

IN THE MATTER OF THE ONTARIO *POLICE SERVICES ACT*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

MIKE DIMINI

- the Complainant

- and -

THUNDER BAY POLICE ASSOCIATION

- The Union

- and -

THUNDER BAY POLICE SERVICES BOARD

- The Employer

AND IN THE MATTER OF a complaint that the Union violated its duty of fair representation

Arbitrator: Howard Snow

Appearances:

On behalf of the Complainant:

Kirsty Niglas-Collins - Counsel

Mike Dimini - Complainant

On behalf of the Union:

Joshua Phillips - Counsel

and others

On behalf of the Employer:

Joel Dubois - Counsel

Hearing held May 23, 2024, via Zoom. Supplementary written submissions were concluded May 31, 2024.

# AWARD

## INTRODUCTION

Mike Dimini is a police officer in Thunder Bay, Ontario, and is the Complainant. He made a Complaint that the Thunder Bay Police Association, the Union, had violated its duty of fair representation by failing to file a grievance regarding comments made by Member(s) of the Police Services Board concerning the Complainant.

The Thunder Bay Police Services Board, the Employer, sought to be added as a party to these proceedings and it was added.

The Union brought a motion to dismiss the Complaint on the basis that there could be no breach of the duty of fair representation on the facts of this dispute. Alternatively, the Union submitted that assuming there was a breach of the duty of fair representation, and assuming that all the facts set out in the Complaint were true, there was no *prima facie* case.

This award is limited to a consideration of the Union's motion to dismiss the Complaint.

## BACKGROUND

March 31, 2022, the Complainant brought this Complaint against the Union. The Complaint set out seven pages of background and submissions with much of the Complaint dealing with the conduct of the Union from 2018 through 2022. There is no mention of any specific provision of the collective agreement. The Complainant raised a number of issues regarding events occurring between November 2018 and March 2022 but ultimately pursued only one. The issue he pursued relates to the Union's failure to file a grievance on his behalf in the winter of 2022.

After receiving the Complaint, the Union sought to clarify the Complainant's specific issues. It wrote to the Complainant indicating that there appeared to be 13 different matters about which the Complainant was dissatisfied. The Union asked the Complainant to indicate whether or not its review of the Complaint was accurate. No concern was raised by the Complainant - instead the Complainant appeared to agree with the Union's summary of 13 issues.

This hearing on the Union motion began on the assumption that there were 13 matters. As the hearing proceeded it became clear that the Complainant was only complaining about one issue. The Complainant complained about the Union's March 2022 failure to file a grievance.

This failure to file a grievance is set out in the March 31, 2022, Complaint as follows:

ss. On February 27th, 2022 the Applicant reached out to another Association Executive Member, Curtis Templeman, requesting a grievance be filed as it relates to the attacks he was experiencing from a Board Member, her counsel and other members publicly. The Applicant provided the suggested wording for the grievance against the employer.

tt. Mr. Templeman wrote back requesting all documentation supporting his grievance including proof of lost wages and emotional distress. On March 4th, 2022, the Applicant sent all requested documentation to Mr. Templeman, although it was readily accessible in the media.

uu. Furthermore, given the Applicant's experience on the Association Executive, he is aware that making this request at such an early stage is premature and not routine.

vv. The Applicant followed up on March 8th, 2022 requesting an update, he was informed that the Association's legal counsel was looking into it. To date he has not heard back on whether they would be filing a grievance. The deadline of fifteen (15) days articulated in the Collective Agreement to file a grievance has expired.

