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DISMISSAL NO. 2557
Case No. 237/22/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

K.E.N.S.,

Applicant,

- and -

Canadian Union of Public Employees, Local 2153,

Union,

- and -

WINNIPEG CHILD AND FAMILY SERVICES,

Employer.

BEFORE: K. Pelletier, Vice-Chairperson
B. Black, Board Member
G. Flemming, Board Member

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

SUBSTANTIVE ORDER

PROCEDURAL HISTORY

1. On October 27, 2022, the Applicant filed an application Seeking Remedy for an Alleged Unfair Labour Practice pursuant to section 20 of *The Labour Relations Act* (the "*Act*") with the Manitoba Labour Board (the "Board").

2. On November 21, 2022, the Union filed its Reply, denying the allegations and advising that it fulfilled its obligations respecting subsection 20(b) of the *Act*. The Union also raised the issue that many of the allegations outlined in the Application were well beyond the timeframe for filing an application and should be

dismissed as being untimely. It further submits that the Application should be dismissed without a hearing for failing to establish a *prima facie* breach of the *Act*.

3. On November 21, 2022, the Employer advised that it would not be filing a Reply.

4. On December 2, 2022, the Applicant filed a Response, supplying additional documentation to dispute the information contained in the Union's Reply, and submitting that she had established a *prima facie* violation of the *Act*.

5. On December 7, 2022, the Union filed an objection to the Applicant's Response to the Reply, stating that the Response is essentially a new and expanded Application which goes well beyond what is contemplated and permitted under Rule 22(5) of the *Manitoba Labour Board Rules of Procedure* (the "*Rules*"). The Union pleads that the Response, as filed, is prejudicial to the Union.

6. The Board held a virtual case management conference on January 25, 2023, at which time the Board communicated to the parties that it had considered the information and submissions of the parties in relation to the appropriateness of the Response, and determined that much of the Response was directly replying to the Respondent's claim that it had not had any communication with the Applicant. The Board concluded that the Applicant supplied additional information in her Response, which she was permitted to do under the *Rules*. As the Board had determined that the matter should proceed to a hearing on the merits, the Board advised that the parties would have the ability to address the issues raised at the hearing.

7. The Board also narrowed the timeframe of the complaint to only include the matters that led the Union to conclude in July and September 2022 that it would not proceed with a grievance on behalf of the Applicant. The Board found that the incidents and issues she raised in her complaint from 2009, 2012, 2015, 2016 and 2020 were untimely pursuant to section 30(2) of the *Act* and would not be addressed as part of this Application.

8. A virtual hearing was held on May 29, 30 and 31, 2023 and concluded on June 29, 2023. The Applicant was represented by counsel and testified at the hearing. She also called one additional witness to testify. The Union was also represented by counsel and called two witnesses.

9. The Employer did not attend the hearing.

10. For the reasons that follow, the Board has determined that the Applicant has not established a *prima facie* violation of the *Act*.

BACKGROUND FACTS

11. The Applicant testified that she began working for the Employer in 2006 as a case worker. Throughout her employment, the Applicant was a member of and represented by the Union. The Applicant identified in her Application that she is a black woman of Jamaican and African descent.

12. The Applicant testified that she was the subject of harassment and discrimination by her Employer. She claimed that she raised these concerns on many occasions with the Union.

13. On December 7, 2021, there was an incident in the workplace involving the Applicant and a youth resident, which resulted in the Applicant being injured. The incident was witnessed by the Applicant's co-worker, who also testified at the hearing. Both the Applicant and the co-worker proceeded to file an incident report and reported the issue to management. When reporting the incident, the Applicant says that her supervisor berated her for not implementing trauma-informed care, of which she claimed she had not received any training. The Applicant felt as though she was being blamed for the incident that led her to be injured by a resident. She was subsequently contacted by her supervisor for a meeting in her office on December 17, 2021. The Applicant's co-worker was not asked to meet with the Employer to discuss the incident, despite being a witness and having also completed the incident report.

14. Prior to the meeting, the youth was involved in another altercation which nearly resulted in a second injury to the Applicant's co-worker. The Applicant testified that she was able to de-escalate the situation. No harm resulted.

15. On December 10, 2021, the Applicant proceeded to contact her union representative to advise her of what had transpired on December 7, 2021. The Applicant testified that they spoke for thirty-nine minutes. The Applicant recalls that the union representative informed her to attend the meeting alone and recommended the Applicant take notes of the meeting. The union representative confirmed this in her testimony, advising that the collective agreement did not anticipate that she would be able to attend a meeting intended to discuss an incident. She testified that she informed the Applicant that, unless it was an issue with a supervisor or a disciplinary issue, she would not be able to attend. She confirmed with the Applicant that, at that juncture, it was neither. She recalled advising the Applicant to take notes of the meeting.

16. On December 17, 2021, the Applicant attended the meeting with her supervisor. The Applicant testified that she was berated and belittled in the meeting, and was blamed for the incident that had occurred on December 7, 2021. The Applicant

insisted that she had not been provided trauma-informed care training and that it was not expected of her in her position. The Applicant informed the supervisor that she felt that there was a lack of support, explaining how she experienced racism at work at various points throughout her career. The Applicant testified that her supervisor proceeded to advise the Applicant that she should not take racial slurs personally and that she might be better off elsewhere. This triggered a memory for the Applicant of another incident that had occurred many years earlier when a manager had informed her to accept abuse from a youth resident who repeatedly spewed racial slurs. On December 17, 2021, the Applicant advised that her supervisor informed her that she would be transferring her to another workplace, under the guise of "safety". The Applicant asked her supervisor if she was being reprimanded, to which the supervisor responded "no". The supervisor refused the Applicant's request for the result of the meeting to be reduced to writing.

17. The Applicant testified that the decision to transfer her was intentionally punitive and targeted, as there was simply no need for a transfer for several reasons. First, the Applicant had successfully managed to de-escalate a situation with the same youth earlier in the week. Second, the Applicant had worked a few intervening shifts with the youth, without any further incident. Third, the Applicant was informed that the youth was being transferred within the next couple of days and would no longer be residing at the location where the Applicant worked. The Applicant testified that she accepted the news of a transfer as disciplinary. She clarified in cross-examination that, though she understood the Employer had the right to transfer case workers pursuant to the terms of the collective agreement, her co-workers were not being transferred, and it appeared to her that she was only being transferred as a result of raising concerns relating to discrimination and differential treatment with her supervisor.

18. The Applicant contacted her union representative on December 19, 2021, advising her that she intended to proceed on a medical leave of absence given the hardship caused by the meeting with her supervisor. The union representative testified that she did not recall receiving advance notice of the Applicant's medical leave. However, she recalled informing the Applicant to detail her meeting with her supervisor so that a complaint could be filed. The Applicant testified that she was not informed by the union representative that a complaint would not be processed while she remained on a leave of absence.

