

IN THE MATTER OF THE ONTARIO *POLICE SERVICES ACT*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

KELLY DONOVAN

- the Complainant

- and -

WATERLOO REGIONAL POLICE ASSOCIATION

- the Union

- and -

WATERLOO REGIONAL 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:

Kelly Donovan - Complainant

On behalf of the Union:

Lauren Pearce - Counsel

Nini Jones - Counsel

and others

On behalf of the Employer:

Clifton Yiu - Counsel

Donald Jarvis - Counsel

and others

Hearing held February 7, May 2, June 17, September 20, October 1, and October 18, 2024, and January 13 and January 14, 2025, via Zoom.

AWARD

INTRODUCTION

Kelly Donovan, the Complainant, was a police officer with the Waterloo Regional Police Services Board, the Employer. She made a complaint that the Waterloo Regional Police Association, the Union, had violated its duty of fair representation by failing to file grievances regarding her concerns with the Employer.

The Employer sought to be added as a party to these proceedings and it was added.

BACKGROUND

The written complaint in this case was lengthy, was amended during the hearing to 33 pages, and raised many issues. The exhibits were also lengthy consisting of over 1,000 pages.

It was not initially clear what was alleged to be a breach of the Union's duty of fair representation. At the June 17, 2024, hearing the Complainant agreed that, at that time, her complaint was as follows:

The Union violated its duty of fair representation over a period of six years by failing to file and pursue three grievances when asked to do so (January 25, 2018, April 8, 2022 and March 13, 2023) and by failing to file other grievances, although it was not asked to do so.

The concern regarding the January 25, 2018, request for a grievance was not pursued. The complaint was ultimately that the Union on two occasions did not file a grievance when the Complainant asked it to do so and also that it had failed to file other grievances at times when it had not been asked to do so.

I note that my jurisdiction is limited to the Complainant's allegation that the Union violated its duty of fair representation. Much evidence was led by the Complainant about the substance of her concerns with the Employer. This evidence was intended to provide background in support of her requests that the Union file grievances, or file grievances even when the Union was not requested to do so. As I have no jurisdiction to determine whether the Employer conduct was improper, I include only a summary of her evidence and allegations. I have made no determination as to whether the Employer committed those alleged wrongs.

The Complainant was employed by the Employer as a police officer from December 2010 to June 26, 2017. The Complainant had begun a medical leave in February 2017. She was diagnosed with post-traumatic stress disorder (PTSD) resulting from an incident at the Ontario Police College in 2011. The Complainant also filed a claim with the Workplace Safety and Insurance Board for a work related injury prior to her resignation. While on leave, the Complainant hired her own lawyer, entered into negotiations with the Employer and reached a resignation agreement in June 2017. Prior to the resignation agreement the Complainant was the subject of an investigation under the *Police Services Act* possibly leading to discipline. In addition she had filed a *Human Rights Code* complaint against the Employer. The resignation agreement settled both the *Police Services Act* investigation and the *Human Rights Code* complaint.

Two witnesses testified - the Complainant and Mark Egers, the President of the Union.

The Complainant testified at length about the negotiations leading to the resignation agreement. She said that because of her failing health in the spring of 2017 she made the decision to resign as a police officer. In May 2017 negotiations for her resignation began, during which she was represented by her lawyer. She reviewed in evidence various offers and

counter-offers leading to the resignation agreement. She provided considerable evidence about the negotiation of the confidentiality provisions. She said that she was prepared to maintain her oath of secrecy but did not want to limit her ability to speak on matters of public interest.

In June 2018 the Employer filed a *Human Rights Code* complaint alleging that the Complainant had violated the resignation agreement. In 2022 the Employer filed extensive amendments to that complaint detailing what the Complainant had done in the period 2018 to 2022.

First Requested Grievance

April 8, 2022, the Complainant wrote to the Union and asked the Union to file a grievance. Her request was as follows:

In accordance with the recent Court of Appeal decision, I am attaching my most recent claim at the Superior Court to now be pursued by way of grievance against the Board and Larkin.

For you [sic] information, here is a list of decisions in this matter from 2018 until today: (in chronological order)

Donovan v. (Waterloo) Police Services Board, 2019 ONSC 818 - <https://canlii.ca/t/hxbvk>

Waterloo Police Services Board v. Donovan, 2019 HRTO 308 - <https://canlii.ca/t/hxnzp>

Donovan v. Waterloo Regional Police Services Board, 2019 ONSC 1212

- <https://canlii.ca/t/hxrq9>

The Regional Municipality of Waterloo Police Services Board v. Donovan, 2019 HRTO 1326 - <https://canlii.ca/t/j2r2p>

Donovan v. Waterloo Regional Police Services Board, 2019 ONCA 845

- <https://canlii.ca/t/j30pv>

Donovan v. Waterloo Regional Police Services Board, 2019 ONCA 994

- <https://canlii.ca/t/j45cl>

Donovan v. WRPSB and Larkin, 2021 ONSC 2885 - <https://canlii.ca/t/jfjbw>

Donovan v. Waterloo (Police Services Board), 2022 ONCA 199 - <https://canlii.ca/t/jn0t5>

Donovan v. Waterloo (Police Services Board), 2022 ONCA 199 - <https://canlii.ca/t/jn0t5> [sic]

Donovan v. Waterloo (Police Services Board), 2022 ONCA 261 - <https://canlii.ca/t/jndkp>

I would also like to suggest that, as part of a grievance, and to protect the interests of all members of the WRPA from this type of retaliation post-resignation, the Association might want to make an

issue about the \$650,000 of taxpayer funds that are being misused to fund a personal vendetta of Larkin & Melanson/Torrance.

Please advise on next steps and timing. I am waiting for the HRTO to schedule a preliminary hearing - they want to dismiss my case there, so although I have one that is open that captures a portion of the attached claim, it may soon fail, and it does not cover everything in the claim.

I look forward to hearing from you,

The Union declined to file that grievance.

The Union's reply, signed by Mr. Egers and dated May 12, 2022, was as follows:

Re: Waterloo Regional Police Association - Kelly Donovan HRTO

We have your email requesting that the Association consider filing a grievance on your behalf.

We have reviewed the Court of Appeal decision from earlier this year, we have reviewed the Resignation Agreement of June 8, 2017 ("Settlement"), the underlying HRTO Application ("2016 Application"), your most recent amended Statement of Claim ("SOC"), and much of the related material, including the outstanding Contravention of Settlement Applications at the Human Rights Tribunal of Ontario ("Contravention Applications").

In considering whether or not to file a grievance in respect of the matters set out in your SOC, we have considered the factual matrix and its connection to the Collective Agreement. We reviewed your 2016 Application filed with the HRTO, and which was resolved by the Settlement. As you are aware, the Settlement describes its purpose as:

AND WHEREAS Donovan and the Board wish to fully resolve and settle the two outstanding matters between them, namely: (a) the application filed by Donovan with the Human Rights Tribunal of Ontario ("HRTO") on or about June 6, 2016 and having HRTO File No. 2016-24566-I (the "Application"); and (b) the Board's investigation into whether Donovan engaged in misconduct in or about May 2016 sufficient to warrant formal charges against Donovan under the *Police Services Act* (the "Potential PSA Charges"); [underlining added]

The 2016 Application asserts that the Chief's commencement of disciplinary investigations under the *Police Services Act* constituted discriminatory behaviour on the grounds of sex and marital status. Section 126 of the *Police Services Act* removes the Association's ability to address disciplinary actions taken by the Chief, under Part V, through collective bargaining or at arbitration. We have generally taken the view that members who wish to advance a challenge to the Chief's actions under Part V of the PSA are better off proceeding to have their discrimination allegations addressed at either the Human Rights Tribunal or before a hearing officer and/or OCPC for jurisdictional certainty.