The grievance the Complainant wished to have filed, referred to in paragraph "ss" above, was as follows:

The Thunder Bay Police Association hereby grieves the Board's conduct with respect to public statements made generally about officers within the Service and more specifically with respect to the relentless, continued, and ongoing harassment of Association Member, Mike Dimini. The actions of Board Members are in direct violation of the current Collective Agreement. The Board has allowed this behaviour to occur at the hands of Board Member Georjaan Morriseau and has not protected its employees, namely Mike Dimini and by extension other members of the TBPA who now face negative criticism as a result of the attacks. Further, Mike Dimini is now experiencing reprisal and retaliation in the highest form by having confidential information, both personal and professional, given to third parties outside of the Board. Mike Dimini came forward in November in 2021 outlining concerns about being targeted and harassed by administration and members of the TBPA. As a result, a member of the board has used this highly sensitive information to advance her own personal interests, to the detriment of employees. This is also a breach of the privacy of Mike Dimini's employment matters. He is now being directly attacked by a Board Member who has made false and malicious claims to officials and is now engaging in a media attack, all while sitting in the Thunder Bay Police Services Board. Ms. Morriseau who is in possession of the facts as a Board member has also chosen to ignore those facts. The Board is allowing this behaviour and not protecting its employees or the organization. The Association seeks the following remedies:  
Ms. Morriseau be removed from the Police Services Board immediately,  
The Board pay all fees associated with the harassment and reprisal faced by Mike Dimini including lost wages and damages and indemnification for all legal costs occurred,  
The Board admit they are in violation of the Collective Agreement, and  
Any other remedy the association may request or an Arbitrator deems just.

## SUBMISSIONS OF THE UNION

The Union made specific submissions on all 13 issues raised by the Complainant. As the Complainant only pursued one issue, that is the Union's failure to file a grievance, I do not record the Union's submissions regarding the other 12 issues.

The Union said that much of the material in the lengthy Complaint dealt with internal Union

affairs. The duty of fair representation does not arise with respect to regulating those matters. Moreover, the duty of fair representation does not require a union to provide a lawyer.

The Union submitted that the duty of fair representation under the *Police Services Act* and at common law applies only to matters over which a union has the exclusive right to represent an employee. Collective bargaining is limited in the police sector and thus this collective agreement is limited in terms of what it can regulate. Police collective agreements do not apply to guarding an employee's reputation. They do not apply to proceedings in forums other than arbitration.

The duty of fair representation flows from the Union's exclusive representational status. This was made clear by the Supreme Court of Canada in *Gagnon* (below). The Union reviewed a number of other authorities limiting the duty of fair representation to matters involving a breach of the collective agreement and to the representation of an employee's rights through the grievance and arbitration procedure.

Any complaint of a violation of the duty of fair representation requires the pleading of facts to indicate that the Union action was arbitrary, discriminatory or in bad faith. It is necessary to allege facts leading to a violation of the duty. A number of other cases have been disposed of on the basis that no *prima facie* case was set out in the complaint or in other pleadings.

The duty of fair representation applies to, and is limited to, the Union's exercise of exclusive power as bargaining agent. The *Police Services Act* limits what the Union can negotiate (Section 119 (3)). The *Act* limits the scope of bargaining to remuneration, pensions, sick leave, grievance procedures and working conditions. But negotiations are subject to Section 126 which sets out limitations on bargaining working conditions. Of particular relevance here is that a Union cannot bargain about matters that are regulated by Regulation. Ontario

Regulation 421/97 sets out a Code of Conduct for Members of Police Services Boards. The Union cannot negotiate to regulate the conduct of Police Service Board Members as that issue is governed by the Regulation. Thus no duty of fair representation arises regarding the conduct of Police Service Board Members.

With respect to the failure to file a grievance regarding the conduct of the Board Member and the protection of the Complainant's reputation, the collective agreement does not protect reputations. The Complainant could bring a civil action for defamation. There is, however, no authority for the Union to do that.

To the extent that the Complainant complains about the conduct of a Board Member or her lawyer, that is not addressed in the collective agreement and, moreover, the Union is prevented from dealing with those things by reason of the Regulation on the Code of Conduct for Board Members. This cannot be the basis for a grievance - the Ontario Civilian Police Commission, a tribunal established under the *Act*, has authority to deal with the conduct of Board Members. Because there is no connection to the collective agreement, the failure by the Union to grieve cannot possibly violate its duty of fair representation.

The duty of fair representation is intended to ensure that a Union acts fairly in how it bargains, and how it enforces, the collective agreement. In this case, even if what is asserted by the Complainant is proven, nothing alleged gives rise to an arguable case of a violation of the duty of fair representation.