19. At the hearing, the union representative reviewed her notes with the Applicant, recalling that the Applicant had informed her that her supervisor would be moving her to another location "due to safety". The union representative testified that she did not think that the issue of relocation was a grievable issue at this juncture, given the language of the collective agreement and the fact that she had not been formally informed of the transfer or to where she would be transferred. However, she agreed

with the Applicant that there was disrespectful conduct and that she should file a respectful workplace complaint. She also recalled advising the Applicant that, if the complaint was not investigated appropriately, there may be cause to file a grievance. She did not mark down, nor did she recall any discussion with the Applicant about a medical leave.

20. On December 20, 2021, the Applicant proceeded on a medical leave of absence as a result of the stress of the discrimination and the harassment she endured. The same day, the union representative recalled that she was working dispatch and contacted her regarding her failure to attend a work shift. The union representative recollected that she needed to find a replacement worker. The Applicant disputed both claims: that she had not previously informed her union representative of her intended medical leave; and that she did not call in sick in advance of her shift on December 20, 2021.

21. On December 21, 2021, the Applicant sent a letter of complaint to the Employer regarding the interaction with her supervisor. The Applicant also sent a copy to her union representative. The union representative responded the next day, advising: "Once you hear back from the employer as to the email you sent yesterday. Then we can have a conversation on how and who you will address the complaint to." The Applicant responded: "Ok. Great. Thanks." She also asks: "What is the time limit for the employer to respond to my grievance? The union book just says a timely manner". The union representative states in reply: "It is not a grievance. It is a (*sic*) email complaint from you asking what and why. A grievance has to be filed from the union. As of now we don't have a grievance. In the future depending on there (*sic*) response we may have a grievance." The Applicant responds: "I thought it was a grievance because of the personal harassment by singling me out, twice in a year to relocate me, after I spoke up about my concerns". The union representative advises the Applicant that relocation is a right of the employer, and that they can use "operational needs as an excuse". She states at the end of the text: "As of now you are filing a complaint as to why you were moved". The Applicant says "ok" and then proceeds to ask if she can ask for a quick response from the Employer. The union representative says: "I would just leave it", which the union representative explained meant for the Applicant to leave the letter as drafted.

22. The Applicant advised in cross-examination that she understood the "just leave it" comment to be dismissive, and understood it to be in response to her asking if she could add a comment asking for her complaint to be addressed while she was on medical leave.

23. On December 22, 2021, the Employer wrote to the Applicant advising that it had received her written complaint regarding the meeting of December 17, 2021, but that it would not address her complaint until she was "well enough to work".

The Applicant approached her union representative, who confirmed that it was the Employer's practice, supported by the Union, that complaints not be processed while a member remained on a medical leave of absence, to ensure that the member could focus on rehabilitation and reintegration, rather than addressing the stressors that led the member to proceed on a medical leave of absence in the first place.

24. On the same day, the Applicant and her union representative discussed the Employer's response. The union representative took notes of the call, recording that she had informed her that the complaint would be left until she was cleared to return to work and that she would be supported when she was ready to return to work. The Applicant did not recall the level of detail in the notes, and could not confirm whether she had been informed that her complaint would be held in abeyance until she was cleared to return to work.

25. On December 30, 2021, the Applicant wrote to her union representative, advising that the Employer had communicated that it would not address her complaint whist she remained on medical leave. The Applicant pleads for assistance, advising she does not know what to do. This message is not answered. The union representative testified that she did not recall receiving the December 30, 2021 text message.

26. There was no communication between the Applicant and the union representative until April 7, 2022, when the Applicant reached out and requested assistance with her "grievance". She states in her email that she is concerned that she was asked to just "leave it" as it relates to her request for her complaint to be processed while she remained on a medical leave of absence. Attached to her email is a full timeline of the workplace bullying, harassment and discrimination she alleged to have endured. In this document, which is titled: "A Grievance Report", the Applicant sets out that she is considering the possibility of resigning as a result of the treatment she endured. She also expresses that she is concerned about the possibility of having to return to work, in a different location, and reporting to a supervisor with whom she had previous concerns.

27. At the hearing, the Applicant testified that she was pleading with the union representative to ensure that her issues would be resolved prior to her return to work. She referred to the collective agreement, which contained a provision which set out that if she missed three consecutive shifts of work, she would be terminated from employment. She was concerned that if she was to be cleared to return to work, she would be expected to return to a toxic and unsafe work environment while she awaited a meeting to resolve the concerns expressed in her December complaint. If she missed work, she would be terminated for missing shifts. This predicament left her concerned, and she expressed to her union representative the necessity for her matter to be resolved before her return to work.

28. On April 10, 2022, the union representative responded, confirming that the Applicant had filed a complaint, rather than a grievance and that a meeting would be scheduled upon her return to work, to resolve the workplace issues she had identified in her complaint. She repeats that the Employer will not address matters while an employee is away from work due to illness and that this practice is supported by the Union. The union representative requested the Applicant advise her of a return to work date.

29. The union representative testified that she read through the several pages of documents provided by the Applicant on April 7, 2022, before her eventual response. When she read the words that the Applicant was considering resigning, she testified that she understood that the Applicant was considering her options. While she remained on medical leave, the union representative stated that she didn't know how she was feeling and wanted to ensure that she was healthy and ready for work before having a discussion about an eventual return to the workplace. She testified: "I always thought she was going to return to work".

30. On April 11, 2022, the Applicant requested that a meeting be confirmed with her supervisor to address the issues outlined in the complaint before she returned to the workplace. She testified that it left her "full of anxiety" thinking that she would be returning to a toxic workplace. She states that she was looking for some sort of confirmation from the Union that her complaint was serious, as it entailed a human rights component. She outlined that she felt disappointed that her union representative was not acknowledging the severity of the issues she was raising.

31. The union representative responded to the Applicant's text message of April 11, 2022, advising that she "will certainly request that [the Applicant's] respectful workplace complaints be heard prior to [her] returning to work in the shelter, but once [she has] been cleared to return to work".

32. The Applicant continued to maintain that she had a grievance regarding differential treatment and standards, and being singled out for differential treatment. On April 12, 2022, she sought out a guarantee from her union representative that, even though cleared to return to work, she would not be required to return to work until her complaint had been addressed. The response from the union representative of April 13, 2022 states: "Please let me know when you have anticipated return to work date and I will then consult the employer on meeting to discuss these matters. I cannot provide you with further confirmation at this time. Take care."

33. The Applicant testified that she was incredibly concerned with this response, which left her in limbo. Without a meeting scheduled, it was her understanding that she

would need to return to work, which would leave her unsafe. She was looking for that security, which was never provided by her union representative.

34. The union representative, on the other hand, testified that she would never have allowed the Applicant to return to an unsafe work environment. She explained that the Applicant had made clear that she did not wish to work for the supervisor who was assigned to the new location. However, she had filed a complaint against the individual located at her previous worksite. The union representative stated that, given this predicament, she expected that, when she was cleared to return to work, the Union would schedule a meeting with the Employer and resolve the issues prior to an eventual return to work. Further, the union representative expressed that she had not received any confirmation that the Applicant would be moved to a different location. If that were confirmed, the union representative advised that it would have been addressed and resolved prior to the Applicant returning to work. The union representative testified that she was "looking for her to take time to feel better, to let me know when she's healthy to go back to work and [she] would then start talking about returning to work and the concerns and the complaint that had not been addressed, but that they agreed they would consider when she was cleared to return to work." She testified that she did not receive anything specifically until the Applicant resigned on May 9, 2022.

