SUPREME COURT OF NOVA SCOTIA
Citation: *Nickerson v. Nova Scotia (Labour Board)*, 2016 NSSC 348

Date: 2016 12 23
Docket: Hfx No. 446694
Registry: Halifax

Between:

Shannon Nickerson

Applicant

v.

Nova Scotia Labour Board and
The Canadian Union of Public Employees Local 3912

Respondents

Judge: The Honourable Justice Joshua Arnold

Heard: July 20 and 21, 2016, in Halifax, Nova Scotia

Counsel: Barry Mason, Q.C., for the Applicant
Susan Coen, for the Respondent CUPE
Edward Gores, Q.C. for the Respondent Nova Scotia Labour Board

By the Court:

Overview

[1] Shannon Nickerson was employed as a part-time psychology professor at Saint Mary's University from September 2000 to September 2011. While so employed Ms. Nickerson was a member of the Canadian Union of Public Employees Local 3912. She was denied re-appointment to her teaching position by the University on September 16, 2011, and her employment ended.

[2] Ms. Nickerson grieved to the Union twice: 1) On March 23, 2011, she filed a grievance which alleged that the University had issued a discipline letter on March 21, 2011, "without just cause" and had undertaken "a pattern of harassment pertaining to communications"; and 2) On October 6, 2011, she grieved the University's action of "denying re-appointment to teaching at (the University) which constitutes dismissal under the Collective Agreement".

[3] In considering her grievance, the Union requested Ms. Nickerson's medical files. Confusion arose between the Union and Ms. Nickerson regarding access to these files. Ms. Nickerson provided the requisite authorization to her family doctor to allow for the provision of medical records and the Union was then provided with her family physician's (Dr. McGrath) medical records as well as reports from Dr. Rosenberg, her psychiatrist. The Union also requested that Ms. Nickerson submit to psychological testing regarding her personality and, although insulted, she fully cooperated.

[4] Ms. Nickerson wanted the matter to proceed to arbitration so that she could testify and receive "vindication". Instead, the Union eventually scheduled the matter for mediation on December 9, 2014.

[5] Through her personal lawyer, Barry Mason, Q.C., Ms. Nickerson complained about the switch from arbitration to mediation. In an eighteen-page letter to the Labour Board written by Mr. Mason, Q.C., on November 25, 2014, among a myriad of complaints Ms. Nickerson demanded the Union provide a process that would allow her "vindication", extract an apology from the University and allow for general, aggravated and punitive damages.

[6] On November 25, 2014, in addition to the eighteen-page complaint letter, Ms. Nickerson also filed a complaint form under s. 54A of the *Trade Union Act*, R.S.N.S. 1989, c. 475, alleging a variety of issues, including:

> - Arbitrary representation conduct which was ill-informed, reckless, or indifferent to your interests eg. A union automatically accepts the employer's version of a grievance without giving the employee a chance to respond to it.
> - Discriminatory representation different treatment due to a personal characteristics such as your race, or sex; or due to individual favouritism eg. A union refuses to arbitrate grievances of certain bargaining unit members because of their religious practices.
> - Bad faith representation conduct based on ill-will, hostility, or revenge toward an employee eg. A union refuses to arbitrate a grievance because the grievor had run against a union official in union elections.

[7] Prior to December 9, 2016, Ms. Nickerson attempted to have the scheduled mediation adjourned as she said her depression was exacerbated by the short time line between receiving the materials being relied on in the mediation and the mediation itself. The Union refused to adjourn the mediation on the basis that they did not need Ms. Nickerson's input or participation in the mediation. Mr. Mason, Q.C. wrote directly to the mediator to complain about the timing of the mediation and requested an adjournment. The mediator adjourned the matter. During the time scheduled for the mediation, instead of having the hearing, the Union and Saint Mary's University conducted negotiations at the conclusion of which they came to a settlement. Ms. Nickerson did not participate in the settlement discussions in any way.

[8] By way of a Settlement Agreement dated December 19, 2014, the Union and the University settled both grievances. The settlement provided that Ms. Nickerson's record would be cleared and the March 21, 2011 discipline letter would be withdrawn; Ms. Nickerson would be reinstated as a part-time professor; she would receive a cash payment of $16,500.00; she would not lose any accumulated seniority; and she would have up to one year to return to work. The settlement required that before returning to work Ms. Nickerson would have to demonstrate that she was medically able to perform the duties of her teaching position, both physically and mentally; she would have to follow certain provisions of the Collective Agreement and certain policies of the University (all similarly employed professors at the University are bound by the same conditions); and she would have to execute a full and final release of any and all claims against the

University. Ms. Nickerson was given until January 30, 2015, to accept. She refused to sign the agreement.

[9] In a six-page letter to Marianne Welsh dated December 31, 2014, written by Mr. Mason, Q.C. after the Union proceeded through settlement discussions instead of mediation, among the many additional complaints about the Union's handling of her matter Ms. Nickerson claimed a loss of income in the range of $170,000.00, not including interest.

