

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**THUNDER BAY POLICE ASSOCIATION**  
**(The “Association”)**

- and -

**MICHAEL NORDAL**  
**(The “Complainant”)**

**ARBITRATOR:** William A. Marcotte

**APPEARANCES:**

**FOR THE ASSOCIATION:** K. Rowen, counsel  
C. Woods, Assn. president  
S. Harrison

**FOR THE COMPLAINANT:** J. Mauro, representative  
M. Nordal, complainant  
K. Donovan

Hearing held via Zoom on March 15, April 12, June 13, June 17, July 3,  
October 17 and November 29, 2024.

**INTERIM AWARD**

In his January 21, 2022 complaint, police officer Mike Nordal (the “Complainant”) contends that the Thunder Bay Police Association (the “Association”) failed in its duty of fair representation [“DFR”] “by not providing Adequate/Effective and at times any representation.” The complaint was revised on February 8 and April 22, 2022 but the substance remained as reflected in the original complaint.

The Association contends that certain allegations made by the Complainant are outside arbitral jurisdiction concerning a DFR matter. In particular, in correspondence dated June 28, 2024 the Association states, relevant for our purposes:

- a) Any allegations which relate to the issue of whether the Complainant was, in fact, subject to workplace harassment. The Association submits that it is not within the scope of the DFR Grievance that is before you to make any determination of findings of fact with respect to whether the Complainant experienced workplace harassment...
- b) Any allegations which pertain to the Association’s representation of the Complainant with respect to criminal court subpoenas or attendance which is not a subject over which the Association exercised the exclusive power of representation vis-à-vis the Employer [i.e., The Thunder Bay Police Service, herein after the “Board”]. This includes, but is not limited to, any allegation regarding the Association’s failure to attend court, provide counsel and/or pay legal costs associated with and subpoena to attend criminal court.
- c) Any allegations which pertain to internal Association matters including but not limited to allegations regarding:
  - i. The Association’s failure to provide financial and/or legal assistance to the Complainant in respect of the criminal court subpoena issue, or any other matter; and
  - ii. The Association’s failure to follow its Constitution and By-laws with respect to the Complainants request for legal assistance from the Association. The allegations have been raised by the Complainant in his Small Claims Court claim against the Association (Court file no. SC-23-00000400-000).

- d) Any allegations which relate to the Association's retention of documents or recordings pertaining to the Complainant. These issues have been raised by the Complainant in his HRTO [i.e., Human Rights Tribunal Ontario] Application, HRTO file no. 2023-51915-1.
- e) The Association further asserts that the allegations set out at paragraphs 222, 228, 286 [of the Complainant's May 14, 2024 "pleadings"] or otherwise relating to what is described as a "legal opinion" dated October 13, 2021, is subject to solicitor/client privilege, which the Association has at no time waived. As a result of the operation of this privilege, the Association asserts that any evidence relating to this legal opinion is inadmissible.

The Association is in receipt of particulars provided by the Complainant on June 27, 2024. The Applicant [sic] reserves all rights to respond to those further particulars as it deems necessary.

For purposes of this award, the parties in their submissions addressed section a), b) and c) (i) and (ii) in the above correspondence. Both parties submitted case law on these issues. Relevant for our purposes, certain of these cases deal directly with the matter of arbitral jurisdiction when dealing with a claim of a failure on the part of a union or association to fairly represent a member.

In *Re Fisher v. Orangeville Police Assn.* [2020] O.L.A.A. No. 101, 312 L.A.C. (4<sup>th</sup>) 285, 2030 CarswellOnt 5338 (Bendel), the complainant contended his police association failed to fairly represent him "during an investigation under the Police Service Act and by failing to cover the legal cost he had incurred in connection with the investigation" (para. 1). In dismissing the complaint, arbitrator Bendel states, at para. 11: "... in the absence of anything contrary in the applicable legislation, the duty of fair representation applied only in respect of matters over which the bargaining agent has the exclusive power of representation." On this matter of exclusivity, the arbitrator cites at para. 12, *Re Canadian Merchant Service Guild v. Gagnon*, [1984] S.C.R. 509, page 526: "the duty of representation arises out of the exclusive power given to the union to act as spokesman for the employees in the bargaining unit".