35. However, she did recall that she was copied on emails relating to sick leave benefits a few weeks later. She recalled that, near the end of April 2022, the Applicant's sick leave benefits were depleted. The Applicant was in discussions with her new supervisor about the possibility of utilizing other benefits to carry her over while she remained on sick leave. The Applicant did not relay any of this information to her Union until April 22, 2022, when another union representative stepped in and supported the Applicant with her request. The Applicant completed a form, supplied it to her new supervisor, and the request was approved.

36. On May 9, 2022, the Applicant was cleared by her medical practitioner to return to work. The same day, she tendered a lengthy and thorough letter of resignation to her Employer, detailing the issues she had in the workplace, stemming back to 2009. The letter was copied to her Union.

37. The Applicant did not reach out to her Union prior to tendering her resignation. She testified that she had knowledge of the three days in the collective agreement for the retraction of her resignation. She testified that she expected that the Union would have reached out to her to confirm that it was indeed her expectation to resign.

38. The union representative testified that she received the information relating to the Applicant's resignation on May 10, 2022. She reached out to the Executive Director

of the Union to have a national representative assigned. She testified that she was surprised to receive this notice, as she was not under the impression that the Applicant would resign, and certainly not before reaching out to her to discuss. The union representative discussed this with the national representative on May 12, 2022. Her notes were entered as an exhibit. The union representative wrote down a list of issues to address with the Applicant, and specifically that she ensure that she receives the letter of recommendation and the record of employment that she requested in her letter of resignation.

39. On May 17, 2022, the union representative reached out to the Applicant. She confirmed with the Applicant that she was certain that she wished to resign and that she would not be seeking reinstatement. The Applicant informed the union representative that she was not seeking to return to work but looking instead for severance pay. The union representative indicated that she would look into the Applicant's request. The union representative testified that she proceeded to discuss this issue with a human resources employee, who confirmed that the collective agreement did not contain any severance provisions and that the Applicant would accordingly not be entitled to any payments. The union representative testified that she also approached the Union and discussed the possibility of severance pay, confirming that severance was not an option. The union representative relayed the information to the Applicant.

40. The union representative testified that, even though this call occurred more than three days after the Applicant's resignation, she would still have advocated for her return or filed a grievance relating thereto if the Applicant wished to return to work. The union representative advised that the Applicant was emphatic in her discussions with her that she did not wish to return to work.

41. On May 27, 2022, the Applicant sought out assistance from her union representative concerning a Record of Employment ("ROE") which had yet to be submitted by the Employer. In this correspondence, she also sets out that she is seeking damages for the late issuance of her ROE; termination pay or pay in lieu of notice; statutory holiday pay; severance; retroactive pay upon completion of bargaining; letter a reference; and back pay for an alleged failure by the Employer to accommodate her between 2008 and 2015.

42. The Applicant and the union representative spoke over the phone on May 27, 2022. The Applicant informed the union representative of her request for damages for constructive dismissal. At the hearing, the Applicant advised that she had previously consulted with legal counsel, who concluded that she had a case for constructive dismissal. The union representative responded that she didn't know if she had a case for constructive dismissal, but that it would be discussed with a national representative from CUPE. The union representative also testified that she informed

the Applicant that her December 17, 2021 complaint had not been addressed and that she would like for the Employer to proceed with its investigation of her complaint. From the union representative's perspective, she testified that the issues raised in the complaint were significant and it was still important for the Employer to consider what has happened, to ensure that the Applicant's concerns were addressed. The union representative stated that the Applicant said in response: "I don't care about my words being heard – I just want to be paid".

43. The Applicant was later contacted by CUPE and asked if she would participate in a meeting with the national servicing representative. The Applicant testified that she agreed to participate as she "finally believed that they were going to do something".

44. On June 3, 2022, the Applicant met with the national servicing representative, along with the union representative with whom she had previously consulted. At the meeting, the Applicant described that she felt cross-examined and targeted. From her perspective, it did not appear that the Union was wanting to find out what had happened. Throughout, she testified that the national servicing representative referred to her as "sister". After a few times, the Applicant advised that she felt unsettled by the use of the term and politely requested that it not be used. The national servicing representative explained to her that she did not mean any disrespect and that the word was frequently used in the context of referring to union members. The Applicant nevertheless requested that she not use the term. As a result, the Applicant states that she was accused of being agitated. She took exception to that, indicating that, despite the national servicing representative interrogating her; using the term "sister"; and cutting her off, she remained in control. The Applicant testified that the entire meeting felt unsafe to her, even though she was informed that it would be a safe space for her to express her concerns. The Applicant described the meeting as "culturally insensitive and contrived". She added that she felt as though she was doing something wrong.

45. The national servicing representative and the union representative testified that the meeting lasted approximately 1.5 hours. It was confirmed at the outset that they were looking to support the Applicant. They also confirmed with the Applicant that she was not seeking to return to work. The national servicing representative and the union representative testified that the Applicant was looking for financial compensation on the basis that she was constructively dismissed due to the harassment, discrimination and differential treatment she had endured in the workplace. On the issue of the word "agitated" that's reflected in the notes, the union representative stated that she was taken aback in the meeting, as the Applicant had used a tone and volume of voice to which she was not accustomed from her previous interactions with the Applicant. From the union representative's perspective, the words employed by the national servicing representative in response were intended to demonstrate that they were attempting to support her.

The national servicing representative asked the Applicant if she wanted to take a break or adjourn to another day. The Applicant declined the invitation. At the hearing, the Applicant stated that she didn't see a point in stopping the meeting and resuming on another day.

46. Following the June 3 meeting, the national servicing representative wrote to the Applicant, advising that she would look into her concerns and requesting any documentation in support. The Applicant provided a large volume of information on June 13. The union representative stated that she reviewed the information and noted that much of it was from "way back". The union representative also testified that there was no new information from 2021 or 2022 that would have assisted her case. She characterized this information as "historical".

47. On July 8, 2022, the national servicing representative sent a letter to the Applicant, in which she set out that there are concerns with the Applicant's request for financial compensation. Further, the letter outlines that the issues raised in the Applicant's resignation letter were primarily historical issues that were raised for the first time with the Union at the time of resignation. The Union remarks that there is little they can do in light of the lateness in reporting.

48. As it relates to the issues surrounding the incident and meeting on December 17, 2021, the Union highlights that a complaint was filed and that it would have been addressed had she not resigned or if she had elected to proceed with the complaint. The Union comments that it has not traditionally pushed back on an Employer's request not to meet with members while they remain on leave, as they "are cautious not to set a precedent for the Employer to expect members to attend meetings while on medical leave".