[10] In light of the fact that Ms. Nickerson refused to sign the settlement agreement her teaching appointment was never reinstated by the University.

[11] On November 13, 2015, Review Officer Brian Sharp released a nineteen-page decision dismissing Ms. Nickerson's complaint in accordance with s. 56A(2) of the *Trade Union Act*.

[12] Ms. Nickerson filed a Notice for Judicial Review on December 23, 2015, with ten stated grounds:

> 1. The Review Officer breached the rules of procedural fairness by weighing and assessing documentary evidence, making findings on contentious issues of fact and credibility without providing the applicant with a full and fair hearing;
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> 2. The Review Officer erred in law by finding that the applicant was required to adduce evidence, at the preliminary stage, of the respondent Union's treatment of non-disabled employees, in order to show that the respondent Union discriminated against her;
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> 3. The Review Officer erred in law by failing to apply the proper test in deciding whether the respondent Union had properly accommodated the applicant's disability;
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> 4. The Review Officer made an unreasonable finding when he found that Dr. Rosenberg gave legal opinions in his medical report;
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> 5. The Review Officer made an unreasonable finding when he found that Dr. Rosenberg was not a credible witness;
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> 6. The Review Officer made an unreasonable finding of fact when he found that Dr. McGrath was not a credible witness;
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> 7. The Review Officer made an unreasonable finding of fact when, without any supporting medical evidence, he found that Dr. Rosenberg was wrong to opine that the conduct of the grievance process would affect the applicant's disabilities;
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> 8. The Review Officer made an unreasonable finding of fact when he found that the applicant would have been able to actively participate in a mediation process;

9. In general, the Review Officer erred in finding that the respondent Union met its duty of fair representation pursuant to the *Trade Union Act*; and

10. Such other grounds as may appear on review of the record or at the Hearing of this matter.

Legislation

[13] Section 54A of the *Trade Union Act* states:

> 54A (1) In this Section, "employee" includes an employee within the meaning of each of the *Civil Service Collective Bargaining Act*, Schedule A to the *Corrections Act* and the *Highway Workers Collective Bargaining Act*.
>
> (2) In this Section and subsection (3) of Section 55, "trade union" includes
>
> > (a) the Nova Scotia Government Employees Union acting under the *Civil Service Collective Bargaining Act*;
> >
> > (b) the Union determined pursuant to Part I of the *Corrections Act*; and
> >
> > (c) the Nova Scotia Highway Workers Union, CUPE Local 1867, or a successor union determined pursuant to the *Highway Workers Collective Bargaining Act*.
>
> (3) No trade union and no person acting on behalf of a trade union shall act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employee in a bargaining unit for which that trade union is the bargaining agent with respect to the employee's rights under a collective agreement.

[14] Section 56A of the *Trade Union Act* states:

> 56A (1) Where the Board receives a written complaint that a trade union or a person acting on behalf of a trade union has contravened subsection (3) of Section 54A, the Board shall appoint an employee within the Department of Environment and Labour, or a person appointed by the Minister, as a review officer to review the complaint to determine whether there is sufficient evidence of a breach of the duty of fair representation.
>
> (2) Where a review officer appointed pursuant to subsection (1) is not satisfied on initial review that there is sufficient evidence of a failure to comply with subsection (3) of Section 54A, the review officer shall dismiss the complaint.
>
> (3) Where a review officer decides not to dismiss the complaint pursuant to subsection (2), the review officer shall serve notice of the complaint on the trade union against which the complaint is made and request a response from the trade union.
>
> (4) Where a review officer has received a response from a trade union to a request made pursuant to subsection (3) and is not satisfied that there is sufficient

> evidence of a failure to comply with subsection (3) of Section 54A, the review officer shall dismiss the complaint.
>
> (5) Where a review officer has received a response from a trade union to a request made pursuant to subsection (3) or the trade union has failed to respond to the request within such period of time as the review officer considers necessary, and where the review officer believes that there has been a failure to comply with subsection (3) of Section 54A, the review officer shall
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> (a) effect a settlement, if possible; or
>
> (b) where not possible, refer the complaint to the Board for disposition.
>
> (6) A review officer appointed pursuant to subsection (1) has the power to order the parties to produce any documents or other things that the review officer considers necessary for the full review of the complaint without holding a hearing.
>
> (7) A decision of a review officer under this Section is final and conclusive and not open to question or review.
>
> (8) Where a complaint has been referred to the Board for disposition pursuant to clause (b) of subsection (5), the Board may
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> (a) add a party to the proceeding at any stage of the proceeding;
>
> (b) determine a complaint with or without holding a hearing; and
>
> (c) where the Board is satisfied that the trade union or person acting on behalf of a trade union has contravened subsection (3) of Section 54A, the Board may make an order provided for in clause (e) of Section 57 and make an order provided for in Section 78.
>
> (9) A complaint under subsection (1) may be withdrawn by the complainant upon such conditions as the Board may determine.