The two disputes that were settled were deeply intertwined with the Chief's exclusive jurisdiction

over the *Police Services Act* disciplinary process under Part V, and almost certainly beyond the jurisdictional reach of the Association and an arbitrator under the Collective Agreement. It is the Association's view that the alleged breach of the Settlement is properly enforced in the forum with jurisdiction over the underlying claim. From the SOC, we understand that the facts underlying your claim of breach of settlement include the Chief's affidavit that disclosed limited personal information of a number of employees of the Employer, as well as the Employer's decision to appeal a WSIB decision regarding your entitlement to benefits.

We do not believe that this Settlement is appropriately enforced at arbitration under the Collective Agreement, and we do not intend to file a grievance regarding the breach of the Settlement.

This is consistent with the position of the Association from the outset. In early 2018, you asked the Association to consider filing a grievance on your behalf, and on February 7, 2018, we advised you that it was our view that your claim should be pursued at the HRTO as a Contravention of Settlement application. To ensure that your rights were not prejudiced, we drew your attention to the time limits and the process set out in the Tribunal's rules.

In addition, as we told you we would, the Association went on to file and ultimately resolve a group grievance relating to the Chief's affidavit. We repeatedly asked you if you wanted the Association to attempt to include you in the settlement of that grievance, and you declined. Finally, as you know, we had counsel attend the Case Management Conference convened by the HRTO in respect of your Contravention Applications. We understand that the Applications are proceeding and various preliminary matters will be heard and determined on September 8, 2022.

We will continue to monitor the HRTO Contravention of Settlement proceedings, and we encourage you to advise the Tribunal that the Association has declined to file a grievance and/or refer the dispute regarding the Settlement to arbitration.

The Union decision led to the Complainant's first allegation of a violation of the duty of fair representation.

The Complainant also led considerable evidence about what she asserted was the Employer's harassment of her. She said that the harassment caused her severe stress, physical harm, psychological harm and financial harm.

The Complainant said that the Employer's *Human Rights Code* complaint in June 2018 was made in bad faith and was an abuse of process in order to harass her. She said there were no clauses in the resignation agreement preventing her from speaking of her experiences working for the Employer. The Employer had agreed in the resignation agreement to release

her from any and all appeals relating to her employment, yet had appealed a WSIB decision allowing her claim for post-traumatic stress disorder. In addition the Employer launched a post-resignation surveillance campaign of the Complainant including looking through her website and printing each page, searching the internet for news coverage of her post-resignation advocacy, accessing her Twitter posts and printing several of her posts, surveillance of her when she attended the Ontario Legislature to testify about legislative amendments regarding policing, repeatedly sending to her email requests for officers to work overtime even after she resigned, reviewing her Facebook profile and printing posts she made there, reviewing her LinkedIn profile and printing posts there, transcribing her testimony to the Manitoba Legislature, and watching and transcribing many hours of videos involving her.

The Complainant said that in the fall of 2015 she began her involvement in Union meetings. She said she received objections from the Union; she said she noticed hostility building up against her. She said she had told the Union she was making a delegation to a Police Services Board meeting and said she had asked the Union to also attend. She said she thought that after that time the Union retaliated against her.

She said that in 2017 before she resigned she was under investigation under the *Police Services Act* dealing with charges of deceit and discreditable conduct. She said she had then filed her own complaint under the *Human Rights Code*. At that time she said police officers had nowhere else they could raise concerns. During the negotiation of her resignation agreement she said she had been assured of her ability to speak out about her experience in policing.

Second Requested Grievance

March 13, 2023, the Complainant again asked the Union to file a grievance, this one

regarding fraudulent or negligent misrepresentation against the Employer. Once again the Union declined. In its letter explaining its decision the Union stated that the Complainant had requested a grievance alleging that the resignation agreement had been breached.

The Complainant's detailed request was as follows:

March 13, 2023

Dear Mr. Mark Egers and Ms. Nini Jones;

I send you this letter on a without prejudice basis to any other claims I have now, or will have in the future.

As you are now aware, in my response to the WRPSB's request to amend their application against me filed on December 23, 2022, I provided the Tribunal with additional evidence to show that nothing in my resignation agreement impedes my ability to speak about my experiences in policing.

As you also know, the WRPSB have relied on their belief that I am "complaining" when I speak publicly about them, and therefore are in contravention of my settlement.

On January 23, 2018, I requested the WRPA file a grievance on my behalf for breach of contract (not a privacy violation) against the WRPSB; that request was denied.

On April 6, 2020, (ironically, 2 months after the WRPSB applied to re-open an overturned motion to attempt to have my civil claim dismissed a second time), Mark Egers wrote to me regarding a "grievance regarding the Board's disclosure of confidential information." In this letter, Mr. Egers reiterated that "the Association had some concerns about the arbitrability of any grievance filed specifically on [my] behalf." I did not have a claim against the WRPSB for the disclosure of confidential information, my claim was for breach of contract. I did not participate in this grievance.

On April 8, 2022, I made another request to the WRPA to file a grievance on my behalf for the allegations set out in my civil claim; that request was denied.

The position of the WRPA since 2018 has been that my claim for breach of contract is best suited at the HRTO (the "Tribunal"). On November 25, 2022, the Tribunal dismissed most of my claim, and are only allowing me to proceed with one allegation of contravention of settlement; *The Regional Municipality of Waterloo Police Services Board v. Donovan*, 2022 HRTO 1409 (CanLII).

At no time has the Association provided me legal representation in the matter of *The Regional Municipality of Waterloo Police Services Board v. Donovan*.

My civil claim was stayed until my remedies elsewhere were exhausted.

I would hope by now that you have heard the digital audio file of Mr. Jarvis telling me, through my agent

at the time (Pamela Machado), that the “*police service is not trying to prevent Constable Donovan from speaking out, or saying what she wants.*” I discovered this file on January 9, 2023, submitted it to the Tribunal (and copied the Association) on January 12, 2023, and have not received any further submissions on the matter. I addressed any issues respecting privilege in my January 12th submission to the Tribunal.

I can only assume that this audio recording puts both you and the WRPSB in a precarious position. On one hand, the WRPSB have proceeded with a case against me, at the public’s expense, which they knew had no legal basis, for almost five years which has caused me a tremendous amount of mental anguish and severe aggravation of my post-traumatic stress disorder symptoms.

On the other hand, the WRPA, who have a duty to represent me and are parties to my resignation agreement, have stood by and watched while the WRPSB has proceeded with their case against me, knowing the details of the negotiations which took place in May and June of 2017. The Association was first made aware in May, 2018, when I filed reply submissions to the Tribunal, revealing the back-and-forth communication that resulted in the resignation agreement. The Association also received my January 12, 2023, submission detailing the communication a second time, along with the digital audio file. And, obviously, having signed the agreement, you are privy to its contents.

It is clear from the evidence, that I would not have resigned from my employment if the WRPSB did not agree to my demands to exclude any clause restricting my ability to speak about my experiences in policing, (other than statutory restrictions regarding operational police information). It is my position that in filing their application against me in June, 2018, and the amendment on December 23, 2022, the WRPSB has breached its duty of good faith and fair dealing and has acted in a way that has been untruthful and misleading.

Regarding negligent misrepresentation, in *Douglas Queen v. Cognos Inc.* 1993 CanLII 146 (SCC), at p. 110, Iacobucci, J. summarized the elements of negligent misrepresentation by stating:

“The required elements for a successful Hedley Byrne claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a “special relationship” between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.”

And a similar statement of the same principle was made in the context of the employer/employee relationship in the text *Employment Law in Canada*, I. Christie (1980), at p. 125:

“2. Misrepresentation, Fraudulent and Innocent One who makes a contract in reliance on a fraudulent misrepresentation of fact by the other party is entitled to have the contract rescinded and may plead the fraud in defence of an action for breach. Fraud consists in intentionally or recklessly making untrue statements knowing they will be relied upon by the other party. A statement is made recklessly when the person making it does not care whether or not it is true. Fraudulent misrepresentation will entitle the other party to have the contract set aside so long as it is a misrepresentation of a material fact which he took into account in deciding to enter the contract, even though he was careless in checking the facts. There need be no promise or “guarantee” of the

correctness of the facts. Indeed, if there is, the case is more likely to be treated as a case of breach.”