The Union relied upon the following authorities: *Renaud v. LaSalle (Town) Police Association*, [2006] O.J. No. 2842; *Lafrance v. North Bay Police Services Board*, [2009] O.L.A.A. No. 313, 180 L.A.C. (4<sup>th</sup>) 385; *Lafrance v. North Bay Police Association*, [2009] O.L.A.A. No. 675, 187 L.A.C. (4<sup>th</sup>) 381; *Luis Lopez*, [1989] OLRB Rep. May 464; *Toronto*

*District School Board*, [2002] O.L.R.D. No. 2560; *Bruce-Grey Catholic District School Board*, [2003] O.L.R.D. No. 3081; *Fisher v. Orangeville Police Association*, [2020] O.L.A.A. No. 101, 312 L.A.C. (4<sup>th</sup>) 285; *Lynch*, [2011] O.L.R.D. No. 805; *Muse*, [2015] O.L.R.D. No. 1167; *Windsor Airline Limousine Services Ltd.*, [2007] O.L.R.D. No. 791; *John Kohut*, [1991] O.L.R.B. Rep. January 35; *Can Annie Ling v. Canadian Union of Public Employees and its local 2725-1*, 2020 CanLII 54892 (ON LRB); *Hemmink v. Teamsters Local Union No. 879*, 2022 CanLII 62045 (ON LRB); *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509; *Gendron v. Supply and Services Union of the Public Service Alliance of Canada Local 50057*, [1990] 1 S.C.R. 1298; *Adams v. USWA, Local 13571-34*, [2003] O.L.R.D. No. 72; Excerpts from the *Ontario Health and Safety Act*; Excerpts from the *Police Services Act*; and *Police Services Act*, Regulation 421/97.

In reply to the Complainant's submissions, the Union agreed that grievances should be read liberally. However, the Union noted that the authorities indicate that in order for an arbitrator to have jurisdiction over a tort, for example, there must be a connection to the collective agreement, such as a breach of the management rights article. An arbitrator must have jurisdiction over a grievance before the arbitrator can also assume jurisdiction over a related tort. For example, the Union submitted that in the *Toronto Police* award (2006, below) there had been a number of transfers which were alleged to be in violation of the management rights article and the arbitrator had jurisdiction over the grievance. When the arbitrator accepted jurisdiction over several alleged defamatory comments, it was because those comments were closely related to, or flowed from, the transfers. The arbitrator did not accept "free standing" jurisdiction. Under *Weber* (below) the Supreme Court indicated that jurisdiction requires that the impugned action flow directly or inferentially from the collective agreement. In the *Toronto Police* matter (below) transfer was a right of the Chief of Police under that collective agreement. Transferring employees was an exercise of management rights and the underlying claim was an improper exercise of those management

rights. The alleged torts of defamation over which the arbitrator took jurisdiction were all part and parcel of the exercise of management rights.

This does not mean that the Complainant has no remedy for what he alleges was defamation by the Board Member. Instead, his remedy is a civil case for defamation, not grievance arbitration. The alleged defamatory statements by the Board Member(s) are the substance of this complaint.

This is not a complaint of an alleged violation of the *Human Rights Code* or the *Occupational Health and Safety Act*. Cases such as *Parry Sound* (below) are thus not helpful to the Complainant.

In response to the Complainant's supplementary submissions, the Union submitted that the central character of the claim must fall under the collective agreement in order for an arbitrator to have jurisdiction over a matter such as defamation. In this Complaint there is no reference to any article of the collective agreement which might anchor his claim and give an arbitrator jurisdiction over the alleged defamation.

#### SUBMISSIONS OF THE COMPLAINANT

The Complainant submitted that the issue was whether the grievance was within the exclusive representation rights of the Union and, if so, was the failure to pursue it arbitrary or in bad faith. The authorities (for example, *Can Annie Ling*, above) make clear that at the stage of a motion to dismiss, the threshold for demonstrating a *prima facie* case is not very high and one must assume that all the allegations are true.