[15] Because the Review Officer dismissed Ms. Nickerson's complaint under s. 56A(2) of the *Trade Union Act*, the Union was not sent notice of the complaint and did not provide a response. The Record from which the Review Officer made a decision, and upon which I base my decision, is limited. The Record does not include all materials and correspondence referenced in the provided communications.

[16] For the following reasons, I am directing the matter be referred back to a different Review Officer (one other than Mr. Sharp) to review the complaint to determine whether there is sufficient evidence of a breach of the duty of fair representation in accordance with s. 56A(1) of the *Trade Union Act*.

Issues

[17] I have determined that Ms. Nickerson's matter should be sent back to a different Review Officer in accordance with s.56A(1) of the *Trade Union Act*. I will address those issues that I feel are necessary to explain my reasons for referring the matter back to a Review Officer and to provide some guidance in relation to certain of the legal issues raised by Ms. Nickerson. I will not address all of her complaints as that would go beyond what is necessary for this judicial review.

[18] I would therefore substitute for Ms. Nickerson's long list of issues the following main issue: Did the Union's delay in pursuing Ms. Nickerson's grievance amount to a breach of the duty of fair representation?

Standard of Review

[19] Ms. Nickerson argues that the applicable standard of review of the decision on judicial review varies in her case, depending on the specific ground of review.

[20] In relation to her grounds of review No. 2 and No. 3, Ms. Nickerson says that these are purely questions of law and, therefore, the standard of correctness applies. In relation to any issues arising from the alleged human rights violations and a union's duty to accommodate as found in her ground of review No. 9, Ms. Nickerson claims that this is purely a question of law and is also subject to a standard of correctness. She states:

> The Review Officer must have correctly determined the nature of the legal test to be applied with respect to these questions of law. If this Honourable Court finds that the Review Officer did not correctly articulate the law of the Union's duty to accommodate and how it handled the human rights complaints of its matter, this Court is entitled to substitute its view of the law with the Board's: *CR Falkenham Backhoe Services Ltd. v. Nova Scotia (Human Rights)*, 2008 NSCA 38; *Housen v. Nikolaisen*, [2002] 2 SCR 235. These are not questions of statutory interpretation of the Review Officer's "home statute"; rather, they are essentially questions of human rights law. No deference is therefore owed to the Review Officer on his findings in this regard.

[21] In relation to her grounds for review relating to dismissing the medical evidence, Nos. 4, 5, 6, and 7, Ms. Nickerson says that these issues are to be reviewed on a standard of reasonableness.

[22] Ms. Nickerson did not specifically address the standard of review for ground Nos. 1 and 8.

[23] With respect to the overall discretionary decision of the Review Officer's jurisdiction to determine whether Ms. Nickerson's complaint ought to be dismissed, she says that this is a question of mixed fact and law also to be reviewed on a standard of reasonableness.

[24] In *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, the majority affirmed the framework determined in *Dunsmuir v. New Brunswick*, 2008 SCC 9, regarding the appropriate standard of review for the judicial review of administrative decisions. As Abella J. stated in *Wilson:*

> [20] A substantial portion of the parties' factums and the decisions of the lower courts in this case were occupied with what the applicable standard of review should be. This, in my respectful view, is insupportable, and directs us institutionally to think about whether this obstacle course is necessary or whether there is a principled way to simplify the path to reviewing the merits.
>
> [21] For a start, it would be useful to go back to the basic principles set out in *Dunsmuir*, under which two approaches were enunciated for reviewing administrative decisions. The first is deferential, and applies when there is a range of reasonable outcomes defensible on the facts and law. This is by far the largest group of cases. Deference is succinctly explained in *Dunsmuir* as follows:
>
> > It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. [para. 48]
>
> [22] The reason for the wide range is, as Justice John M. Evans explained, because "[d]eference . . . assumes that there is no uniquely correct answer to the question": "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 C.J.A.L.P. 101, at p. 108. The range will necessarily vary. As Chief Justice McLachlin noted, reasonableness "must be assessed in the context of the particular type of decision making involved and all relevant factors" and "takes its colour from the context": *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (CanLII), [2012] 1 S.C.R. 5, at paras. 18 and 23, citing with approval *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, at para. 59.
>
> [23] The other approach, called correctness, was applied when only a single defensible answer is available. As set out in *Dunsmuir*, this applied to constitutional questions regarding the division of powers (para. 58), "true

> questions of jurisdiction or vires" (para. 59), questions of general law that are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (para. 60), and "questions regarding the jurisdictional lines between two or more competing specialized tribunals" (para. 61).

[25] Therefore, according to *Dunsmuir*, the standard of review in most cases will be reasonableness. Correctness will be the standard only if the case happens to involve a question regarding: 1) the division of powers; 2) true questions of jurisdiction or *vires*; 3) questions of general law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise; or 4) questions regarding the jurisdictional lines between two or more competing specialized tribunals.