At this time, I am requesting that the Association file a grievance on my behalf claiming fraudulent or negligent misrepresentation against the WRPSB seeking financial compensation in the amount of approximately \$528,000.00, representing lost earnings from June 26, 2017, to present day, (less any amounts already paid to me upon resignation).

Please reference Ontario Police Arbitration Commission Award Number 11-013.

I only recently became aware of the decision; *Saanich Police Board v Saanich Police Association*, 2022 CanLII 127684 (BC LA).

At paragraph 19, *Saanich* states:

“19. The Association is correct that more time has elapsed in this case than in *Donovan*. However, Weber, Northern Regional Health Authority and the Code do not include the length of time post agreement as a factor to take into consideration in determining the appropriate forum for a dispute. What the court in *Donovan* found more persuasive was that, although the plaintiff was no longer employed by the board, she had been a member of the association, covered by the collective agreement and represented by the association when the resignation agreement was negotiated and executed. Her employer and bargaining agent were parties to the agreement. The court, relying on Weber and *St. Anne Nackawic* found that the resignation agreement was negotiated “within the ambit” of the collective agreement.”

Based on *Saanich*, the WRPSB’s application against me arises within the ambit of the Collective Agreement and a labour arbitrator has jurisdiction to hear their grievance. I intend to bring this case to the attention of the Tribunal.

Regarding damages for fraudulent misrepresentation, it states at pg. 414 of *Queen v. Cognos Inc.*, 1987 CanLII 4123 (ON SC), 63 O.R. (2d) 389:

“Assuming that negligent misrepresentations were made to the plaintiff inducing him to enter into the contract of employment, what is the measure of the plaintiff’s damages? I adopt as indicating the correct approach the words of Zelling, J. in a case of negligent misrepresentation inducing a contract: *Johnson v. State of South Australia* (1980) 26 S.A.S.R. 1 at p. 34: “In general in assessing damages I have to put the plaintiff in the same position as he would have been if the negligent misrepresentation not been made.”

Another relevant case on the issue is *Saskatoon City Police Association v Board of Police Commissioners*, 1999 CanLII 32080 (SK LA).

It is also my position that a claim for moral damages is warranted in this case. The WRPSB negotiated my resignation in bad faith by being untruthful and misleading. They told me what they had to, to get me to agree to resign. They told me they would not restrict my ability to speak, and then they came after me for speaking. They have wasted hundreds of thousands of dollars of public funds on a case that can only exist if their misrepresentations to me were made fraudulently.

Their filing of their June, 2018, application at the Tribunal was done in bad faith, added significant stress to my life, and caused me significant mental distress lasting from 2018 until present day. As I have had to sustain this treatment for an extended and excessive period of time, when I should be regaining my health and replacing my income, I ask for \$100,000.00 in moral damages for their egregious conduct.

Please reference *Teljeur v. Aurora Hotel Group*, 2023 ONSC 1324, and *Pohl v. Hudson's Bay Company*, 2022 ONSC 5230 (CanLII).

Please respond to this request as soon as possible within the next 14 days.

The Union's April 28, 2023 response declining to file a grievance was as follows:

We have your correspondence, dated March 13, 2023, requesting that we file a grievance on your behalf. As we understand it, you are asking that the Association file a grievance alleging that the Resignation Agreement, dated June 8, 2017 ("Resignation Agreement"), has been breached by the Employer.

We understand that you assert that the basis for a grievance can be summarized as follows:

- a) As a result of both an outstanding HRTO Application and potential *Police Services Act* disciplinary charges, you (with the assistance of your counsel) negotiated the Resignation Agreement with the Employer;
- b) While the Resignation Agreement was being negotiated, between your counsel and the Employer's counsel, certain assurances as to the interpretation of the Resignation Agreement were made by the Employer;
- c) Subsequently, based on your understanding of the Resignation Agreement, you engaged in public commentary about the Employer, to which it has taken objection and has filed a Contravention of Settlement Application at the Human Rights Tribunal of Ontario ("Contravention Application") against you; and
- d) You assert that the filing of and pursuit of the Contravention Application by the Employer is a matter that could found a grievance against the Employer.

We have again reviewed the Resignation Agreement, the Employer's Contravention Application, and your correspondence, and, as we have every time that you have raised the possibility of a grievance, we have considered the factual matrix and its connection to the Collective Agreement. As we have informed you previously, the two disputes that were settled through the Resignation Agreement were deeply intertwined with the Chief's exclusive jurisdiction over the *Police Services Act* disciplinary process under Part V and are highly likely to be beyond the jurisdictional reach of the Association and an arbitrator under the Collective Agreement.

We are of the view that the Employer's act of filing a Contravention of Settlement Application does not either constitute a breach of the Collective Agreement nor create a sufficient nexus to the Collective Agreement so as to create jurisdiction in an arbitrator to interpret or apply the Resignation Agreement. While we appreciate the decision in *Saanich Police Board*, we note that the arbitrator appeared to only have the Superior Court decision, not the Court of Appeal decision in your claim. The Court of Appeal stated,

[41] For these reasons, we agree with the respondents' submission that the appellant's claims are subject to determination pursuant to the procedures set out in the collective agreement and the *PSA*. To the extent that the claim seeks relief that is not available under the collective agreement or the *PSA*, it is subject to the jurisdiction of the HRTO, in which both parties have asserted claims that are currently outstanding.

[42] We therefore dismiss the appeal. In the particular circumstances of this case, however, we vary the order of the Superior Court by staying this action until such time as the appellant's remedies under the collective agreement and in the HRTO have been exhausted.

[43] Only at that point will this court determine whether it should exercise any residual discretion it may have to grant relief that is not available under the statutory labour arbitration regime or in the HRTO.

We do not agree that there is a basis to pursue the claim you describe in your March 13, 2023 letter at arbitration, and do not agree that an arbitrator has jurisdiction over such a claim. Rather, we are of the view that your claim is properly within the jurisdiction of the Human Rights Tribunal, as both you and the Board seem to accept. To that end, we ask that you review our earlier correspondence, May 12, 2022, which we sent to you after you last requested the Association consider filing a grievance. We agree with the Court of Appeal, that as the resolution of the disciplinary process contemplated by Part V, the claim may also be capable of being adjudicated under the provisions set out in the *Police Services Act*.

As a result, the Association does not intend to file a grievance as you propose in your letter. Please let me know if you have any questions or concerns.

This led to the second alleged breach of the duty of fair representation. The Complainant led considerable evidence in support of her request for a grievance regarding what she felt was fraudulent misrepresentation or misfeasance in public office or negligence.

In cross examination, the Complainant agreed that her *Human Rights Code* complaint had been settled by the resignation agreement and that the *Police Services Act* investigation as to deceit and discreditable conduct had also been settled by the that resignation agreement. The Complainant agreed that she had agreed to withdraw her *Human Rights Code* complaint and that the Employer had agreed not to pursue the *Police Services Act* investigation. She agreed that there were mutual releases. She agreed that her legal expenses had been reimbursed under that settlement. She agreed that she was represented throughout by her own lawyer. She agreed that no grievance had been filed by the Union at that time and that no

grievances were settled by the resignation agreement. She agreed that her lawyer had conducted the negotiations on her behalf.

The Union then turned to the first complaint of a breach of the duty of fair representation, the failure to file the abuse of process grievance in 2022. The Complainant agreed that the grievance was essentially that which she had asserted in an earlier Court statement of claim which had alleged a breach of contract, negligence, misfeasance in public office, and misfeasance by the Chief of Police. Regarding the claim of breach of contract she agreed that she was alleging the Employer had breached the resignation agreement. She also agreed she was alleging the Employer, through the Chief of Police, had breached the confidentiality of the settlement. When asked what factual allegations she was concerned about, she said it was the Employer appealing the WSIB decision and improper disclosure in the Chief of Police's affidavit of her personal information. The Complainant said that regarding negligence, the Employer had been negligent in its oversight of the conduct of the Chief of Police. The Employer was negligent in allowing the Chief of Police to use confidential information. As for misfeasance in public office, that involved providing the information in the affidavit in an effort to hurt her. She said she believed that those actions were done intentionally in order to make her "go away."