The substance of the Complaint relates to the comments by the Board Member(s) and the rest

of the Complaint goes to whether the Union's actions were arbitrary or in bad faith. The Complaint indicated that the Union's actions and its failure to pursue the grievance were activated by personal hostility or revenge. That is a difficult thing to prove and that is why there are several pages to the Complaint. The Complainant submitted that the submissions in the Complaint are adequate to demonstrate the actions were arbitrary or in bad faith.

The draft grievance is not a grievance, but rather one which the Complainant wanted to have filed and it should be interpreted even more liberally than an actual grievance prepared by a union.

The *Human Rights Code* is incorporated into the collective agreement and provides basic rights in the collective agreement. One such basic right is to have a safe workplace free from harassment.

The Complainant acknowledged that there are decisions that charges laid against police officers under the *Police Services Act* do not give rise to a duty of fair representation. Likewise there are decisions that there is no duty of fair representation regarding workers compensation issues, or interactions on picket lines, or the internal processes of a union. However, none of those are similar to the matter sought to be grieved here which involves defamatory statements.

Working conditions that cannot be bargained may still give rise to a duty of fair representation. For example, the accommodation of a disabled employee should be able to be grieved under the rationale in the *Parry Sound* decision (below).

The Complainant then referred to several authorities in support of an arbitrator having jurisdiction in this matter.

In the *Durham Regional Police* case (below) the underlying issue was the failure to provide a harassment free environment. This preliminary decision dealt primarily with the question of whether an investigator's report could be subpoenaed and does not clearly address the issue of jurisdiction.

In the *Waterloo Regional Police* case (below), there was a dispute as to whether or not certain actions taken against the employee were disciplinary actions which would fall outside the jurisdiction of the Union or whether they were reprisals for that grievor's attempts to protect herself from sexual discrimination. The arbitrator agreed to hear the facts and reserved jurisdiction as to whether or not she had jurisdiction until the completion of the case, at which time the decision could be based on a full evidentiary record.

In the *Ontario Provincial Police* decision (below) the issue dealt with the integration of employees who had suffered from mental health issues. The arbitrator concluded that both an alleged violation of employees' rights to a safe and healthy workplace and an allegation that the employer had failed to follow its own policies in regards to health and safety and employee accommodation, were arbitrable.

In the *Toronto Police* case (2010, below) the arbitrator accepted jurisdiction over alleged defamatory statements. Here, the Complainant also wanted to file grievances about false and malicious comments by a Board Member.

The question is what items can be grieved, not what items can be bargained. The Complainant urged me to reject the Union's arguments that defamation was unable to be grieved and thus not subject to the duty of fair representation.

In his supplementary written submission, the Complainant filed another earlier decision in

the *Toronto Police* matter (2006, below). The Complainant repeated his submissions that grievances should be given a liberal interpretation and even more so in a possible grievance situation such as this with the grievance the Complainant wanted filed. In addition, the Complainant repeated his submission that the standard for demonstrating a *prima facie* case is not high. The essential character test from *Weber* (below) should be applied - does the matter complained about fall under the collective agreement? This does not require specific language - rather the issue is whether the claim is part of the essential character of a collective agreement dispute, a dispute that involves the interpretation, application, administration or alleged violation of the collective agreement. The fact that the alleged tort does not violate a specific term of the agreement is not determinative. Instead the connection must be to a claim before the arbitrator. Given the low threshold, the Complainant asserted that the facts before me disclose a *prima facie* case.

Finally, and in the alternative, the Complainant submitted that even if the grievance he wished to have filed is not arbitrable, the Union's failure to explain why it did not pursue the grievance amounts to a breach of the duty of fair representation.