In *Re Muse [2015] O.L.R.D. No. 1167*, arbitrator Nyman noted at para. 5, that in exercising its duty of fair representation as the exclusive agent for employees, the union must do so “in a manner that [is] not arbitrary, discriminatory or in bad faith.” And further, at para. 8:

In the course of defining the scope of a trade union’s duty of fair representation, the Board has consistently stated that it is defined by the scope of the union’s authority as exclusive bargaining agent. If the matter is one the trade union is mandated to represent the employee, it is a matter to which the duty of fair representation extends. If, however it is not a matter within the purview of the union’s representational rights, is not a matter to which the duty of fair representation extends.”

As to the extent of that duty, Arbitrator Nyman states, at para. 10:

The Board has also determined that a trade union’s duty of fair representation is restricted to the union’s representation of employees in the bargaining unit **IN THEIR DEALINGS WITH THEIR EMPLOYER...** [Emphasis in original.]

In *Re John Kobut [1991] OLRB Rep January 35 (Tacon)* restriction on the union’s representational rights is addressed at para. 14:

The rationale that the union’s obligation to represent is necessarily limited to the arena circumscribed by the collective agreement is the reason that the arena defines the scope of the union’s exclusive authority to act for its members.

As can be seen from the above decisions, the Association’s duty of fair representation arises from its exclusive authority to represent its members in dealing with the Board on matters that are covered by the parties’ collective agreement *Re Renaud v. LaSalle (Town) Police Assn., [2006] O.J. No. 2842*. Where a matter is not covered by the provisions of the collective agreement, the Association does not have exclusive authority and, therefore, no duty to fairly represent a member arises. Thus, in *Re Lafrance v. North Bay Police Assn., [2009] O.L.A.A. No. 675 (Starkman)*, it was found that the Association did not fail in its duty of fair representation when it did not file a grievance for the complainant when the employer denied her legal expenses as provided for under Article 19 of the collective agreement. (See also *Re Windsor*

*Airline Limousine Services Ltd. [207] O.L.R.D. No. 791 (Anderson)*, where it was found that the union did not have a duty to fairly represent the grievor for costs associated with legal proceedings in that no basis had been established for the claim.) In *Re Luis Lopez, [1989] O.L.R.B. Rep. May 464 (Tacon)*, the union did not fail in its DFR when it did not represent the grievor before the Workers' Compensation Appeals Tribunal. In *Re Toronto District School Board, [2002] O.L.R.D. 2560 (Albertyn)*, it was found the union did not breach its duty of fair representation when it did not take the grievor's claim for disability benefits under the Ontario Teacher's Insurance Plan and its insurer.

In *Re Muse, supra*, it was found that a union member's complaint that the union did not properly apply its constitution is not proper subject-matter of a complaint of failing in its duty to fairly represent a member. In *Re John Kohut [1991] OLRB Rep. January 35 (Tacon)*, it was determined that the Union did not breach its DFR in not participating in the grievor's criminal proceedings.

In *Re Hartimer v. Saskatchewan Joint Board Retail Wholesale & Dept. Store Union, 2017 CanLII 20060 (SKLRB)*, the union filed three grievances on behalf of the grievor against the employer. At a union meeting, the members voted to proceed to arbitration of the three grievances. At a subsequent meeting the members voted not to proceed with the grievances. The grievor filed a complaint that the union failed in its duty to fairly represent her. Arbitrator Mitchell admitted evidence concerning the internal workings of the union including its constitution. This case is distinguishable from the matter at hand in that three grievances had been filed against the employer. In the instant case, the complainant seeks to admit evidence concerning the Association's handling of his request for assistance for his legal proceedings against the Crown. Secondly, there is no grievance before me filed on behalf of the Complainant against the Board. Given these differences, the *Hartimer* award is not relevant to purposes at hand.

The Complainant submits, nonetheless, that the manner in which the Association dealt with his request for financial assistance regarding expenses he

incurred in dealing with a subpoena to appear in Court was flawed and against the provisions of the Association's constitution and by-laws. The internal business of a union is addressed, relevant to our purposes, in the *Lynch* and *Bruce-Grey* awards.