The Complainant agreed that in 2022 she had provided the statement of claim to the Union and asked it to file a grievance based on it. It was suggested to the Complainant that in 2022, when she asked for a grievance, one of the two unlawful instances of misconduct was related to the Chief's affidavit. She agreed that her allegation was the Chief's affidavit violated the resignation agreement. She said she was aware that the Union had filed a group grievance challenging the information disclosed in the Chief's affidavit. She said she knew that the Employer and the Union were working on a resolution to that grievance and agreed that the Union had reached out to the Complainant regarding the settlement. She said that she had

inquired about participating and had been advised that the Union did not know whether she could participate since the resolution would have to be agreed upon by the Employer and the Union. It was suggested to her that she had concerns about the affidavit, as did the Union, that a grievance had been filed by the Union and the Union and Employer were working on a settlement, and that the Union had approached the Complainant to include her but that she had declined. She replied that she did not participate as her concern was that the disclosure was a breach of her resignation agreement. She agreed however that the two instances of unlawful conduct were the Chief's affidavit and the WSIB appeal.

The Complainant said that her concern went beyond simply the Chief's disclosure and the WSIB appeal. It included surveillance, involving abuse of process and harassment. The Complainant agreed that she was not asking the Union to complain about those matters. The Complainant said that her duty of fair representation complaint did not involve her original *Human Rights Code* complaint, that it only related to conduct from June 2018 onward. She said her position was that the Union had a duty to act for her. In terms of abuse of process she was asked whether she was referring to the Employer abusing the *Human Rights Code* process and the WSIB process by filing an appeal and she agreed. Asked whether or not she felt the Union had a duty to act, she said yes. She said that she felt the Union had a duty to prevent the Employer from abusing the *Human Rights Code* and WSIB processes - that was the crux of her concern here.

As for her second complaint involving negligent misrepresentation or fraudulent misrepresentation, she agreed that her concerns related to the original *Human Rights Code* application and the settlement of that matter leading to her resignation. She agreed that she alleged the Employer represented that the settlement meant one thing and then changed its mind. She said she had agreed to resign on the basis of their assurances. She agreed that the Employer had then gone before the Human Rights Tribunal saying that the settlement was

quite different from its earlier assurances. She agreed that her concern was they said they would not pursue her and then, by filing a subsequent human rights tribunal application, they did just that.

Finally, with respect to her complaint that the Union had violated its duty of fair representation by not filing grievances although it was not asked to do so, she agreed that she was asserting the Union should have acted on its own and filed grievances given all the information they had about her poor treatment.

Mark Egers was the second witness in this matter. Mr. Egers has been a police officer with the Employer since 2000 and the President of the Union since October 2016. He said his role in the Union was largely labour relations, that is assisting members and bargaining. He said that when he became President he understood there were concerns by the Complainant about harassment. He said she did not come to the Union for assistance but instead hired her own lawyer and filed a *Human Rights Code* complaint. He said that the Union applied for and received intervener status in that complaint and therefore got a copy of the material filed. He said that in general the Union does not assist members in *Human Rights Code* complaints but does intervene. He said the Union's primary role in assisting its members is through the collective agreement and its grievance procedure.

Mr. Egers testified that the Union does assist members in *Police Service Act* investigations leading to possible discipline. He said that the Union had offered to help the Complainant with her *Police Services Act* investigation but that she had declined the Union's support. Mr. Egers testified that when the Complainant's *Human Rights Code* application was resolved through her resignation agreement the Union received the draft agreement, sent it to its legal team, saw "no red flags" and signed it.

Mr. Egers testified about a grievance the Union had filed concerning an affidavit from the Chief of Police. He said the Chief's affidavit had been filed in a class action lawsuit and the Union felt that confidential information had been disclosed about some Union members. He said the Union reached out to include the Complainant in any possible settlement but that the Complainant had declined to participate.

Mr. Egers identified the Complainant's April 8, 2022, request that the Union file a grievance. He testified that the Union carefully reviewed the information, forwarded it to the Union's legal counsel and, after consideration, concluded the Union had no jurisdiction to file a grievance. Mr. Egers said that the matter arose from the *Human Rights Code* complaint and the Union felt an arbitrator under their collective agreement would have no jurisdiction.

Mr. Egers said the Union sent a letter to the Complainant outlining its conclusions and he identified that letter. He said that the letter accurately reflected the steps taken by the Union and the Union's conclusions. Asked about the Complainant's criticism that the response did not mention misfeasance in public office or negligence, Mr. Egers said that the Union had looked at the facts and not the characterization given to those facts by the Complainant. He said that the Union was of the view that the matter came back to the *Human Rights Code* complaint and the resignation agreement and that the Union concluded it had no jurisdiction.

Mr. Egers also identified a second request for a grievance in March 2023. He said that the Union reviewed the request carefully, sent the material to its legal counsel, received advice, determined that they had no jurisdiction over the matter, and concluded that a labour arbitrator acting under this collective agreement would find that the conduct regarding the human rights complaint was not within the arbitrator's jurisdiction. The Union declined to file a grievance.

Mr. Egers said that the Union had explained its decision in detail to the Complainant and identified his April 28, 2023 letter. He said that letter accurately sets out the view the Union took. Mr. Egers said that the Union looked to the facts and the actual facts arose out of the *Human Rights Code* complaint and the resignation agreement. He said that having looked at the facts, the Union concluded it had no jurisdiction.

As an intervener in matters under the *Human Rights Code*, Mr. Egers said the Union routinely receives the filings before the Human Rights Tribunal. He said that the Union reviewed those filings in a general way and said there were often many pages. With respect to the Complainant, he said that he never understood her to be seeking assistance, that he thought she was doing a good job pursuing her *Human Rights Code* complaint. If the Complainant had asked for assistance he said the Union would have reviewed her request.

Mr. Egers was asked about the allegation that the Union decision was based on personal hostility and his response was “absolutely not.” He said that in November 2016 the Complainant wanted to put a motion before a Union meeting but that he had not allowed it as under the Union's Constitution the motion needed 30 days notice. He said that he thought the Complainant did not like his decision to decline her motion, but that he had treated her the same as he treated all other members. He said this had no bearing on the Union's conclusions.

In cross examination, Mr. Egers was asked about the role of the Union in intervening in *Human Rights Code* complaints. He said that the central role of the Union was to protect the collective agreement. He said that as interveners the Union receives documents on a regular basis and that their counsel reads them. He indicated that the role of the Union was to help members with matters under the collective agreement, workers compensation matters, etc.

Asked about the resignation agreement, Mr. Egers indicated that he thought it was a legal document and would bind the parties. Asked why the Union was a party to the agreement he said that as the bargaining agent it was necessary for the Union to sign off on the agreement. He said the Union did that as it represents the members. Asked whether the Complainant could have simply resigned, he said that anyone can. Asked whether the Union could simply say they were not going to sign a resignation agreement, Mr. Egers said he did not know whether that was possible. Asked whether he saw anything in the resignation agreement that would prevent the Complainant from speaking about her complaints, he said he saw nothing specific.

The Complainant then asked about the number of grievances the Union filed and Mr. Egers indicated that it depends on what the labour relations climate with the Employer was like at any given time. He said, for example, that in 2021 the Union had some 34 grievances and at the time he testified in 2025 there were six or seven. Asked whether the grievances were all serious matters, he said that it varied and that all grievances were fact dependent.

Asked about his view of the *Police Services Act* investigation of the Complainant, Mr. Egers said that he had inferred it was related to off-duty conduct, that at the time of the investigation he probably knew more, but at the time he testified he could not remember anything further.

Mr. Egers agreed that suicide was a real threat for police officers with PTSD.