49. The Union notes that the Applicant elected to resign without first consulting with the Union. She also confirmed that she did not wish to rescind her letter of resignation or to seek reinstatement. In the letter, the national servicing representative highlights the following:

> We understand you had carefully analyzed your options before presenting your written resignation to the Employer; however, without consulting with the Union, you decided to resign with the hope that a financial compensation package could be negotiated for you. Unfortunately, since these matters were not brought to our attention within a reasonable time after taking place, we were unable to reasonably address them at this point. Therefore, having consulted CUPEs Legal Counsel and Human Rights Representative, and after careful consideration and review of the details surrounding your case, we have determined that the Union is unlikely to be successful if a grievance were to be filed on your behalf. Furthermore, the Union is of the opinion

> that the remedy sought is not reasonable, and is unlikely to be reached if proceeding. As I mentioned before, I have also considered the fact that you were aware that the Union could assist you, but chose not to report these incidents to us until after the time of your resignation.

50. The national servicing representative concludes by advising the Applicant of her right to file an Appeal with the Grievance Review Committee of Local 2153.

51. On July 21, 2022, the Applicant wrote to the national servicing representative, pointing out where, in her view, there were concerns with the letter she received on July 8, 2022. She sets out in further detail the issues she experienced at work and highlights the many times throughout the years that she contacted the Union for assistance. She remarks that she had no choice but to resign, since she would have been otherwise accused of abandoning her shifts if she went back to work in an unhospitable work environment. She requests once again for the Union to represent her in her quest to obtain the remedies she outlined in her May 27, 2022 correspondence.

52. The Applicant then proceeded to file an Appeal. She attended, with counsel, before the Grievance Review Committee on September 6, 2022. The Applicant confirmed that she provided context to the Committee and that her legal representative presented the legal arguments in support. The Applicant confirmed that much of the argument surrounded her request for damages and severance pay. She confirmed that she stated at the Appeal that she was not seeking reinstatement.

53. The union representative testified that she attended the Appeal hearing virtually and took notes. She stated that the purpose of the Appeal was to discuss whether or not there was the possibility of a grievance on a possible constructive dismissal or severance claim. She noted that the Grievance Review Committee wanted to provide the Applicant the opportunity to be part of the process, to make her case for a possible grievance. Ultimately, what was presented by the Applicant and her counsel, according to the union representative, were the same issues that had been previously discussed.

54. The Committee met following the Appeal. The union representative stated that the Committee felt that this was not a matter for which a grievance could be filed. They were concerned that she had resigned in May before the issues she raised in December could be addressed. They were also concerned that many of the other issues, though credible, were just too dated.

55. The Grievance Review Committee responded in writing on September 16, 2022, advising that “all matters discussed were taken into careful consideration by the

Appeals Committee and as a result of which the decision was made that the Union will take no further action in this matter".

56. In her evidence, the Applicant relied on several medical notes which supported her continued absence from work. In cross-examination, the Applicant confirmed that she supplied a note dated March 28, 2022, in which the medical practitioner notes: "planning to move on & quitting job by 06 May when her sick time runs out (*sic*) need to extend the sick time". The Applicant confirmed that she did not provide a copy of this note to her Union at any time before resigning. She confirmed that the only notations she made to a possible resignation were contained in the twelve-page attachment to her April 7 email, in which she writes on the eleventh page: "Therefore, I am considering resigning from my position…" and further down on the same page: "Due to management's ongoing pattern of discriminating against me I have been seriously considering resigning from my position…"

57. The Applicant proceeded to file this Application on October 27, 2022.

POSITIONS OF THE PARTIES

For the Applicant

58. Counsel for the Applicant sets out that the Union's failure to act on the Applicant's behalf regarding her claim of discrimination and harassment, coupled with the ensuing constructive dismissal constitutes a failure to act, in breach of the Union's responsibility to provide fair representation. The Applicant states that the lack of communication; lack of direction and the Union's failure to properly investigate her concerns, all demonstrate that the Union failed in its duty to represent her.

59. Counsel highlights that the Applicant informed the Union of the issues she was having on many occasions, and the Union simply failed to act. Counsel contends that the Applicant was so distressed that she proceeded on medical leave, and the Union made no effort to reach out to her during her time of need. It was the Applicant who took the initiative and reached out to the Union.

60. Counsel argues that the Applicant asked on several occasions for the Union to address the issues of harassment and impending relocation before returning to work. She was specifically concerned that she would be assigned to an office with a supervisor with whom she had previous concerns and that if she missed three consecutive shifts, she would be terminated from employment. Confronted with this predicament, counsel states that the Applicant had no choice but to resign from employment.

61. Counsel states that the union representative did not act in a manner that is in keeping with the obligations set out in the *Act* in that the union representative:

    - did not file a grievance on behalf of the Applicant, despite her urging;
    - failed to respond to requests for meetings with the Employer prior to an eventual return to work;
    - did not reach out to the Applicant while she was on leave;
    - failed to investigate her claim that there had been a constructive dismissal;
    - failed to act on the Applicant's statement that she was considering resigning from her position;
    - did not inform her of the necessity of a return to work meeting prior to any eventual return to the workplace; and
    - failed to inform her that the only way to file a grievance would be for the Applicant to file a grievance regarding her resignation.

62. Counsel points out that the Union has inaccurately outlined in its correspondence that the Applicant failed to reach out to the Union prior to deciding to resign. Counsel states that the Applicant contacted the Union for support on many occasions, and was never informed of her rights or responsibilities. Rather, she was led to believe that she could not be assured a meeting prior to her return to work; and that she would be required to return to a toxic workplace, where harassment and discrimination would ensue. She was not informed of her right to file a grievance as it relates to her resignation, on the basis that it was a constructive dismissal. From counsel's perspective, these taken together illustrate the depth and breadth of the Union's failures.

63. Counsel referenced the evidence of the Union's witnesses, and highlighted a few concerns expressed, namely:

    - The union representative stated that there was always a return-to-work meeting with the employer scheduled in advance of any employee returning to work following an extended leave. Yet, she did not share this information with the Applicant.

- The national servicing representative testified that she did not inform the Applicant that the only way that she could file a grievance was if she returned to work.

64. Counsel relied several decisions in support, including: *Lees et al*. v *Wilson et al*, 2008 MBQB 326; *Doman Forest Products Ltd.* v. *GMAC Commercial Credit Corp. - Canada*, 2004 BCCA 512; *Canadian Merchant Service Guild* v. *Gagnon*, 1984 CanLII 18 (SCC), [1984] 1 SCR 509; *Datchko* v. *Deer Park Employees' Association*, 2006 CanLII 63025; *T.M.T.* v *Canadian Union of Public Employees, Local 500*, 2021 CanLII 23594; *Laskowski* v. *Society of Energy Professionals*, 2007 CanLII 32647; *Thompson* v *Alberta Labour Relations Board*, 2017 ABQB 205; *Bentfield Clarke* v *Unifor Local 112*, 2020 CanLII 80800; *Centre Hospitalier Régina Ltée* v. *Labour Court*, 1990 CanLII 111 (SCC), [1990] 1 SCR 1330; *Blue Line Taxi Co. and R.W.D.S.U., Ontario Taxi Union, Loc. 1688, Re*, 1992 CanLII 14638; *Northern Regional Health Authority* v. *Horrocks*, 2021 SCC 42; *Potter* v. *New Brunswick Legal Aid Services Commission*, 2015 SCC 10 (CanLII), [2015] 1 SCR 500; *CB, HK & RD* v *Canadian Union of Public Employees, Local No. 21*, 2017 CanLII 68786 (SK LRB) [2017] S.L.R.B.D. No. 33 | 298 C.L.R.B.R. (2d) 14; and *Hartmier* v S*askatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*, 2017 CanLII 20060 (SK LRB).