[26] In *Dunsmuir* the majority discussed the reasoning behind judicial review:

> 27 As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.
>
> 28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[27] Justice Abella's judgement in *Wilson* confirms the presumption of deference to administrative tribunals when she states:

> 38. … it would, I think, still be beneficial if the template so compellingly developed in *Dunsmuir*, were adhered to, including by applying the residual "correctness" standard only in those four circumstances *Dunsmuir* articulated.

Role of the Review Officer

[28] In relation to her entire complaint, Ms. Nickerson argues that the Review Officer has a limited role as a "gatekeeper" and that the onus on her to show that a panel could find that the Union breached its duty of fair representation is not a heavy one. She submits:

> The roll [sic] of the Review Officer pursuant to s. 56A(1) is a screening roll (see *Coates*, paragraph 17), or essentially, the roll [sic] of a gatekeeper. The British Columbia Court of Appeal in *Lee v. British Columbia (Attorney General)*, 2004 BCCA 457 stated that the onus on a complainant at the "gatekeeper" stage is not particularly high; rather, the complainant must simply adduce evidence which puts the complaint out of the "realm of conjecture" (see paragraph 26). Though the Court of Appeal was dealing with a decision of the Human Rights Commission in that case, the Applicant submits that the same principle applies in the case at hand. While deference is owed to the Review Officer, the onus on Ms. Nickerson was not high at the initial stage to demonstrate that there was sufficient evidence that the panel could possibly find that the Union breached its duty of fair representation.

[29] In *Coates v. Sharpe*, 2012 NSSC 311, Moir J. examined the standard of review applicable to a Review Officer's decision. After referring to the leading cases, including *Dunsmuir*, he quoted the analysis as described by the Court of Appeal in *Police Assn. of Nova Scotia Pension Plan (Trustees of) v. Amherst (Town)*, 2008 NSCA 74:

> 22 In the *Police Association* case at paras. 41 and 42, our Court of Appeal summarized the standard of review analysis under *Dunsmuir*:
>
> > The first step is to determine whether the existing jurisprudence has satisfactorily determined the degree of deference on the issue. If so, the SOR analysis may be abridged (para. 62, 54, 57).
> >
> > If the existing jurisprudence is unfruitful, then the court should assess the following factors to select correctness or reasonableness (para. 55):
> >
> > > (a) Does a privative clause give statutory direction indicating deference?
> > >
> > > (b) Is there a discrete administrative regime for which the decision maker has particular expertise? This involves an analysis of the tribunal's purpose disclosed by the enabling legislation and the tribunal's institutional expertise in the field (para. 64).
> > >
> > > (c) What is the nature of the question? Issues of fact, discretion or policy, or mixed questions of fact and law, where the legal issue

> cannot readily be separated, generally attract reasonableness (para. 53). Constitutional issues, legal issues of central importance, and legal issues outside the tribunal's specialized expertise attract correctness. Correctness also governs "true questions of jurisdiction or vires", ie. "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter". Legal issues that do not rise to these levels may attract a reasonableness standard if this deference is consistent with both (1) any statutory privative provision and (2) any legislative intent that the tribunal exercise its special expertise to interpret its home statute and govern its administrative regime. Reasonableness may also be warranted if the tribunal has developed an expertise respecting the application of general legal principles within the specific statutory context of the tribunal's statutory regime (para. 55-56, 58-60).

[30] Justice Moir went on to consider the *Trade Union Act* complaint screening process:

> 23 As I said, s. 56A of the *Trade Union Act* is fairly new. Enacted in 2005, and amended in 2006, it brought in a new process for screening complaints. So far, no judge has determined whether a review officer's decision is owed deference.
>
> 24 So, I must turn to the three *Dunsmuir* factors.
>
> 25 On the first factor, the review officer's decision is protected by s. 56A(7), a strongly worded privative clause: "A decision of a review officer under this Section is final and conclusive and not open to question or review."
>
> 26 A person, such as Ms. Coates, may well question why s. 56A(7) does not put an end to the review. If legislative supremacy is a fundamental principle of our constitution, by what right do we persist in reviewing a decision "not open to ... review"? It does no harm to remind ourselves of the basics.
>
> 27 The answer is that the courts have long been willing to supervise the quality of statute-based decisions to see that the rule of law prevails. The supervisory jurisdiction has constitutional protection: *Crevier v. Québec (Attorney General)*, [1981] 2 S.C.R. 220. Therefore, the supervisory jurisdiction can withstand a privative clause. But, that does not mean that the court can take over the statutory decision-making.
>
> 28 The *Dunsmuir* approach to judicial review results from a long evaluation. Starting with *Canadian Union of Public Employees v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227, the courts searched for a middle way between staying out of, and intruding into, statutory decision-making to which the court's attention was not invited, between doing nothing about procedural unfairness or unreasonable decision-making and taking over the decision-making process.

> 29 The need for that balance is a partial explanation of the reasonableness standard. It may seem peculiar to Ms. Coates that, with most statutory adjudications, we cannot interfere just because we think the decision is wrong. The court reviews many statutory decisions only for reasonableness, and otherwise defers to the decision-maker's right to be wrong, because of the tension between supremacy of the legislature and protection of the rule of law.
>
> 30 So, the first factor tends toward deference to a review officer's decision under s. 56A of the *Trade Union Act*.