Asked about the June 2018 complaint the Employer made against the Complainant, Mr. Egers said he could not recall specifically the details but that he understood it was about whether the Complainant had violated the resignation agreement in her public speaking. He said that in his 25 years as a police officer he was aware of perhaps five or six instances in

which the Employer had pursued a former member.

Asked what the Union would do with a communication a member sent to the Union regarding their health, Mr. Egers said that while he might as a human be concerned he did not think the Union had a legal obligation to help. Perhaps there was a moral obligation but he did not like to impose his will on anyone. He agreed that in a situation of PTSD there might be some urgency to act if a life was in danger, that even if there was no request he might act.

Returning to the resignation agreement, Mr. Egers said that he thought, in layman's terms, the Complainant's decision to resign was irrevocable. He said the Union had signed the resignation agreement as it was "outside" the collective agreement - the Union becomes involved if the Employer and an employee wish to agree to something which provides a greater or lesser benefit than that which is provided in the collective agreement.

Mr. Egers repeated that the Union had been willing to include the Complainant in the grievance they filed regarding the Chief of Police's disclosure of confidential information. He said he could not recall whether there were any other former members included in that grievance.

Regarding the Complainant's request for a grievance in 2022 Mr. Egers said the Union had reviewed the facts and then sent the request to its legal counsel. He said the Union had conducted a thorough investigation including conversations with legal counsel and had discussions about the validity of the complaint. He said the decision not to pursue a grievance ultimately had been the Union's, although it was made in tandem with legal counsel.

In general terms, Mr. Egers said that if he did not himself have knowledge he would

investigate any matter. He said the Union would look at the facts in conjunction with counsel, read all the material, and that this may take weeks in any given situation. He said ultimately the Union declined to pursue the Complainant's grievances as they felt the Union had no jurisdiction. The Union thought the Human Rights Tribunal of Ontario was the correct forum as the matter arose out of the resignation agreement and the Union felt the matter should stay with the Tribunal. The Union concluded arbitration was not the correct forum.

Mr. Egers was asked whether he had ever lost a first responder to suicide and answered no.

Regarding the 2023 grievance Mr. Egers said the Union had read everything, did its own investigation, consulted legal counsel, held meetings, thoroughly investigated the matter and sent a letter back to the Complainant denying the request to file a grievance. Asked why there had been no mention of the language in her request, but rather a reference to a breach of the resignation agreement, Mr. Egers said that it all comes back to the same thing that the Union had looked at the facts, not the Complainant's legal characterization, and the Union did not think it had jurisdiction to lay a grievance. Asked whether the Union response was the result of a thorough investigation, he said it was. He said that everything was looked at and taken into account. Asked whether in the face of all the information the Union still stood by its conclusion not to file a grievance, Mr. Egers said the Union had looked at all the facts and advice and had based its decision on that.

Finally the Complainant asked Mr. Egers whether the Union would ever file a grievance for someone without having a formal request. Mr. Egers said that at times members are not familiar with the process so the Union might suggest a grievance in some situations. In addition Mr. Egers said that he was of the view the Union had no legal obligation to help the Complainant. He said that she had approached the Union multiple times and that each request had been answered.

In re-examination Mr. Egers said that the Union had never decided the issues in the Complainant's cases were unimportant. However, he said that the importance had no bearing on whether the Union filed a grievance.

PROVISIONS OF THE COLLECTIVE AGREEMENT

No party made reference to any provision in the collective agreement.

COMPLAINANT'S POSITION

The Complainant began by noting that it had been seven and a half years since her resignation. She said she had been searching for justice for seven years. She asserted that the Employer had engaged in an abuse of process which led to "matters of life and death." She said she was still continuing her efforts to achieve justice. She noted that there had been seven earlier decisions between her and the Employer (see below). The question was where did jurisdiction lie, that is what Court or tribunal could deal with her concerns.

The Complainant then reviewed each of the seven decisions involving herself and the Employer. She noted that in 2017 as part of a settlement of a dispute with the Employer which was then before the Human Rights Tribunal of Ontario she had resigned her position as a police officer and then been "put through hell." In 2018 her concern had been a simple issue of breach of the settlement agreement. But years later this proceeding was now one to decide whether her representation by the Union had been in violation of its duty of fair representation. The collective agreement between the Union and Employer contains a grievance procedure. She had made requests for the Union to file grievances, her requests were denied by the Union, and the issue now was whether the refusal by the Union was justified. The Complainant asked that I find the Union's decisions were either arbitrary or

made in bad faith.

The Complainant said that her case did not compare to any other cases. She said her advocacy had led to positive changes in policing. She said she had to fight for her life. She had made two requests to the Union to file grievances, one about representations made to her by the Employer and the other about abuse of process or retaliation. The Union had declined to file either grievance “hanging their hat” on the jurisdiction of the Human Rights Tribunal to deal with those issues.

The resignation agreement - the contract - she signed with the Employer, one which was also signed by the Union, had ended her employment. She claimed that there had been fraudulent or negligent representations made to her designed to induce her to sign the contract and thereby end her employment. She stated that when one entered a contract with a Police Service one might reasonably expect that the contract would be entered into in good faith. She then reviewed some authorities regarding fraudulent misrepresentation and asserted that her claim met all the requirements. Moreover, she said the Union knew of this misconduct. She then reviewed other arbitration awards which had spoken of misrepresentation.

The Complainant said that the Union had not conducted a thorough investigation. She said that in her request for a grievance regarding fraudulent misrepresentation the Union response had referred to it as a claim of a breach of the resignation agreement. Those two things did “not line up.”

The Complainant also said that her claim that the Union should file a grievance even when no request was made “was not far-fetched”. She said that the Union had been aware of the problems she was facing, that the Union had been told of her concerns about the Employer misconduct, and that it was reasonable in those circumstances for the Union to have filed a

grievance even though she had not requested the Union to do so.

The Complainant then referred to the *Rivers* case, below, in which the Union had filed a grievance and asserted that the Union should have done the same thing in her case. The Complainant then referred to the *Saanich* award, below, and said that her case was similar. She asserted that the Union's conduct was arbitrary or in bad faith in not agreeing to her request for grievances regarding negligence or fraudulent misrepresentation. She said that the Union can abuse its power under this system as the Union has control over access to the grievance procedure. She then referred to the *Canadian Merchant Service Guild* decision, below, on the substance of the duty of fair representation and said that all of the factors outlined there were at play here.

Finally, the Complainant said that she was of the view that only a grievance by the Union would stop the Employer from mistreating her. The Union has the power to do something about her mistreatment by the Employer, but the Union had not assisted her in any way. It had abused its power. She said this situation would lead to “open season” for the Employer to abuse employees unless a grievance was filed.

The Complainant referred to the following authorities: *Donovan v. (Waterloo) Police Services Board*, 2019 ONSC 818 (CanLII); *The Regional Municipality of Waterloo Police Services Board v. Donovan*, 2019 HRTO 1326 (CanLII); *Donovan v. Waterloo Regional Police Services Board*, 2019 ONCA 845 (CanLII); *Donovan v. WRPSB and Larkin*, 2021 ONSC 2885 (CanLII); *Donovan v. Waterloo (Police Services Board)*, 2022 ONCA 199 (CanLII); *The Regional Municipality of Waterloo Police Services Board v. Donovan*, 2022 HRTO 1409 (CanLII); *Donovan v. Human Rights Tribunal of Ontario*, 2023 ONSC 6746 (CanLII); *Queen v. Cognos Inc.*, 1993 CanLII 146 (SCC), [1993] 1 SCR 87; *Toronto Police Association v. Toronto Police Services Board*, OPAC Award Number 10-006; *Toronto Police*

Services Board v. Toronto Police Association, OPAC Award Number 11-013; *Rivers v. Waterloo Regional Police Services Board*, 2018 ONSC 4307 (CanLII); *Saanich Police Board v. Saanich Police Association*, 2022 CanLII 127684 (BC LA); *Abutalib v. Toronto Police Association*, OPAC Award Number 10-016; *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509; *Weber v. Ontario Hydro*, 1992 CanLII 7499 (ON CA); *Centre Hospitalier Régina Ltée v. Labour Court*, [1990] 1 SCR 1330, 69 DLR (4th) 609; *Fisher v. Pemberton*, 1969 CanLII 726 (BC SC); and *Lafrance v. North Bay Police Association et. al.*, OPAC Award Number 09-10.