65. In reference to this Board's decision in *T.M.T*. v. *C.U.P.E., supra*, counsel pointed out the manner in which the Board has interpreted the words "arbitrary, discriminatory and bad faith". Counsel referenced the decision in *Laskowski, supra*, as an example where the union went far beyond innocent mistakes. In *Thompson* v. *Alberta Labour Relations Board, supra,* it was pointed out that one of the issues before the Court was whether the Board had properly concluded whether the union had properly investigated the matter. In *Bentifield Clarke*, *supra*, counsel emphasised that, though no breach was found, once the union discovered its error, it did what it could to rectify its mistake. In contrast, in the present case, counsel states that, even if there was a misunderstanding as to her complaint filed in December 2021, when pointed out to the Union, it did not do anything to remedy the situation. This, from counsel's perspective, demonstrates that the Union acted in an uncaring way.

66. Counsel referenced the decision in *Centre Hospitalier Régina, supra,* in which the Saskatchewan labour board found that the union had breached its duty when it determined that it would not proceed with the grievance for reasons unrelated to the grievance. Counsel states that, in the present case, the Union has claimed that it did not file a grievance as it did not receive the relevant information in a timely way. Counsel disputes that, suggesting that the Union had all of the information it required in December 2021, and could have easily filed a grievance on behalf of the Applicant.

67. Counsel referenced the decision in *Datchko, supra*, contending that the case stands for the proposition that, if a member does not request any help, the union will not be found in breach. This is in direct opposition to the present case.

68. In *Blue Line Taxi, supra*, counsel states that the arbitrator found that management rights must be exercised in a manner that is not deemed discriminatory, arbitrary or in bad faith. In the present case, the Employer did not act in a manner that is in keeping with its obligations under the collective agreement, and the Union could have filed a grievance relating to the same.

69. In *Horrocks, supra*, the Supreme Court of Canada stated that the employer has the exclusive authority to manage the workplace, and which exercise of management discretion must be fair and reasonable. In the present case, there was no logical reason for the Applicant to be transferred. She was targeted on the basis of her race, alleges counsel, which is a direct contravention of the collective agreement. *Horrocks* also stands for the proposition that the Union has a heightened duty to act given their exclusive jurisdiction to address human rights issues. The Applicant required protection, submitted counsel, but was denied the necessary access and opportunity to be heard and for her claim to be considered.

70. On the issue of constructive dismissal, counsel referenced the Supreme Court of Canada decision in *Potter, supra*, which sets out the test for a constructive dismissal. In this case, counsel submits, the Applicant proceeded on a leave of absence. She was told that her concerns would not be addressed while she remained on leave, despite her urging. If she had refused to work before her issues would be addressed, she would have been terminated per the collective agreement. Counsel submits that she was forced to resign.

71. Counsel referenced *Centre Hospitalier, supra*, which sets out that a union has a heightened duty to act and to protect its members when they are terminated. Counsel points out that some authorities have suggested that a union must file a grievance when an employee is dismissed.

72. Counsel contends that the Applicant is entitled to the remedies she seeks, which include:

    a. an order for the Union to file a grievance regarding the Applicant's claim that she was constructively dismissed;

    b. for the timelines to be waived by the Board for the filing of a grievance;

    c. compensation for each breach, consistent with the unfair labour practice remedies available under the *Act*; and

d. costs of $1000.00 for each hearing date, consistent with the decision in *Hartmier, supra*.

For the Union

73. Counsel pointed out that section 20(b) of the *Act* applied, as the Applicant resigned from employment. Though the Applicant has suggested that she was constructively dismissed, counsel outlines that the Applicant decided to resign rather than attempting to address her issues through the complaint she filed, and by failing to consult with her union representative. Even after her resignation, counsel points out that the Applicant continued to maintain that she had no interest in returning to work and that she did not wish to rescind her resignation. On these facts, counsel submits that the evidence demonstrates that the Applicant was not interested in resolving the issues that led her to unilaterally resign from employment.

74. Counsel for the Union agrees that the Applicant volunteered significant information regarding her interactions with her supervisor in December 2021, which resulted in the Applicant filing a complaint on December 20, 2021. Counsel alleges that the union representative was clear with the Applicant that the matter would be held in abeyance while she remained on a medical leave of absence, to ensure that she could focus on regaining her strength and returning to the workplace. The union representative's evidence was that there were strong policy considerations for this practice, and the Union was not going to change the policy which could negatively impact on its members. In any event, the Union points out that the Applicant did not seek out medical clearance for her to participate in meetings with the Employer whilst she remained on a medical leave of absence.

75. Counsel stipulates that, once the Applicant had been cleared to return to work, the union representative intended to work with the Applicant and the Employer to resolve the issues that she raised in her complaint. The Applicant had issues with both her departing supervisor and the workplace that she was purportedly being transferred to, and would have been unable to properly function in either location without some investigation into her complaint. However, rather than allowing the Union to assist her, counsel states that the Applicant elected to unilaterally resign from employment, under the guise that she had "no other choice". Counsel states that the Applicant chose to resign and made that election clear. Counsel highlights that in her discussion with her medical practitioner in March 2022, she made clear that she intended to resign as soon as her sick leave benefits were depleted. She did not offer the same direct message to her union representative, says Counsel for the Union, choosing instead to make note that she was considering resigning in a lengthy document that accompanied her April 7, 2022 email. If she had made it clear to her union representative that she was intent on resigning given that the Applicant believed to have been imposed an impossible predicament, counsel says that the

union representative would have acted differently and provided additional information. However, on the face of this document and the discussions that ensued, counsel argues that there was nothing to suggest to the Union that the Applicant would resign without first consulting with the Union or before seeking out additional assistance.

76. On the issue of the Union's alleged failure to file a grievance, counsel submits that there were no grounds to file a grievance. The Employer has the right to relocate employees, pursuant to the collective agreement. Whether there was differential treatment resulting from that decision was to be addressed through the complaint she filed in December. This had been communicated to the Applicant as early as December. Further, there was a complaint in place which specifically addressed the issues of harassment and discriminatory treatment. The Employer would have needed to address these issues as part of its investigation. Counsel contends that, after she resigned, the Applicant made clear in her communication with her union representative that she had no intention of proceeding with her complaint.

77. Counsel points out that the Union's communication to the Applicant that many of the issues she raised were untimely and were not related to the issues she raised in December, but rather focussed on the concerns she was raising from many years ago: issues that she had either herself resolved or which she had attempted to resolve with the assistance of her union many years prior. It is these matters, says counsel, that the Union was suggesting were untimely and were outside the time for the filing of a grievance. The matters which arose out of the December interactions with the Employer were the subject of a complaint and were considered timely.