[31] Moving to the second factor – the existence of a "discrete administrative regime" – Moir J. said:

> 31 There are authorities that can help with the second factor. A long line of cases, of which both the *C.U.P.E.* case and *Casino Nova Scotia* are examples, "emphasized the importance of deference to the decisions of the Labour Relations Boards on core issues under industrial relations legislation" (*Casino Nova Scotia*, para. 26).
>
> 32 As he is part of the same legislative regime, one sees that the question of "a discrete administrative regime for which the decision-maker has particular expertise" may well be answered in the same way for the review officer as it is for the Labour Relations Board.
>
> 33 With s. 54A, the Board was given a new responsibility, one previously with the courts. Its jurisdiction to remedy a breach of the duty of fair representation is so closely related to the Board's established functions that the case law on deference is analogous.
>
> 34 A review officer is appointed by the Board: s. 56A(1). A review officer's first responsibility is to dismiss, without notice to the union, a complaint about which the officer "is not satisfied on initial review that there is sufficient evidence of a failure to comply with" the duty of fair representation: s. 56A(2). The dismissal is mandatory.
>
> 35 If the complaint survives initial review, notice is given to the union and it is requested to make a response: s. 56A(3). Once again, the review officer must ask himself, as Mr. Sharp did, whether he is satisfied there is sufficient evidence of a failure to provide fair representation, and he "shall" dismiss the complaint if he is not satisfied.
>
> 36 It was at that point that the process ended for Ms. Coates, but we have to look at the whole process to assess the second factor. A review officer who "believes" that there has been a breach of the duty to provide fair representation must "effect a settlement, if possible": s. 56A(5)(a) or "where not possible, refer the complaint to the Board for disposition": s. 56A(5)(b).
>
> 37 Breach of the duty of fair representation is a core issue for the Labour Relations Board, now that the subject has been incorporated into the *Trade Union*

> *Act*. The review officer is not a mere administrator of complaints. His function is to make determinations on the very same core issue. His satisfaction determines whether a complaint goes forward.
>
> 38 At that, the review officer does much more than screen complaints. He has to try to settle the complaints he believes to be founded on evidence.
>
> 39 Both the screening function and the settlement role suggest that the review officer must use specialized knowledge when interpreting the duty of the procedural and substantive provisions on fair representation.
>
> 40 The review officer falls under the general purposes of the *Trade Union Act*, as well as the specific screening and settlement purposes of s. 56A.
>
> 41 With the 2005 amendments, the review officer became an integral part of a discrete legislative regime in which the Board has long been recognized as having special expertise to interpret and administer the home statute, the *Trade Union Act*. In light of the review officer's function and role, he cannot be treated differently than the Board under the second *Dunsmuir* factor.

[32] As to the third consideration, the nature of the question, Moir J. held that it was a question of law involving the Review Officer's "home statute", and thus all three factors pointed to deference:

> 42 The third factor has often been summed up as "What is the nature of the question?"
>
> 43 It is here that Ms. Coates makes her strongest case for the correctness standard. She complains that she made a s. 54A complaint, a complaint of breach of the duty of fair representation and, instead, she got a decision about the need to exhaust appeals under s. 55. She contends that Mr. Sharp did not have jurisdiction to decide a s. 55 issue.
>
> 44 We need to look a little more closely at s. 56A(4) and s. 54A(3). Subsection 56A(4) reads:
>
> > Where a review officer has received a response from a trade union to a request made pursuant to subsection (3) and is not satisfied that there is sufficient evidence of a failure to comply with subsection (3) of Section 54A, the review officer shall dismiss the complaint.
>
> Subsection 54A(3) reads:
>
> > No trade union and no person acting on behalf of a trade union shall act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employee in a bargaining unit for which that trade union is the bargaining agent with respect to the employee's rights under a collective agreement.

> 45 So, Mr. Sharp had to be satisfied, on the basis of the complaint and the response, that there was sufficient evidence that the NSGEU had acted, in the course of representing Ms. Coates, in a manner that was arbitrary, discriminatory or in bad faith.
>
> 46 Did that include considering whether Ms. Coates had exhausted the internal appeal procedures? That was the question. What was 'its' nature?
>
> 47 In my view the question is a straight one of law. It is not a true question of jurisdiction. Mr. Sharp's jurisdiction arose when Ms. Coates' complaint was filed with the Board and the Board appointed him to be the review officer for that complaint. See the discussion at paras. 26 and 27 of *Canadian Union of Public Employees, Local 2434 v. Port Hawkesbury (Town)*, 2011 NSCA 28.
>
> 48 We have here a question of statutory interpretation about the home statute of the regime of which the review officer is an integral part. An administrative decision that determines such a question usually deserves deference: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 34.
>
> 49 Each of the three factors points to deference. Therefore, a decision of a review officer under s. 56A of the Trade Union Act on a subject of this nature is reviewable only for its reasonableness.