UNION POSITION

The Union said that this duty of fair representation case concerned two written requests from the Complainant that the Union file a grievance, plus the allegation that the Union should have filed other grievances without any requests having been made for it to do so. When the two written requests were made, the evidence indicated that the Union had considered the requests, sought and received legal advice, concluded that the requests were outside the jurisdiction of a labour arbitrator, and written to the Complainant explaining the Union's reasoning.

The Union said that its decisions here were correct. When one “drills down,” it is clear that everything arose from the settlement of the *Human Rights Code* complaint and the *Police Services Act* discipline investigation. While the Complainant disagreed with that, that did not ground a duty of fair representation complaint. The question is: Was the decision arbitrary, discriminatory or in bad faith? The Union said this complaint fell short of showing any violation of the duty of fair representation and that the complaint should therefore be dismissed.

The Union said that under the *Police Services Act* it bargained with the Employer. Disputes under the collective agreement fell within the exclusive jurisdiction of a grievance arbitrator. Much of the Union role dealt with enforcing the collective agreement. The Union then noted the *Weber* decision, below, in which the Supreme Court of Canada had affirmed that the exclusive jurisdiction of arbitrators relied upon the essential character of the dispute. It is wrong to look at how the dispute is characterized, instead one must look at the essential character. One must look to the facts underlying the dispute. Clever pleading of a claim in court cannot be used to avoid the exclusive jurisdiction of an arbitrator, nor can clever pleading in a grievance lead to jurisdiction for an arbitrator when the facts, properly considered, indicate there is no jurisdiction.

The Union acknowledged that it has the exclusive right to represent its members and that the corollary is it must do so without violating its duty of fair representation. The Union noted that the duty of fair representation in this case is the common law duty. There was no statutory provision imposing the duty of fair representation.

The essential facts were not in dispute. The Complainant had been subject to investigation under the *Police Services Act*. The Complainant took issue with that and alleged that the investigation was a reprisal, that it flowed from her earlier delegation at a meeting of the Police Services Board. She had then made an application against the Employer under the *Human Rights Code* of Ontario. In that proceeding she was represented throughout by her own counsel. She and the Employer negotiated a resolution of the human rights complaint and the *Police Services Act* investigation which included her resignation. The Union was not involved in the negotiations for that settlement, but after the settlement agreement had been negotiated, the Union reviewed and signed it. That settlement agreement contained assurances regarding confidentiality.

A dispute arose regarding the meaning of those confidentiality provisions. That dispute led to the Employer bringing an application to the Human Rights Tribunal. The Union at that time had suggested to the Complainant that she proceed before the Human Rights Tribunal and the Complainant did so. The Complainant then filed another application herself, saying that the Employer had breached the settlement agreement. All that has led to extensive litigation.

In due course, the Complainant made two requests for the Union to file grievances. The Union declined both requests and explained in writing that it concluded her requests were outside the jurisdiction of a grievance arbitrator.

The first request in April 2022 was based on her statement of claim in an earlier civil proceeding. It alleged a breach of settlement, misfeasance and negligence. But there were two factual allegations - first that there had been an improper disclosure of the settlement by the Chief of Police and secondly that there had been an improper appeal of a worker's compensation claim after the resignation agreement.

The Union's evidence was they had in both instances considered the matter, sought legal advice, and concluded they were not able to file a grievance as an arbitrator would have no jurisdiction over a grievance about a matter which arose out of the settlement of *the Police Services Act* investigation and/or the *Human Rights Code* application.

While the Complainant had suggested that the Union left the decision to its lawyers, the Union evidence was that it took advice from the lawyers but did its own investigation including meeting with counsel and ensuring that it was in a position to make a reasonable decision. The Union had explained its conclusions in writing. The Complainant raised concerns about the fact that the Union response did not mention misfeasance or negligent

representation or negligence but the Union had looked at the facts of the alleged wrongful conduct and reached its conclusion on those facts, not on the Complainant's legal characterization.

The second request for a grievance was in March of 2023. This request was based on alleged misrepresentations. The Union again said that it had concluded that an arbitrator would not have jurisdiction and provided its reasons in writing. Again the Complainant had criticized this as the Union response referred to a breach of settlement and not to the various torts she had raised. Once again the Union evidence was it had based its decision on the facts of the conduct and not on the Complainant's legal characterization. The Union said that one must look to the facts and the facts always came back to the settlement agreement and the *Human Rights Code* proceedings. The Union said it was reasonable for it to conclude that this request for a grievance dealt with the scope of the confidentiality clauses in the settlement agreement. The Union said its view of the facts was completely fair.

The Union then addressed the *Saanich* decision, above, and said that decision addressed the question of whether or not a former member of the bargaining unit could grieve. But the Union had never asserted that the fact the Complainant was a former member was relevant to its ability to grieve on her behalf. The Union decision was always based on the substance of the grievance and not the Complainant's status as a former employee or a former member of the bargaining unit.

Throughout this lengthy process since the Complainant's settlement agreement, the Union had looked to the facts and endeavoured to determine whether or not there could be a breach of the collective agreement. It looked at the facts and not the Complainant's legal characterization of her claim. The question is: What was the substance of the claim? The Union said that its conclusion throughout had been correct, but certainly was not arbitrary

or otherwise in violation of the duty of fair representation.

As for whether there had been any bad faith, this assertion seems to have been based on an exchange some years ago when the president of the Union, Mr. Egers, the Union witness in this matter, would not allow the Complainant's proposed motion in a Union meeting as Mr. Egers viewed it as being out of time. The Union said there was no credibility to any claim of bad faith, that this had been a minor procedural decision made in a Union meeting and that Mr. Egers had said it had no relevance at all to the Union determination

As for the claim regarding the Union filing grievances when it had not been asked to do so, the Union said it was unclear what actions the Complainant asserted the Union should have taken. The Complainant was clearly concerned about the Employer filing litigation with the Human Rights Tribunal and the Workers' Safety and Insurance Board but it is difficult to suggest that either of those Employer actions violated the collective agreement. The Complainant was also concerned that the Employer was monitoring her social media and her public speeches but it's difficult to see how either of those violated the collective agreement. In general terms the Union said it was unfair to say that the Union should have reached out to her to see if she thought she was being harassed. As for her claims of poor health, it seemed the Complainant thought the Union should have checked with her more often to see how she was doing. Mr. Egers, the Union president, said that at no time did he understand the Complainant sought assistance in these matters. He said he thought she was pursuing her concerns on her own, as she wanted, and was doing fairly well. In any event, the Union said there was no valid claim for breach of the duty of fair representation.

The Union also referred to two decisions, below, which held that it could not be a breach of the duty of fair representation if there had been no request for a grievance.

Moreover, if this general concern was a breach of the duty of fair representation, what would the remedy possibly be? What grievance could I order the Union to file and pursue?

The Union asked that the complaint be dismissed.

As for the specific remedies sought by the Complainant, the Union said that the Complainant's requested declaration that her disputes arose within the ambit of the collective agreement and were properly before a grievance arbitrator was a question that I had no authority to decide. It would be up to the arbitrator, if I were to order a grievance, to decide whether or not the Complainant's concerns fell within the ambit of the collective agreement and whether he or she had jurisdiction to deal with the Complainant's concerns. Moreover, the Union said that the proper remedy in a duty of fair representation case was to put the Complainant in the position he or she would have been in had the duty of fair representation not been breached. Thus if there was any remedy it should be simply an order that a grievance be filed.