78. The Union rejects the Applicant's claim that it failed to follow up with her. Counsel pointed out that the union representative and the national servicing representative both paid attention to the issues raised by the Applicant and followed up with her each time, except for the December 30, 2021 text message, which the union representative said she did not receive. Conversely, counsel points out that the evidence illustrated that the Applicant did not herself follow up on the text message to ensure that it was received.

79. In response to the entirety of the Applicant's claim, Counsel outlines that the evidence demonstrated that:

    - The Applicant states that she was requesting a grievance, while the Union was pursuing a complaint regarding the supervisor's conduct exhibited in December. The union representative made clear to the Applicant that a grievance would not be possible at this stage, and that the complaint would need to be investigated by the Employer;

- While the Applicant's counsel suggested that the Applicant proceeded on a medical leave as a result of the Employer and the Union's conduct, the evidence does not support this conclusion;

- Counsel for the Applicant also suggested that the union representative stated that the Applicant was only looking for financial compensation, as supported by the confirmation that she provided on multiple occasions. It was made clear to the union representative, to the national servicing representative and at the Appeal hearing that the Applicant had no intention of returning to work;

- The events that led to the filing of the Complaint were reported to the Union within days of them occurring. However, it is true that many of the issues the Applicant alleged later in April were not brought to the Union's attention until that time, and were therefore considered untimely.

- The Applicant was not relocated at any time. She proceeded on a leave of absence before any move could be effected. Even if a grievance were possible, it would have been premature.

80. The Union relied upon the following authorities: *M.F. and CUPE Local 2039 and Central Park Lodge*, Dismissal No. 1995, MLB Case No. 244/10/LRA*; B.N. and International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local Union 728*, Dismissal No. 2238, MLB Case No. 16/17/LRA; *S.M. and CUPE Local 204, M. Schroeder and St. Boniface General Hospital*, Dismissal No. 2425, MLB Case No. 126/21/LRA; and *Canadian Labour Arbitration*, 5th Edition, Chapter 7. Discipline VIII. Non-Disciplinary Terminations § 7:92 Resignation.

81. Counsel highlights that in *Central Park Lodge*, *supra*, the Board set out the test for what constitutes a dismissal. In *BBE Hydro*, *supra*, there was no evidence that the union acted in a manner that would constitute a breach of the *Act*, and the applicant in that case failed to take the necessary steps to protect her interests prior to the submission of her resignation.

82. Counsel referenced the decision in *SM and CUPE*, *supra*, in which the complainant had retired because she believed that she was going to be terminated. The Board determined that the complainant had elected to retire. Counsel also referenced several passages from this decision, which are oft-quoted by this Board regarding what is to be expected from union representatives.

83. Counsel proceeded to review the authorities submitted to the Board by counsel for the Applicant, pointing out that in *TMT, supra*, there was no finding of a breach of

the duty to fair representation. The applicant in that case had been transferred to another area; had remained on medical leave; and elected to resign notwithstanding the advice received from her union. The union had filed a grievance alleging a constructive dismissal, and a legal opinion was later obtained which suggested that an arbitrator would likely conclude that the applicant had voluntarily resigned. The Board did not find any breach on these facts.

84. Similarly, in the present case, the Applicant was informed that there was no merit to a grievance. She was given the opportunity to appeal that conclusion, which she did along with her legal representative.

85. Counsel distinguished the present case from *Laskowki*, *supra*, in which there was a flagrant error. There was no evidence that the Union failed to investigate and there was no breach of the collective agreement which would support the filing of a grievance. The Applicant had filed a complaint, which was going to be investigated had the Applicant not unilaterally resigned.

86. Counsel also stipulates that the facts in *Potter, supra,* are distinguishable.

87. Counsel points out that the cases relied upon by counsel for the Applicant regarding financial liability are not applicable in this instance. There is nothing that would warrant an exceptional order as that found in *Hartmier, supra.* There was also no deprivation of democratic rights. In the present case, the Applicant was offered the opportunity to appeal the Union's decision of July 6, 2022, which she did, and she did so with the assistance of legal counsel.

88. Counsel also urged the Board to consider the inconsistent evidence provided by the Applicant as it relates to the relocation of other employees. Counsel remarks that the Applicant emphatically stated in direct examination that no other employee was moved in the same way that she was moved. When presented with a specific example of other another individual who was moved, who was also not white, she acknowledged that she knew about his transfer, offering that she "didn't know the reason he was moved". Counsel states that the Applicant was quite aware that she was not treated differently than others who had been moved, even if they didn't want to be moved.

89. Counsel argues that the Union met its duty of fair representation by:

    a. allowing an opportunity to the Applicant to bring forward her concerns and supporting her through the filing of a Complaint;

    b. giving representation and taking copious notes in all interactions and meetings;

c. advising the Applicant that her Complaint and her concerns would be addressed once she was medically cleared to return to work;

d. meeting with her and addressing her concerns on June 3, 2022;

e. providing an opportunity for her to appeal the Union's decision not to proceed with a grievance.

Applicant's Response

90. In response, counsel for the Applicant states that counsel for the Union has misconstrued the law regarding a constructive dismissal. She also points out that the Applicant asked on multiple occasions for a grievance to be filed, without success. Counsel says that this case is distinguishable from *SM and CUPE, supra,* in which the union had actively discouraged the Applicant from resigning. Those efforts were not made in the present case, says counsel for the Applicant. The Union did not even respond to the Applicant when she highlighted that she was considering a possible resignation in her document of April 7, 2022.

91. Similarly, in *Central Park Lodge*, *supra,* the circumstances are distinguishable as the Application was deemed premature because the union had not yet determined whether it would advance the grievance to arbitration. In the instant case, the Union determined that it would not proceed with a grievance. The Union did not fulfill its role as gatekeeper and did not respond appropriately.

ANALYSIS

92. Section 20 of the *Act* establishes the duty of fair representation. The Applicant bears the onus of establishing a violation of either subsection 20(a) or (b) of the *Act*. Section 20 of the *Act* provides:

> **Duty of fair representation**
> 20 Every bargaining agent which is a party to a collective agreement, and every person acting on behalf of the bargaining agent, which or who, in representing the rights of any employee under the collective agreement,
>
> (a) in the case of the dismissal of the employee,
>
> (i) acts in a manner which is arbitrary, discriminatory or in bad faith, or
>
> (ii) fails to take reasonable care to represent the interests of the employee; or

(b) in any other case, acts in a manner which is arbitrary, discriminatory or in bad faith;

commits an unfair labour practice.