[33] In commenting on the Review Officer's decision specifically, Moir J. stated:

> 51 In this case, the decision-maker provided extensive reasons. In my assessment they demonstrate clearly a reasonable path of thought.
>
> 52 In its reply, the union contended that Mr. Sharp had no jurisdiction to determine the complaint. It argued that, because of s. 55(3)(a) of the *Trade Union Act*, Ms. Coates' failure to exhaust her internal appeal rights (and the union's effort to give her full access to that process) precluded her filing a complaint.

[34] Justice Moir's decision was upheld in *Coates v. Nova Scotia (Review Officer of Labour Board)*, 2013 NSCA 52, wherein Fichaud J.A. confirmed that the standard of review is reasonableness in relation to the decision of a Review Officer:

> 37 The reviewing judge must be correct on issues of law, that include the selection and application of his standard of review to the decision of the administrative tribunal: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, paras 43-44.
>
> 38 It is established that the standard of review by a judge to a Labour Board decision, that applied the *Trade Union Act*, is reasonableness: *Casino (Nova Scotia) v. Nova Scotia (Labour Relations Board)*, 2009 NSCA 4, paras 26-28, and

authorities there cited; *Cape Breton Island Building & Construction Trades Council v. Nova Scotia Power Inc*., 2012 NSCA 111, para 36.

39 Before this case, there has been no decision of a Nova Scotia court that conducted a standard of review analysis to a decision of a Review Officer under the recently enacted s. 56A of the *Trade Union Act*. So a standard of review analysis is appropriate: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, paras 54, 57, 62.

40 Justice Moir (paras 24-49) examined *Dunsmuir*'s factors and concluded that the Review Officer's decision was entitled to deference, meaning a reasonableness standard of review. I adopt the judge's analysis of the factors, and note particularly s. 56A(7) of the *Trade Union Act*:

> A decision of a review officer under this Section is final and conclusive and not open to question or review.

…

45 There is nothing exceptional, as Justice Rothstein required in *Alberta Teachers' Association*, to justify a correctness standard. I agree with Justice Moir in the decision under appeal:

> [47] In my view the question is a straight one of law. It is not a true question of jurisdiction. ...
>
> [48] We have here a question of statutory interpretation about the home statute of the regime of which the review officer is an integral part. An administrative decision that determines such a question usually deserves deference: [citing *Alberta Teachers' Association*]

46 In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, paras 11, 14-17, Justice Abella for the Court discussed the meaning of "reasonableness" (quoted below, para 57). In *Jivalian v. Nova Scotia (Community Services)*, 2013 NSCA 2, para 15, this Court recently summarized those principles:

> Reasonableness is neither mechanical acclamation of the tribunal's conclusion nor a euphemism for the court to impose its own view. Rather the reviewing court shows respect for the Legislature's choice of a decision maker, by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of possible outcomes. [citing *Newfoundland and Labrador Nurses' Union*].

[35] The issues raised by Ms. Nickerson that she says require a standard of correctness involve the Review Officer's interpretation of his role under s. 56A of the *Trade Union Act* and the Review Officer's interpretation of the duty of fair representation found in s. 54A(3) of the *Trade Union Act.*

[36] In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* [*sub. nom. Human Rights Commission*], 2011 SCC 53, the Court explained that questions that are of central importance to the legal system as a whole are reviewed on a correctness standard to ensure basic consistency in the fundamental legal order of Canada. The issue in *Human Rights Commission* was whether the Canadian Human Rights Commission had the power to award costs. This question was ultimately decided on a reasonableness standard. The Court explained that "[i]t cannot be said that a decision on whether to grant legal costs as an element of that compensation…would subvert the legal system, even if a reviewing court found it to be in error." Similarly, the interpretation of the Review Officer's role under s. 56A and the proper test for discrimination in the context of the duty of fair representation is important to the s. 54A and s. 56A *Trade Union Act* framework. A reasonable but erroneous conclusion on this issue would not subvert the legal system as a whole.

[37] As for true questions of jurisdiction, *Human Rights Commission* indicates that this category should be interpreted narrowly. Issues that would have been considered jurisdictional in the past should now be dealt with under the standard of review analysis. In general, if the issue does not raise issues of general legal importance, the standard of reasonableness will apply:

> 40 Moreover, the term "costs", in legal parlance, has a well-understood meaning that is distinct from either compensation or expenses. It is a legal term of art because it consists of "words or expressions that have through usage by legal professionals acquired a distinct legal meaning": Sullivan, at p. 57. Costs usually mean some sort of compensation for legal expenses and services incurred in the course of litigation. If Parliament intended to confer authority to order costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. As we shall see shortly, the legislative history of the statute also strongly supports the inference that this was not Parliament's intent.

[38] As noted by Fichaud J.A., the *Trade Union Act* is the Review Officer's home statute. I apply the standard of reasonableness to my consideration of the Review Officer's decision.