The Complainant relied upon the following authorities: *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (CanLII), [2003] 2 SCR 157; *Durham Regional Police Association and Durham Regional Police Services Board*, 2015 CANLII 60920; *Waterloo Regional Police Services Board and Waterloo Regional Police Association*, 2022 CanLII 35162; *The Ontario Provincial Police Association and The Ontario Provincial Police*, (unreported) Abramsky August 31, 2018; *Toronto Police Services Board and Toronto Police Services Association*, 2010 CanLII 65787; *Weber v. Ontario Hydro*, 1995 CanLII 108, [1995] 2 SCR 929; *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 SCR 509; *McLeod v. Camco*, [1987] OLRB Rep. April 547, 1987 CanLII 3253; *Roth v. National Automobile, Aerospace, Transportation & General Workers Union*

*of Canada (CAW-Canada), Local 1256, 2002 CanLII 22724 (ON LRB); Hartimer v. Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail Wholesale and Department Store Union, Local 955, 2017 CanLII 20060 (SK LRB); and Lenahan v. Canadian Auto Workers, Local 222, 2004CanLII 23662. In his supplementary submission the Complainant also relied upon Toronto Police Services Board and Toronto Police Services Association, 2006 CanLII 50481, one of the preliminary awards in the same matter relied upon above.*

#### SUBMISSIONS OF THE EMPLOYER

The Employer made no submissions on this motion.

#### PROVISIONS OF THE COLLECTIVE AGREEMENT

Neither party referred to any provision in the collective agreement as a basis for the grievance the Complainant had proposed.

#### CONCLUSIONS

*What is the “duty of fair representation”?*

Collective bargaining in Canada is primarily regulated by statutes. Because the statutes give unions the exclusive right to negotiate employment terms for the employees, employees are no longer able to individually negotiate their employment arrangements with their employer.

Apart from the union control of the bargaining for the collective agreement, nearly all collective agreements are enforced through a grievance and arbitration process and in nearly

all of those agreements the union, rather than the individual employee, controls access to arbitration.

Given the exclusive right of unions to represent employees, that is to bargain and enforce the collective agreement, Canadian common law provides that when exercising their exclusive rights unions have a duty to represent all the employees in the bargaining unit fairly. This “duty of fair representation” was originally developed and enforced by the courts. In many collective bargaining statutes the enforcement of the duty of fair representation has been transferred to labour relations boards. However, for police collective bargaining under the *Police Services Act* in Ontario, this duty of fair representation is enforced through arbitration (see *Renaud*, above). Since it is a common law concept, the duty of fair representation is the same regardless of who enforces it.

Because the duty of fair representation flows from the union’s exclusive bargaining rights, it applies both to the negotiation of collective agreements and to the administration of the provisions of the collective agreements.

This Complaint relates to administering the collective agreement, to the Union’s failure to file a grievance when asked to do so regarding the conduct of Member(s) of the Thunder Bay Police Services Board, the Employer.

The Supreme Court of Canada has described the duty of fair representation with respect to grievances in the following terms:

The following principles, concerning a union's duty of fair representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent

all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee. (*Canadian Merchant Service Guild and Guy Gagnon* [1984] 1 S.C.R. 509, at p. 527)

In paragraph 1, above, the Supreme Court expressly grounds the duty of fair representation in a union's exclusive power.

*Does the Union have a duty of fair representation in this instance?*

The Union said it had no duty of fair representation in this matter as the collective agreement did not deal with the conduct of the Members of the Police Services Board. Moreover, the conduct of Board Members is governed by a Regulation specifying a Code of Conduct for Board Members and, as a result, the parties could not bargain about, and the collective agreement could not deal with, that issue.

What, then, are this Union's exclusive rights? Section 119 (3) of the *Police Services Act* provides that:

The parties shall bargain in good faith and make every reasonable effort to come to an agreement dealing with the remuneration, pensions, sick leave credit gratuities and grievance procedures of the members of the police force and, subject to section 126, their working conditions.

Section 126 of the *Act* then provides that:

Agreements and awards made under this Part do not affect the working conditions of the members of the police force in so far as those working conditions are determined by sections 42 to 49, subsection 50 (3), Part V (except as provided in subsections 66 (13) and 76 (14)) and Part VII of this Act and by the regulations.

As can be seen, this *Act* limits the exclusive power of the Union and limits the items about which the Union can bargain. This differs from many other collective bargaining statutes.