93. The Applicant has alleged that the higher standard of care set out in section 20(a) of the *Act* applies as she claims she was constructively dismissed from employment, thereby "dismissed" by the Employer. The Board has previously considered the terms "dismissal of the employee" as they are used in the legislation. The Board's decision in *V.S.* v. *Manitoba Government Employees Union*, 2010 CanLII 99174 is helpful in that regard. In that decision, a long line of authorities was considered in distilling the issue of what constitutes a dismissal for the purposes of making clause (a) of section 20 applicable. It is useful to repeat the Board's findings in that decision:

> Manitoba's legislation setting forth the duty of fair representation is unique in that section 20(a) of the *Act* sets forth a higher standard of care governing the scrutiny of cases concerning the "dismissal" of an employee. Section 20(a) provides that a bargaining agent must not only refrain from acting in a manner which is arbitrary, discriminatory or in bad faith, but must also exercise "reasonable care" in representing the interests of the employee under the collective agreement. As the Board noted in *Perrin* v. *Manitoba Nurses' Union* (2007), 139 C.L.R.B.R. (2d) 152 at page 156, "reasonable care" is the degree of care which a personal of ordinary prudence and competence would exercise in the same or similar circumstances.
>
> The term "dismissal" is not defined in the statute. However, the Board has considered its meaning in the course of considering the applicability of section 20(a) of the *Act*. In the leading case of *Kepron* v. *Brandon University Faculty Association* (2004), 103 C.L.R.B.R. (2d) 102, Vice-Chairperson Hamilton, as he then was, reflected upon the meaning of the term "dismissal" in the context of section 20(a) of the *Act*. In that case, the Board considered whether a denial of tenure to a university professor, resulting in the termination of his probationary appointment, was a "dismissal". The Board determined that:
>
> > …[T]he word "dismissal" must be given its normal and ordinary meaning, as understood in the context of the employment and arbitral jurisprudence governing collective bargaining regimes. This normal and ordinary meaning is simply that an employer must have just cause to "fire" or "dismiss" an employee for (alleged) culpable conduct which the employer claims is in breach of one or more employment obligations. In our view, it is this normally accepted meaning of "dismissal" which the Legislature intended to cover

> when it adopted the criterion of "reasonable care" for "dismissals" and chose to distinguish that standard from good faith, discrimination and arbitrariness "... in any other case." Indeed, there are many "... other case(s)" where the result can result in a termination of employment, one example being the decision of an employer to "lay off" an employee which can result in the termination of the employment relationship if the employee is not "recalled" within a pre-determined and negotiated recall period. The jurisprudence is clear that an (improper) lay-off is not a "dismissal" under section 20(a).

The Board added that the term "dismissal" must be interpreted in the context of the just cause provision set out in section 79 of the *Act*, which provides that every collective agreement must contain a provision requiring that the employer have just cause for disciplining or dismissing any employee in the bargaining unit. The Board explained that the phrase "just cause for disciplining or dismissing any employee" refers to "conduct on the part of an employee which is culpable or in breach of an employment obligation and exposes that employee to the disciplinary reach of the employer". Following its distillation of the relevant principles, the Board concluded that "the word 'dismissal' in section 20(a) means a dismissal in the culpable or 'no just cause' sense commonly understood in collective bargaining relationships, academic or otherwise". Accordingly, the Board held that the denial of tenure did not constitute a "dismissal" and that section 20(a) of the *Act* was thereby inapplicable.

The Board applied these principles in *W.R.H*. v. *Canadian Union of Public Employees, Local 1482*, [2008] M.L.B.D. No. 14. In that case, the union filed a grievance on behalf of the employee maintaining that his layoff was in fact a discharge without just cause contrary to the collective agreement. The Board concluded that "where it is alleged that an Employer's action is in fact a discharge in the guise of a layoff", the standard set out in section 20(a) of the *Act* may be applied. In so holding, the Board recognized that an alleged disguised discharge may, depending upon the circumstances, constitute a "dismissal" in the "culpable or 'no just cause' sense commonly understood in collective bargaining relationships".

In *Moudgill* v. *Manitoba Government Employees Association*, [1989] M.L.B.D. No. 11, the Board considered whether an alleged "constructive dismissal" constituted a "dismissal" under section 20(a) of the *Act*. The applicant therein complained that the bargaining agent failed to take reasonable care to represent his interests when, on the advice of legal counsel, it refused to continue at arbitration with his demotion

> grievance. Notwithstanding the applicant's characterization of his demotion as a "constructive dismissal", the Board rejected the proposition that the case concerned a "dismissal" within the meaning of section 20(a) of the *Act*.
>
> The Board has also considered whether an employee's resignation, during a period of illness and emotional stress, constituted a "dismissal". In *Beach* v. *Manitoba Teachers' Society*, [2005] M.L.B.D. No. 2, the applicant claimed to have been mistreated and she resigned her position following the employer's denial of her request to be transferred. She contacted her bargaining agent which assisted her in obtaining long term disability benefits following her resignation. However, the bargaining agent, on the advice of legal counsel, refused to pursue her claim for reinstatement of her employment on the basis that the grievance was unlikely to succeed. The applicant alleged that the bargaining agent's refusal to proceed contravened section 20(a) and (b) of the *Act*. The Board concluded that the employee "terminated her employment with the [employer] on her own accord" therefore there was no "dismissal" as contemplated by section 20(a) of the *Act*.
>
> Having regard to the above-noted authorities, the Board determined that V.S.' decision to retire does not constitute a "dismissal" and section 20(a) of the *Act* is, therefore, not applicable in this case. The term "dismissal" has been properly interpreted by this Board to mean the termination of employment by the employer for either (alleged) culpable conduct by an employee or by application of the "innocent absenteeism" doctrine (in which case the employer terminates the employment relationship owing to the alleged failure of an employee to attend work regularly, thereby frustrating the employment contract). There is no evidence of such a termination of employment by the Commission in the present case.

94. The cases highlighted in the *V.S. v. Manitoba Government Employees Union, supra,* decision are instructive as they assist in interpreting the words used by the legislature. The Board is mindful of the manner in which this Board has considered the term "dismissal" for the purposes of section 20(a) of the *Act*, and has paid particular attention to the cases in which employees have terminated their employment on their own accord. These are the facts with which the Board is confronted here. Despite her contention that she was constructively dismissed, the Applicant was not dismissed by the Employer, as that term has been defined by the legislature and interpreted by this Board. The Applicant's employment ended when she elected to resign. She had a choice to remain employed while her complaint remained outstanding. She had the option of consulting with her union representative prior to making the election to resign. Further, she had an opportunity to consider, even after she resigned, whether she should consider rescinding her

resignation. On these facts, the Board agrees with the position of the Union that this case does not concern a dismissal and, therefore, section 20(a) of the *Act* does not have application.

95. Accordingly, clause (b) of section 20 of the *Act* applies. The Board has considered whether the Respondent acted in a manner that was arbitrary, discriminatory or in bad faith towards the Applicant. This is not a situation where there is any evidence of discriminatory or bad faith conduct. The substance of what the Applicant alleges would fall under the category of "arbitrary" conduct. As the jurisprudence illustrates, what will constitute arbitrary conduct will depend on the circumstances. In *J.H.B. v. Canadian Union of Public Employees* (2009), 164 C.L.R.B.R. (2d) 182 at page 190, the Board defined "arbitrary conduct" as:

> …a failure to direct one's mind to the merits of the matter, or to inquire into or to act on available evidence, or to conduct any meaningful investigation to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles, or displaying an attitude which is indifferent, summary, capricious, non-caring or perfunctory. Flagrant errors consistent with a non-caring attitude may also be arbitrary, but not honest mistakes, errors of judgment, or even negligence.