Overview of the Delay Issue

[39] Ms. Nickerson argued that the lengthy delay by the Union in pursuing her grievance breached the Union's duty of fair representation. In her brief, Ms. Nickerson argues:

2. *Delay in prosecuting the grievance to arbitration*

> The Union neglected to prosecute either of the Applicant's grievances for almost two years. The evidence on record demonstrates that the Union did nothing during the intervening time. There is no explanation for this delay.
>
> The Review Officer's explanation is that Ms. Nickerson was partly responsible for the delay. This finding is patently unreasonable. The Review Officer stated that the Union "could not set arbitration dates because the Complainant had not made decisions about disclosing evidence". On the evidence, this is simply untrue. The only restriction the Complainant placed on the Union's gathering of medical evidence was that the requests be in writing. Though the Union did not appreciate this request, Ms. Nickerson's request in this regard was nothing but reasonable. Ms. Nickerson could not be responsible for a delay in bringing the grievance simply because she asked for the Union to make requests to her medical professionals in writing.

[40] The Review Officer rejected Ms. Nickerson's claim of bad faith in part based upon a factual finding that she contributed to the delay by failing to cooperate in the provision of her medical records. The Review Officer also stated that if the Union was not solely responsible for the delays then there could be no finding of bad faith. Was the Review Officer's determination of the facts in this regard reasonable?

[41] The Review Officer discussed the issue of delay in his decision of November 13, 2015, beginning at pg. 10:

> Turning to the Complainant's specific allegations of bad faith representation, I am not satisfied that the Board could find that the Respondents represented the Complainant in bad faith by failing to move her grievances forward in a timely manner.
>
> Over three years elapsed between the date the Complainant was dismissed, and the date when the mediation was scheduled to take place. <u>While that is a troubling length of time, I am not satisfied that the Board could potentially find that the Respondents were solely responsible for that delay. Rather, I am satisfied that the Board could only find that the Complainant also played a significant role in delaying the progress of the Grievances. Since the evidence reflects that the parties were at least jointly responsible for the delay the progress of the Grievances, I am not satisfied that the Board could potentially find that the delay amounted to bad faith representation on the Respondents' part.</u>
>
> As I have already noted, the evidence shows that the Complainant/Respondent relationship was strained throughout the representation period, and that <u>the strain interfered with the Union's collection of evidence and ability to schedule case related dates</u>. <u>For example, the evidence shows that the Legal & Legislative</u>

> Representative was actively attempting to gather medical evidence in early 2012. However, due at least in part to disagreements with the Complainant, the Representative had not received that evidence by April 16, 2013, when she prepared a legal opinion for W. Moreover, Complainant counsel's October 30, 2014 letter to W reflects that the Representative's 2012 request still had not been satisfied in late 2014, and that the Complainant was still disputing aspects of that request.
>
> Other evidence reflects that the evidentiary disputes affected the overall progress of the case. For example, in her March 3, 2014 letter to W, the Legal & Legislative Representative explains that the Union could not set arbitration dates because the Complainant had not made decisions about disclosing medical evidence.
>
> Even if the Board could find that delays in pursuing a grievance amount to bad faith representation, I am not satisfied that the file evidence would potentially permit the Board to reach that conclusion in this situation.
>
> The Board could not ignore the evidence that disagreements between the Complainant and Respondents negatively affected the progress of the Grievances. Therefore, I am satisfied that the Board could only potentially find that the Complainant was at least partially responsible for the amount of time it took for the grievances to progress to mediation. Since the Board could not find that the Respondents were solely responsible for delays in the resolution of the Grievances, I am not satisfied that the Board could potentially find that evidence of the age of the grievances provided an acceptable basis for a further finding that the Respondents represented the Complainant in bad faith.
>
> I am not satisfied that the file evidence would permit the Board to potentially find that the Respondents represented the Complainant in bad faith by threatening to curtail her involvement in the case because she needed more time. With all respect to the Complainant, the evidence does not suggest that this allegation is valid. [Emphasis added]

[42] In relation to the Review Officer's analysis of whether Ms. Nickerson contributed to the delay by refusing to provide the Union with her medical information, if this factual conclusion is not supportable on the Record, and if the Review Officer does not refer accurately to specific evidence that would give this conclusion factual support, then this would not be a reasonable conclusion. It must also be kept in mind, however, that the Review Officer's decision on the issue of delay is based on a finding of fact, so it is necessary to be mindful that "[a] judicial review is not a rehearing of the evidence, or an opportunity to bring new evidence" and that the review is "conducted solely on the basis of the record": *Pioneer Distributors Ltd v. Orr*, 2015 BCSC 461, [2015] B.C.J. No. 576 at para. 35.