One express limit on bargaining in Section 126 of the *Police Services Act* is any matter that is determined by regulation. As the grievance the Complainant requested dealt with the conduct of Members of the Police Services Board, the Regulation setting out a Code of Conduct for those Members is relevant. Ontario Regulation 421/97 - Members of Police Services Boards - Code of Conduct - includes a number of specific provisions. Some of them are:

4. Board members shall keep confidential any information disclosed or discussed at a meeting of the board, or part of the meeting of the board, that was closed to the public.
5. No board member shall purport to speak on behalf of the board unless he or she is authorized by the board to do so.
6. A board member who expresses disagreement with a decision of the board shall make it clear that he or she is expressing a personal opinion.
7. Board members shall discharge their duties loyally, faithfully, impartially and according to the Act, any other Act and any regulation, rule or by-law, as provided in their oath or affirmation of office.
8. Board members shall uphold the letter and spirit of the Code of Conduct set out in this regulation and shall discharge their duties in a manner that will inspire public confidence in the abilities and integrity of the board.
9. Board members shall discharge their duties in a manner that respects the dignity of individuals and in accordance with the *Human Rights Code* and the Canadian Charter of Rights and Freedoms.

In addition, Section 25 of the *Police Services Act* provides that the Ontario Civilian Police Commission, a tribunal established by that *Act*, may inquire into the conduct of a Member

of a Board and has the authority to remove a Member of the Board or suspend the Member.

Given the language of the Regulation on the Code of Conduct of Board Members, I conclude that the Union is prohibited from bargaining to regulate the conduct of Board Members in the collective agreement. In light of that, it would be surprising to find any language in the collective agreement that does regulate the conduct of Board Members - the Union submitted that there was none and no such language was suggested by the Complainant.

I was provided with a number of cases in which there was no duty of fair representation. For example, it has been held in the Police sector that unions have no jurisdiction over discipline matters and matters of discipline under the *Police Services Act* attract no duty of fair representation. A similar result was reached regarding workers compensation claims (see *Lafrance*, [2009] O.L.A.A. No. 675, at para 42). Likewise it has been held that a union had no exclusive power and so no duty arose regarding criminal proceedings (see *John Kohut*, above), and that no duty arose in a civil matter dealing with a disability claim (see *Adams*, above).

More generally, it has been held that when an employee could pursue a matter dealt with in the collective agreement on his or her own such that the union had no exclusive jurisdiction, no duty of fair representation arose (see *Toronto District School Board*, above).

The lack of a violation of the collective agreement would normally be sufficient to conclude that the Union had no exclusive power to deal with the matter, that a grievance arbitrator had no jurisdiction and the Union had no duty of fair representation.

However, the Complainant submitted that a grievance arbitrator would have jurisdiction over this complaint as a tort - in this instance the tort of defamation.

Historically torts were developed and enforced by the courts as part of our common law. Tort is the area of law, independent of contract, that provides remedies for wrongs. Examples of torts are trespass, assault, battery, negligence, nuisance, false imprisonment and defamation which is the tort of injuring another person's reputation. The submission was that a grievance arbitrator would have jurisdiction to deal with a grievance that simply alleged defamation.

There are cases in which grievance arbitrators have taken jurisdiction over a tort. The recent authorities arise following the Supreme Court decision in the *Weber* case (above), in which an employee had been on sick leave and the employer hired a private investigator to investigate its concerns that the employee was malingering. Following the investigation, the employer suspended the employee for abusing his sick leave benefits. The union filed grievances including one that alleged the hiring of a private investigator violated the collective agreement. In addition, the employee filed a civil claim in court based on tort and a breach of the Canadian Charter of Rights and Freedoms, claiming damages for the investigator's surveillance.

The Supreme Court of Canada concluded that arbitrators have the authority to consider some tort claims. The Court stated that:

In considering the dispute, the decision-maker must attempt to define its "essential character" . . . The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement. (at para. 52)

In the *Weber* case, since the tort claim was a part of the suspension and as the collective agreement had language addressing "unfair treatment" and as the collective agreement incorporated the benefits of the employer's Sick Leave Plan, the difference between the parties related to the administration of the collective agreement. The Supreme Court

concluded that the related tort claim had to be dealt with by the arbitrator hearing the grievance and that the court had no jurisdiction.

