materials from the Lancaster House Audio Conference on March 21, 2013, "High Conflict Personalities: Dealing with Difficult Behaviours and Personality Disorders". We are not making any assumptions or conclusions as to whether (the Complainant) falls within this ambit; and we do not have the medical evidence to confirm or deny it. So, since the medical evidence is lacking we can only consider this possibility. Although I hesitate to mention this, we are obliged to consider the possibility, as indicators appear to be present. Of course we would need a doctor to provide some answers, which hasn't happened.

In an April 24, 2013 email respecting the legal opinion, the Complainant described the Legal & Legislative Representative's comments about High Conflict Personality Disorder as "absurd". However she indicated that she would be "more than willing to submit to an assessment by a registered clinical psychologist of the Union's choice. And will also permit an interview between my GP and the psychologist".

In a letter dated May 15, 2013, W thanked the Complainant for her cooperation, and indicated that:

- the choice of psychologist should be made in cooperation with the Complainant's physician;
- the Union would pay the referral and assessment costs; and
- the Complainant's medical information and psychological assessment would be reviewed and discussed in preparation for arbitration (which at that point was scheduled to take place starting on July 23, 2013).

In a September 13, 2013 letter to the Complainant, the Union's Atlantic Regional Director explained that the Union believed it was obligated to ask for the High Conflict Personality Disorder assessment in order to properly prepare for arbitration. The Union believed it needed the assessment to determine whether disability was a factor to be considered in arbitrating the Grievances. The evidence reflects that the Complainant participated in the psychological assessment, but does not disclose what the results were.

I am not satisfied that the Board could potentially find that the Respondents acted in bad faith by asking the Complainant to undergo a High Conflict Personality Disorder assessment.

Subsection 54A(3) required the Respondents to adequately inform themselves before representing the Complainant. The evidence, as well as allegations the Complainant has made, show that conflict existed between the Complainant and members of the University administration for a significant period of time. Under those circumstances, I am not satisfied that the Board could potentially find that the Respondents acted in bad faith by concluding that personality traits may have been a relevant consideration for an arbitrator dealing with the case. As a result, I also am not satisfied that the Board could potentially find that the Respondents acted in bad faith by seeking to acquire an expert opinion which could either eliminate the Complainant's personality traits as a factor in her relationship with the administration; or provide evidence establishing that the University had a duty to accommodate those traits.

Having reviewed this complaint carefully, I am not satisfied that there is sufficient evidence to potentially permit the Board to find that the Respondents failed to comply with s. 54A(3). Consequently, I must dismiss the complaint.

CONCLUSION:

The Complainant's complaint is dismissed.

DATED AT HALIFAX, NOVA SCOTIA, THIS 13TH DAY OF NOVEMBER, 2015.

Brian Sharp
Review Officer