The Union referred to the following authorities: *Alessandrone v. Toronto Police Association*, unreported, July 15, 2016 (Anderson); *Lafrance v. North Bay Police Association*, (2009), 187 LAC (4th) 381 (Starkman); *Fisher and Orangeville Police Assn.*, (2020), 312 LAC (4th) 285 (Bendel); *Hill v. Canadian Union of Public Employees, Local 793*, 2006 CanLII 7208 (OLRB); *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC); *Saskatoon City Police Association v. Saskatoon Board of Police Commissioners*, 2015 SKCA 35; *Burns v. Sheet Metal Workers' International Association, Local Union 540*, 2005 CanLII 21427 (OLRB); *Ismail Oral v. Unite Here Local 261*, 2022 CanLII 125609 (OLRB); *Murray David Skelton v. ETFO*, 2019 CanLII 11745 (OLRB); *Vella v. Toronto Civic Employees Union, Local 416*, 2014 CanLII 6646 (OLRB); and *De Fina v. CUPE Local 1571*, 2012 CanLII 11097 (OLRB).

EMPLOYER POSITION

The Employer noted that this was a duty of fair representation application. To the extent that the Complainant raised many issues about the Employer, those matters should be dealt with, and were currently being dealt with, by the Human Rights Tribunal of Ontario.

The question here is did the Union breach its duty of fair representation. The issues raised by the Complainant in seeking a grievance were already before the Human Rights Tribunal. The Employer said that the Complainant had not established any breach by the Union of the duty of fair representation. The Union had concluded after careful consideration that these concerns were either currently before the Human Rights Tribunal or that they were intertwined with a discipline proceeding under the *Police Services Act* and, in any event, were outside the jurisdiction of an arbitrator. The Employer submitted that based on all the evidence the Union was entitled to make the decisions it had made.

The Employer said that the Complainant's duty of fair representation complaint should be dismissed.

COMPLAINANT'S REPLY

The Complainant made further submissions in reply. Those reply submissions were primarily disagreements regarding how the Union had characterized the events about which she had complained. However, as those events were mainly regarding the dispute between the Complainant and the Employer and as I did not hear evidence from the Employer regarding those events and since, as a duty of fair representation arbitrator, I have no jurisdiction to decide the dispute between the Complainant and the Employer, I find no benefit to recording those disagreements.

CONCLUSIONS

What is my jurisdiction, that is, what do I have authority to decide?

I was appointed under the *Police Services Act* by the Deputy Solicitor General, Community Safety as arbitrator to determine a dispute between the Complainant and the Union “with respect to the Duty of Fair Representation.” The *Police Services Act* governs this employment relationship. Under the *Act* the Union has a duty to represent all the employees fairly so when an employee believes the Union has not treated him or her fairly, that employee may complain and the complaint is dealt with by arbitration.

There is a second form of arbitration under the *Police Services Act*. The other type of arbitration, often referred to as grievance arbitration, is by far the more common form of arbitration. The authority of a grievance arbitrator is, in general terms, to interpret and enforce the collective agreement. The remedy the Complainant sought here was that the Union file grievances to be heard by a grievance arbitrator.

My authority as a “fair representation” arbitrator is limited to deciding whether the Union has violated its duty of fair representation. I have no authority to go beyond that and consider the Complainant’s underlying concerns about her treatment by the Employer, concerns which might fall under the jurisdiction of an arbitrator appointed to interpret and enforce the collective agreement.

What is the Duty of Fair Representation?

In Canada, unions have the exclusive right to negotiate collective agreements setting out the employment terms for all the employees in a bargaining unit. This collective agreement

between the Union and the Employer includes a grievance and arbitration process for the resolution of disputes under the agreement and, as is common, the Union, rather than the individual employee, controls access to the grievance and arbitration process.

Because unions have the exclusive right to bargain and enforce collective agreements, Canadian law has for many years provided that unions have a duty to represent all the employees fairly. This “duty of fair representation” was originally developed and enforced by the courts and, as with other judge-made law, is known as a “common law” duty. Since the development of this duty as a common law concept, many statutes regulating collective bargaining have been amended to expressly include the duty of fair representation and the enforcement of that statutory duty has been transferred to labour relations boards. However, the duty of fair representation has never been included in the *Police Services Act* and the duty of fair representation under that *Act* remains a common law duty that is enforced through an arbitration such as this.

This complaint relates to the Union's decisions declining to file grievances on behalf of the Complainant. The Supreme Court of Canada has described the duty of fair representation with respect to union control over grievances in the following terms:

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

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee. (*Canadian Merchant Service Guild*, (above) at page 527)

When included in a statute, the duty of fair representation is commonly a requirement for the union to “not act in a manner that is arbitrary, discriminatory or in bad faith” (see for example, Ontario *Labour Relations Act, 1995*, Section 74). Arbitrary, discriminatory and bad faith are referred to by the Supreme Court in its summary of the duty of fair representation. The shorter description contained in many statutes is commonly used as the meaning of the duty of fair representation.

However the duty is described, it is clear that unions have discretion. It is helpful to keep in mind the second point in the quote from the Supreme Court in the *Canadian Merchant Service Guild* case, above, in assessing whether the Union breached its duty of fair representation. The Court noted that “the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.”

The possible impact of the fact the Union signed the resignation agreement

There were suggestions from the Complainant that the fact the Union signed the resignation agreement had an impact on the Union’s duty of fair representation. The Union is listed on the resignation agreement as a party to that agreement. There was no mention in either the oral evidence or in the submissions that the Union undertook any obligation, nor that it was entitled to any benefit, from the agreement. I note, however, that in the agreement the Complainant undertook not to commence any future proceeding against the Union regarding events prior to June 26, 2017 - the date of the Complainant’s resignation - and that all three parties agreed to keep the agreement in strict confidence. I accept Mr. Egers’ evidence that although the Union was not involved in negotiating the agreement, the Union signed because the terms of that agreement were different from those that were in its collective agreement. In any event, I conclude that the fact the Union signed this resignation agreement has no impact on its duty of fair representation.

Did the Union Breach its Duty of Fair Representation?

In order to assess whether the Union breached its duty, I review the Union's decisions.

The Union submitted that its decisions to decline to file grievances in response to the Complainant's concerns were reasonable and not in violation of the duty of fair representation. In its submissions and in each of the two replies the Union wrote to the Complainant declining to file a grievance when requested, the Union made reference to having examined the essential character of the dispute and said it was necessary for it to do so.

In the *Weber* case, above, the Supreme Court stated that in assessing whether a grievance arbitrator has the jurisdiction to decide a matter:

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. (paragraph 52)

Only when a dispute, in its essential character, arises out of the interpretation, application, administration, or violation of a collective agreement does the arbitrator have jurisdiction to deal with it.

Did the Complainant's concerns involve the collective agreement?

As a general matter, I find it reasonable for a union to decline to file a grievance which it cannot pursue to arbitration because the issues do not arise under the collective agreement.

With that in mind, I note that at no point did the Complainant indicate what Employer actions, actions which might be considered as the essential character of her disagreement with the Employer, violated the collective agreement or otherwise involved the interpretation

application or administration of any articles of the collective agreement.

Prior to her resignation the Complainant was involved in a *Police Services Act* disciplinary investigation and in a proceeding under the *Human Rights Code*. Neither of those involved the collective agreement. The Union had no role in either process, and certainly had no exclusive authority. No duty of fair representation arose regarding either of those processes.

The resignation agreement settled both the *Police Services Act* and *Human Rights Code* proceedings. When disagreements about her resignation agreement arose, both the Employer and the Complainant brought their concerns before the Human Rights Tribunal of Ontario. There was no suggestion that the Tribunal lacked jurisdiction to decide the Complainant's disagreements arising from the resignation agreement.

Two of the Complainant's concerns were the disclosure of private information by the Chief of Police and the Employer's appeal of a Workplace Safety and Insurance Board decision. The concern was that in both instances the actions violated the terms of her resignation agreement.

The Complainant also alleged that misrepresentations were made by the Employer to her causing her to agree to the resignation agreement. She also asserted that the Employer's action in filing an application alleging she had contravened the resignation agreement was itself contrary to the resignation agreement.