The Supreme Court described this approach as the “exclusive jurisdiction model”. It indicated that:

This does not mean that the arbitrator will consider separate “cases” of tort, contract or *Charter*. Rather, in dealing with the dispute under the collective agreement and fashioning an appropriate remedy, the arbitrator will have regard to whether the breach of the collective agreement also constitutes a breach of a common law duty, or of the *Charter*. (at para 55, my emphasis)

A helpful examination of this issue is found in *Toronto Police Services Board and Toronto Police Services Association* (2006 CanLII 50481 (ON LA), above). There Arbitrator Surdykowski concluded that he had jurisdiction over alleged defamatory statements related to a grievance regarding 14 grievors. The 14 grievors alleged that their transfers were discriminatory and without reasonable cause and were therefore contrary to the management rights clause of the collective agreement. In that case, the parties had agreed the arbitrator had jurisdiction over the transfers under the management rights clause.

The arbitrator concluded that he also had jurisdiction over certain allegedly defamatory statements which were closely tied to those transfers. At para. 29 and 30 of his Oct. 23, 2006, award Arbitrator Surdykowski wrote as follows:

29. There is no doubt that an arbitrator has the exclusive jurisdiction to hear and order a remedy for a claim based in tort, including defamation, so long as the particular tort claim is part of the essential factual character of a claim that falls within the ambit of the particular collective agreement. The qualifier “essential” means that there must be more than some connection between the tort claim and a collective agreement claim. In the courts the requisite connection must be to a claim that has been or could be made under the collective agreement. When the issue arises at arbitration, the connection must be to a claim (i.e. grievance) that is before the arbitrator, because an arbitrator's jurisdiction is circumscribed by the grievance(s)

before him as well as by the collective agreement and applicable legislation. “Essential” means indispensable, or fundamental or “part and parcel” of a thing. Accordingly, at arbitration, in order for a tort claim to fall within the exclusive jurisdiction of the arbitrator at arbitration, it must be indispensable to or a fundamental part of a collective agreement claim that has been made under the particular grievance.

30. As I read the *Weber, supra*, jurisprudence, the “essential character” test requires that there must be a factual and functional connection between a collective agreement claim and a claim in tort such that the tort claim is actionable as part of the collective agreement claim. A tort claim that is remote from or independent of any collective agreement claim does not fall within the jurisdiction of an arbitrator under the collective agreement. It must be so, for the collective agreement is the root of the arbitrator’s jurisdiction, and it would indeed be odd if an arbitrator could consider and give a remedy for a tort claim notwithstanding that s/he dismissed the collective agreement claim that was the basis of the grievance before him/her. (Emphasis in the original)

Applying this approach Arbitrator Surdykowski took jurisdiction over some defamation claims which were part and parcel of the transfers and decided he did not have jurisdiction over other defamation claims which were not essential to the transfers.

In the grievance proposed by the Complainant in this case, there is no alleged breach of the collective agreement to ground the alleged defamation. I see no basis upon which this dispute about alleged defamatory statements by Board Member(s) might be viewed in its essential character as a dispute about the interpretation, application, administration or alleged violation of the collective agreement. Instead, the grievance the Complainant wished the Union to pursue solely referred to alleged defamatory statements by the Board Member(s). I see no basis upon which a grievance arbitrator would have had jurisdiction over this tort.

I find none of the Complainant’s authorities on this issue assist his position. For example, in the *Durham* case (above) the grievance about a failure to ensure a harassment free workplace explicitly alleged a violation of “Article 5” of the collective agreement. In the

*Waterloo* case (above) the grievance about discrimination and harassment on the basis of sex alleged a violation of the grievor's rights under the collective agreement. Moreover, the grievance followed the dismissal of the grievor's earlier court case over these same issues. Her court case had been dismissed on the grounds that the collective agreement prohibits sex discrimination and sexual harassment and so the matter complained about fell under the jurisdiction of a labour arbitrator. In the *Ontario Provincial Police* award (above) the grievance alleged a violation of the collective agreement and the award concluded that the employer had "violated the Grievors' rights under the collective agreement" (at para. 347). Unlike this Complaint where there is no suggestion of a provision of the collective agreement being violated, in each of these awards there was an explicit allegation of a violation of the collective agreement. There was also a finding that there had been a violation of the collective agreement in one award.