96. In considering arbitrary conduct, the Board's jurisprudence has firmly established that a complainant's disagreement or dissatisfaction with the quality or nature of the bargaining agent's representation is not the standard to use when assessing a section 20 complaint. Rather, the Board will consider whether the bargaining agent reasonably exercised its discretion not to pursue a grievance or refer it to arbitration by directing its mind to the complaint; gathering the relevant information; and seeking whatever advice may be necessary.

97. Numerous decisions of this Board have outlined that the Board does not sit on appeal of each and every decision made by the union. Rather, very specific behaviour/conduct on the part of the union is required to sustain a violation of the *Act*. As counsel for the Union has pointed out, honest errors or the expression of some laxity in the pursuit of the interests of the member are generally not sufficient to sustain a violation. However, in making decisions about how or whether to pursue certain issues on behalf of members, union representatives should be alert to the significance of the issues at stake and they should carry out their duties in a thoughtful, serious and careful manner. That does not mean that they necessarily need to follow the personal preferences or views of the individual member. They are entitled to consider strategically how they respond to any given situation.

98. The Applicant's main complaint is that the Union failed in its duty owed to her by failing to proceed with a grievance on her behalf relating to issues of discrimination

and harassment in the workplace, despite her repeated requests. She resigned from employment effective May 9, 2022. The Applicant explains that she resigned from employment following consultation with "a lawyer" who had concluded that she had a "good chance" at a claim for constructive dismissal. Though she had a complaint in place regarding the treatment she endured in December 2021, she decided to resign out of fear that she would be required to return to a toxic work environment. She claims that her resignation was a constructive dismissal, as the Employer and the Union left her no other alternative: return to work in an unsafe work environment or face the prospect of being terminated for failing to attend three consecutive days of work.

99. Assuming the facts to support a constructive dismissal exist in this case (a critical component of which is a unilateral change to the terms and conditions of employment) and even assuming a constructive dismissal can occur under a collective agreement where a dispute about terms and conditions of employment can be grieved, the Applicant's allegations of constructive dismissal do not support a conclusion that the Union failed in its duty of fair representation in this case. That is because the Applicant decided to present her resignation letter to the Employer without discussing it first with the Union. Though she advised the Union in writing that she was contemplating resigning from employment on April 7, 2022, it was not discussed with the Union in any detail prior to her ultimately resigning. She made the issue clear to her medical practitioner but did not inform her union representative of her predicament, that she was concerned about the possibility of being terminated after three missed shifts if she refused to return to what she deemed to be an unsafe work environment. The union representative made clear to the Applicant that she would be addressing her complaint of harassment and discrimination and potential relocation, once she was ready and able to return to work. When the union representative contacted her following her resignation, the Applicant informed her that she was seeking compensation on the basis of an alleged constructive dismissal. She was emphatic that she was not seeking to rescind her termination or to return to the workplace.

100. At the hearing, the Applicant maintained that a constructive dismissal grievance ought to have been filed on her behalf. She did not have any interest in continuing with the complaint that she had filed regarding her supervisor's treatment of her in December 2021. The union representative made inquiries of the Employer and was informed that severance was not available. The union representation and the national servicing representative met with the Applicant to discuss her concerns on June 3, 2022. The national servicing representative investigated the issues, discussed them with legal counsel and the Human Rights Representative and ultimately reached the conclusion that the Union was "unlikely to be successful if a grievance were to be filed". The Union informed her that it would not file a grievance related to constructive dismissal because the Applicant had vacated her position

and did not want to be re-employed by the Employer. This conclusion was outlined in the letter to the Applicant of July 7, 2022.

101. Having considered the totality of the evidence presented at the hearing, the Board finds that the Union was right in concluding that the Applicant did not wish to pursue the concerns she raised in the workplace and that she was not seeking to return to work. If she had sought to retract her resignation and the Employer had refused to take her back, the Union may have had a ground for asserting that she had been dismissed by the Employer's actions. As things stood, she had taken the step to resign and it was the Union's legitimate view that no arbitrator would say she had been terminated.

102. From the Board's perspective, the Union appears from the outset to have formed a quite reasonable opinion that a complaint was in place that would address the issues she had in regard to her supervisor and potential relocation. The concerns she brought forward were outlined in her complaint, and it was reasonable for the Union to assume that the matters would be addressed once the Applicant was well enough to return to work. It tried to advance the Applicant's interests in a reasonable, thoughtful manner. Yet, she resigned from employment, having little confidence that the Union would be able to represent her interests. This was a critical decision for her and one for which she alone bears responsibility.

103. Subsequently, the Applicant, assisted by her legal counsel, presented her case on Appeal. In that forum, the Applicant repeated her requests for financial compensation. Her legal counsel stated that the Applicant had requested the filing of a grievance relating to the concerns she raised in December. She also argued that the Union ought to have informed her that her resignation would have an impact on any leverage she had with the Employer. The legal representative offered the Union favourable interpretations of the collective agreement. The Union permitted the Applicant every opportunity to make her case, but in the end, it simply did not see the issue from the Applicant's perspective. In arriving at its decision not to pursue the Applicant's matter further, the Union was not motivated by bad faith and did nothing arbitrary or discriminatory in its representation of the Applicant.

104. It is important to note here that the Board appreciates that the Applicant has raised some very serious and sustained concerns about inappropriate conduct in the workplace. There is no reason to question that the Applicant genuinely believed that she had been the victim of discrimination in the workplace and that this led to her decision to resign. However, the Board is asked to consider the facts of this case as a duty of fair representation complaint and not on the strength of the arguments she would present if a grievance had been filed, or if the matter had been referred to arbitration. The Union's obligation is to reach a reasoned decision after it has made itself aware of the relevant facts, which it obtains by conducting a reasonable

investigation and assessment. As noted earlier, the standard is not one of perfection. As long as the Union reaches a reasoned decision and does not act arbitrarily, discriminatorily or in bad faith, the Board does not second guess the Union's analysis and representation. While the Union may have conducted its investigation differently, the Union did not act arbitrarily, discriminatorily or in bad faith, nor did it fail to reach a reasoned decision. There is also an absence of any evidence to suggest that the Union failed to consider relevant information in ultimately concluding that it would not proceed with a grievance.

105. Regrettably, the Applicant's loss of employment happened as a result of her misapprehension of her case and a failure to protect her own interests by communicating clearly with her union representative and specifically consulting with the Union prior to deciding to resign. In these circumstances, there are no facts to support a conclusion that the Union acted arbitrarily, with discrimination or in bad faith.

CONCLUSION

106. The Application is dismissed.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by K.E.N.S. on October 27, 2022.

DATED at **WINNIPEG**, **Manitoba**, this 29th day of September, 2023, and signed on behalf of the Manitoba Labour Board by

"Original signed by"
K. Pelletier, Vice-Chairperson

"Original signed by"
B. Black, Board Member

"Original signed by"
G. Flemming, Board Member

KP/ms/acr/ejh-s