The Complainant's primary factual concerns were thus not based on a violation of the collective agreement but rather based on a violation of the terms of the resignation agreement.

The Union in both replies noted that the *Police Services Act* investigation and the Human Rights Tribunal proceeding were both intertwined with the Chief of Police's exclusive jurisdiction over discipline. The Union has no role in discipline which is conducted entirely outside the collective agreement.

I again note that the Complainant made no suggestion of any provision in the collective agreement upon which to base a grievance. I find the Union's conclusion that a grievance arbitrator acting under the collective agreement would not have jurisdiction to consider her claims was a reasonable conclusion by the Union.

The Complainant in this case also sought the filing of a grievance on the basis that the Employer had engaged in torts such as negligence, fraudulent misrepresentation, misfeasance in public office, etc. Briefly, torts are civil wrongs as opposed to criminal wrongs. Other torts include assault, trespass, nuisance and defamation. In the *Weber* case, above, the Supreme Court dealt with the issue of whether an arbitrator would have jurisdiction over various torts. Arbitrators have jurisdiction over some torts but the Supreme Court explained as follows:

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*. (paragraph 55)

For an arbitrator to have jurisdiction to consider and remedy the torts complained about here, the essential character of the dispute must arise from the collective agreement. If so, the related torts could be addressed; if not, the arbitrator would have no authority over the torts.

Having found above that the Union's conclusion that a grievance arbitrator acting under the collective agreement would not have jurisdiction was a reasonable one for the Union, I also find it was reasonable for the Union to conclude that a grievance arbitrator would have no

jurisdiction over these torts. It was reasonable for the Union to conclude that there was no breach of the collective agreement to which the torts might relate.

Were the Union's decisions arbitrary or made in bad faith?

The Complainant submitted the Union's decisions not to file grievances were either arbitrary or in bad faith and therefore in violation of the Union's duty.

Were the Union's decisions arbitrary? Arbitrary means that a decision was unreasonable or implausible or capricious, that is the decision was not based on reason or judgement.

Apart from asserting that the Union's decisions were arbitrary, the Complainant provided no argument in support of that position. She did not suggest any particular reason why she thought the decisions were arbitrary, other than the implicit reason that the Union declined to file two grievances which she thought had considerable merit.

The Union explained in detail how it approached both of the Complainant's requests. In both instances the Union reviewed the material relied upon by the Complainant and also sought legal advice. Once the Union had legal advice, the Union reviewed all the material including the legal advice it received and it then reached a decision. In each instance the Union set out in detail the reasons for declining to file a grievance and provided those reasons to the Complainant.

Considering the evidence from Mr. Egers and Mr. Egers' detailed responses on behalf of the Union, I see no grounds for finding those decisions were arbitrary. Careful consideration of facts and legal advice, and lengthy, well written reasons provided to the Complainant do not fit with the general understanding of arbitrary decisions.

I turn now to the question of bad faith decisions. Bad faith in this context indicates decisions that were motivated by hostility or malice or ill will. The Complainant said that the Union had developed hostility towards her in 2016 or 2017 before she resigned but it was unclear what she felt had caused that hostility. About that time Mr. Egers, who was chairing a Union meeting, testified that he had ruled out-of-order a motion the Complainant wanted to place before the meeting. She indicated that from about that time she felt the Union was hostile towards her.

Denying an out-of-order motion in a Union meeting, a motion for which the Complainant had not given the required notice, is insufficient to demonstrate hostility by the Union toward the Complainant. Apart from the Union denying her requests to file grievances and the possibility that the hostility arose from her desire to move a motion in a Union meeting years before, there were no other suggestions of hostility or malice or ill will toward the Complainant by the Union. In the Complainant's two requests for grievances, the Union dealt fully with each, consulted legal counsel and carefully responded to the requests. Their actions show nothing that would suggest bad faith.

In addition, I note that during this period the Union approached the Complainant, by then a retired police officer and former member of the Union, and inquired of her whether she wished to be included in a group grievance the Union had filed with the Employer. The Complainant declined. Actively seeking out the Complainant in this manner in an effort to assist her is inconsistent with the Union having ill will or hostility toward her.

Apart from her arbitrary and bad faith submissions, the Complainant submitted that the Union had not conducted a full or fair investigation into her concerns prior to declining to file the grievances. She provided no particulars as to what she thought the Union should have done in conducting investigations which would meet her concept of a proper Union

investigation, other than perhaps the Union accepting her requests to file the grievances.

It is clear that the Union has considerable discretion in considering requests to file grievances. In these instances the Union conducted lengthy investigations and wrote two thorough replies to the Complainant regarding her requests. I do not know of any additional investigation the Union should have made in either instance before deciding whether to file a grievance. In each of those instances I find the Union conducted a fair investigation.

In its replies declining to file a grievance, in addition to noting it found no grounds upon which an arbitrator acting under the collective agreement would have jurisdiction to address the Complainant's concerns, the Union expressed the view that the Complainant's concerns were within the jurisdiction of the Ontario Human Rights Tribunal. The fact that the Human Rights Tribunal had jurisdiction, and that the Complainant could pursue her concerns there, supports my conclusion that it was reasonable for the Union to decide not to pursue a grievance.

Filing grievances on behalf of the Complainant in the absence of a request

In addition to her two requests for the Union to file a grievance, the Complainant asserted that it was unfair and a violation of the Union's duty of fair representation for the Union not to file other grievances on her behalf in the absence of any request from her.

It was not clear what type of grievances the Complainant thought the Union should have filed nor why the Complainant thought the Union should have filed these other grievances. It appeared that the Complainant thought that the fact she was known by the Union to be in poor health and the fact that the Union was aware of the problems she was facing with the Employer required the Union to have filed grievances to assist her in her ongoing battle with

the Employer. It was not clear why she felt her health some years after she resigned would amount to a matter dealt with by the collective agreement such as to justify a grievance, assuming a grievance about her health was one type of grievance she thought the Union should have filed. Nor was it clear how her multi-year battle with the Employer arising out of her resignation agreement would amount to a matter dealt with by the collective agreement such as to warrant the filing of a grievance.

As a general matter, I find it difficult to conceive of how this Union's failure to file a grievance in a situation where an affected employee, or former employee, did not request a grievance could be found to be arbitrary, discriminatory or in bad faith.

As for this particular matter, I note that the Complainant did not suggest any particular grievance(s) the Union ought to have filed on its own volition. I am unable to think of any grievance the Union might have filed on behalf of the Complainant. I fail to see how on the facts of this case the Union could be required by the duty of fair representation to have conceived of and filed one or more grievances itself.

I find no violation of the duty of fair representation by the Union failing to file grievances of its own volition.

While my conclusion is simply that, on the facts here, there was no violation of the Union's duty by not filing grievances over matters when it had not been asked to do so, I would note that two decisions of the Ontario Labour Relations Board cited by the Union (see *Burns* and *Unite Here*, above) went further and found that no violation can arise unless there has been a request for a grievance.

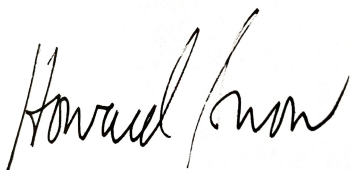
Summary

I conclude that the Union did not violate its duty of fair representation. On the contrary, the evidence demonstrated that the Union had, in both instances when it was asked to file a grievance, conducted thorough and time-consuming investigations, sought legal advice on the matters, and wrote lengthy, thorough and thoughtful responses outlining the reasons the Union was not prepared to pursue the requested grievance. Moreover, I find the Union did not violate its duty of fair representation by failing to file grievances in situations where the Complainant had not asked it to file grievances.

Finally there were submissions with respect to remedy, but having found no violation of the duty of fair representation I do not address those submissions.

The complaint is dismissed.

Dated in London Ontario, this 20th day of March, 2025.

A handwritten signature in black ink, appearing to read "Howard Snow", is written over a light blue rectangular stamp. The signature is fluid and cursive.

Howard Snow
Arbitrator