In *Re Lynch*, [2011] O.L.R. D. No. 805 (*Silverman*), the applicant filed a complainant that his union failed in its duty to fairly represent him when there was an increase in union dues effective under a renewed collective agreement. Arbitrator Silverman addressed this matter at para. 18 as follows:

At paragraph 19 of *Lynch v. Biso*, 2011 CanLII 9039 (ON LRB), the Board explained

19 The Board has on a number of occasions said that the “duty of fair representation obligation is not a platform for the Board to delve into internal union politics. The duty of fair representation is confined to governing unions in respect of their activities on behalf of employees they represent within the context of the bargaining relationship with the employer.”

The arbitrator noted, at para. 17 “... the union's decision to change the dues formulation... is a matter of the internal business of the union and does not give rise to a violation of section 74 of the Act [i.e., the section that addresses the duty of fair representation.]”

In *Re Bruce-Gray Catholic District School Board*, [2003] O.L.R.D. No. 3081 (*McKellar*) at para. 29: “Finally, the Board agrees with [the union's] submission that the duty of fair representation... does not apply with respect to a union's representation of bargaining unit employees in legal proceedings other than those in which the union enjoys exclusive representation rights vis-à-vis the employer.... The fact that [the union] may choose to represent members in such proceedings [before the Ontario College of Teachers] does not mean that it becomes subject to [the duty of fair representation]... the fact that [the union] may represent its members in a preliminary portion of such proceedings does not create an obligation... to continue that representation for the balance of the proceedings.” The complaint was dismissed.

In applying the above arbitral approaches to the issue at hand, it is clear that the Association's internal business is not a matter over which an arbitrator dealing with a complaint of failure to fairly represent the Complainant has jurisdiction. Arbitral jurisdiction is defined by the Association's exclusive authority to represent its members in its dealings with the Board concerning the collective agreement. The matter of whether or not the Association provides assistance to a member in legal proceedings is not a matter of an exercise of exclusive authority in dealing with the Board over collective agreement provisions but is a matter that lies exclusively between the Association and the Complainant. In their circumstances, evidence concerning dealings between the Complainant and his Association regarding financial assistance arising from his involvement in legal proceedings is not admissible for reason that such evidence lies outside arbitral jurisdiction to deal with a complaint of failure of the Association's duty to fairly represent the Complainant.

In regard to the matter of whether or not the Complainant was harassed in the workplace, an allegation of workplace harassment is proper subject-matter of a grievance under the provisions of the collective agreement at hand. Thus, it would be appropriate for the Association to file a grievance on his behalf. Whether or not the Complainant was harassed is the subject-matter of an issue that is not before me for purposes of dealing with his complaint of a failure to fairly represent him. However, if the grievor approached his Association contending that he had been harassed in the workplace, the Association's obligation to fairly represent him would fall within its authority to file a grievance with the Board. If the Association decided not to file a grievance on his behalf, that decision is properly before me and is to be examined against the standard of whether or not the decision was arbitrary, discriminatory, in bad faith or wrong.

On February 14, 2022, Association president, Colin Woods, sent the Complainant a draft of a grievance "regarding your complaints of workplace harassment and discrimination." The draft grievance states, relevant for our purposes: "The Association grieves the Service's ongoing failure from approximately

December of 2019 and continuing to present to provide Constable Michael Nordal with a harassment and discrimination free work environment, including but not limited to..." On February 21, 2022, the Complainant sent Mr. Woods and email stating: "At this time, I am not going to proceed with any grievance connected to these matters."

The above exchange between the Association and the Complainant clearly indicates that the Association was willing to file a grievance claiming harassment on his behalf and equally clearly indicates that the Complainant did not want the Association to file such a grievance on his behalf. It is difficult to conclude in these circumstances that the Association failed in its duty to fairly represent the Complainant.

The Complainant contends, however, that he had good reason for the Association not to file the grievance on his behalf at that time. The Complainant further alleges that he asked the Association on multiple occasions to file a grievance on his behalf.

In these circumstances I find the Complainant can lead evidence as to the reason or reasons why he declined the Association's offer to file a harassment grievance on his behalf in February, 2022. I find that if the Complainant requested the Association to file a grievance on his behalf subsequent to February 21, 2022, evidence concerning the requests is admissible. However, if those requests occurred prior to February 21, 2022, evidence concerning those requests is not admissible.

Dated at Toronto, this 17<sup>th</sup> day of January, 2025.



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William A. Marcotte  
Arbitrator