The other basis by which the Complainant alleged the Union had jurisdiction over this grievance was based on the assumption that the *Human Rights Code* provides a basic set of rights for all employees, including those covered by this collective agreement, and provides for a harassment free workplace. The Complainant asserted this but did not explore the argument fully in his submissions.

I do not find this submission to provide a basis of arbitral jurisdiction in this instance for two reasons.

First, workplace harassment is normally understood to be something that occurs in the workplace. The grievance mentions "public statements", "to third parties outside of the Board" and "media attack". The Complaint states that the attacks were made "publicly" and that the attacks were "readily accessible in the media". There may be an issue as to whether this was workplace harassment. Assuming it was workplace harassment, the *Code* prohibits

harassment in the workplace on the basis of certain grounds - such as age, race, and colour - and there is no allegation the harassment was on the basis of any of the prohibited grounds.

Secondly, and more importantly, the Regulation on a Code of Conduct for Board Members sets out more explicit restrictions on Board Members and their public statements than merely ensuring a harassment free workplace. In addition, the Regulation requires that Board Members "... discharge their duties in a manner that respects the dignity of individuals and in accordance with the *Human Rights Code*...". Assuming that the Board Member's comments were workplace harassment under the *Code*, and assuming that the *Code* normally provides a basic set of rights in a collective agreement, the *Police Services Act* (Section 126) states that collective "Agreements ... do not affect the working conditions of the members of the police force in so far as those working conditions are determined by ... the regulations." To the extent that the working conditions at issue here are based on the Board Member's comments, this Regulation expressly regulates the matter, including the requirement for Board Members to act in accordance with the *Code*.

The Complainant is not left without any way to seek a remedy - for example, he could sue for defamation, or make a complaint to the Ontario Civilian Police Commission about the Board Member's comments.

I find no basis upon which the substance of the Complainant's Complaint and the grievance he wanted to have filed can be asserted to be a violation of the collective agreement. They are not matters about which the Union had exclusive power and are not matters about which the Union could grieve. I find the Union had no duty of fair representation and was not in violation of any such duty.

*Assuming exclusive power, has the Complainant set out a prima facie case?*

Secondly, the Union asserted that, assuming the Union had a duty of fair representation here, and assuming that everything alleged by the Complainant were true, there was no *prima facie* case of a breach of the duty of fair representation. In this case the claim of no *prima facie* case simply means that, assuming that everything asserted in the Complaint is true, it would not lead to an arguable claim of a violation of the duty of fair representation and thus there is no need for the Union to call any evidence to respond to it. In other words, even assuming there was a duty of fair representation, the Union said it was clear that there had been no breach of that duty.

Given my conclusion that there was no duty of fair representation in this instance, I need not consider this submission.

*Complainant's alternative submission*

Finally, the Complainant submitted that “Alternatively ... even if you find that [the Complainant's] proposed grievance lacks arbitral jurisdiction ... the Union’s failure to explain how, why or whether his grievance was filed as requested alone amounts to a breach of the duty of fair representation.” (Supplementary written submission, May 28, 2024, para. 14).

I accept that when a union has a duty of fair representation, that union’s failure to explain why a grievance was not pursued may breach that duty.

However, in this case I find no merit in this submission. While the Union’s failure to communicate with the Complainant may have been poor practice, the Union had no duty of

fair representation and I fail to see how the Union could have possibly breached that nonexistent duty.

*Summary*

In summary, I allow the Union motion to dismiss the complaint on the basis that the Union owed no duty of fair representation in this particular circumstance regarding comments made by Member(s) of the Police Services Board.

The Complainant's duty of fair representation Complaint is dismissed.

Dated in London, Ontario, this 12<sup>th</sup> day of July, 2024.

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Howard Snow, Arbitrator