[43] While findings of fact are not immune from review, they are subject to a deferential standard of review, that is, reasonableness. As the majority, per Bastarache and LeBel JJ, said in *Dunsmuir* at para. 47, reasonableness "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[44] Donald J.M. Brown and Hon. John M Evans state in *Judicial Review of Administrative Action in Canada* (Carswell, looseleaf, 2014), at p. 14, "only those findings that are not logically or rationally explained or not plausible given the evidence will be subject to review and correction." Findings of credibility will be held to a more stringent degree of deference. In *Campbell v. Nova Scotia (Minister of Community Services)*, 2010 NSSC 116, [2010] N.S.J. No. 155, Moir J. reviewed the Board's decision to refuse funding for medical marijuana for the applicant in the face of evidence indicating that it was medically necessary:

> 20 The finding was that the evidence was inadequate to show that the recommended medication was essential to Ms. Campbell's health and well being. That is what "only" denotes in "based only on Ms. Campbell's evidence and the vague and unchallenged ... letter of Dr. Vitale". That being treated as the "only ... evidence", Mr. Vye was "not convinced that the use ... is 'essential'" to Ms. Campbell.
>
> 21 Note that no finding was made against Ms. Campbell's credibility or, beyond its supposed vagueness, the unchallenged evidence from Dr. Vitale.
>
> 22 There is nothing vague in Dr. Vitale's letter. He says that use of the recommended medication "has proven essential to her health and well-being" and it "[reproducibly] relieves her symptoms of pain and nausea".
>
> 23 Mr. Potter argues that the letter is vague because it leaves many questions unanswered. The department did not require Dr. Vitale's attendance for cross-examination. I do not see how the absence of detailed answers to questions flowing from the general opinion expressed by the physician makes the general opinion "vague". On the contrary, it is clear though general.
>
> 24 Short of a finding against Ms. Campbell's credibility, and there is no hint of such, it was unreasonable to conclude that her evidence fails to establish the necessity of the recommended medication. She gave evidence that she suffers from serious diseases. She gave evidence of debilitating physical, emotional, and cognitive symptoms. She gave evidence that the recommended medication significantly improves the symptoms and allows her to function, and that the alternatives, Interferon and Ribavarin, caused dangerous side effects.

> 25 That being the evidence, there being no suggestion that Ms. Campbell contradicted her affidavit or, otherwise, lacked credibility, there was only one rational finding available to the Assistance Appeal Board. Medical marijuana is essential for Ms. Campbell.

[45] A decision can be set aside if findings of fact essential to the decision are unreasonable. In *Millett v. Nova Scotia (Minister of Agriculture)*, 2015 NSSC 21, [2015] N.S.J. No. 29, on a judicial review of a decision of the Deputy Minister of Agriculture to uphold an inspector's decision to seize a herd of cattle, Moir J. held that the Deputy Minister had "misconstrued his statutory role" (para. 116). He added, as an alternative basis for setting aside the decision, that the Deputy Minister had made unreasonable findings of fact that were essential to the decision:

> 117 In addition to being erroneously restricted, the Deputy Minister's review was factually flawed.
>
> 118 We have no trouble with the standard of review here. The Deputy Minister's findings are owed deference. They are reviewed for their reasonableness, as that concept has been defined by the courts in relation to judicial review. See, *Jivalian v. Nova Scotia (Department of Community Services)*, [2013] N.S.J. No. 2 at para. 15 and *Newfoundland and Labrador Nurses' Union* as cited there.
>
> 119 The Deputy Minister's finding that the inspectors attempted to obtain the owner's cooperation to relieve the distress of the animals is unreasonable. It is contrary to the evidence that was before the deputy. My critical evaluation of that finding begins at para. 14 above and ends with para. 21. A summary is all that is needed now.
>
> 120 The lead inspector's evidence of what happened that day and night a year ago consists of the detailed record she prepared soon after the events. The record contains no evidence that the inspector asked for the cooperation of the Millett family, or even told them about her obligation to seek their cooperation. There is not even subjective evidence suggesting that the inspector was conscientious of her obligation.
>
> 121 On the contrary, the record shows unequivocally that the inspector never sought cooperation of the owners to relieve the distress of the animals.
>
> * From the beginning, the inspectors had information that the herd belonged to a member of the Millett family. Yet, the inspectors made the decision to effect a seizure long before any family member was sought out.
>
> * Some four hours later, the lead inspector, supported by an RCMP officer, confronted one member of the Millett family and learned that the herd belonged "mostly" to Nelson Millett.

> * At the home of Nelson Millett and his spouse, the lead inspector and the RCMP officer demanded to know whether Nelson Millett was the owner. There was no mention of cooperation to relieve distress. Reasonable questions about whether there was a complaint and why the police were present went unanswered.
>
> * When Mr. Millett approached the lead inspector at the pasture she "refused to answer their questions and repeated my questions about ownership".
>
> * When the lead inspector finally got the admission she wanted, that Mr. Millett owned the herd, she said nothing about relieving distress. Instead, she gave Mr. Millett a warning designed to make his statements admissible in a criminal proceeding and launched into what was clearly a criminal inquiry.

122 In light of those undeniable facts, the Deputy Minister's findings to the effect that the lead inspector sought confirmation of ownership to secure cooperation in the relief of distress, and that Mr. Millett is to blame for not admitting ownership sooner, are untenable.

123 The power to seize an animal is in s. 23(1) of the *Animal Protection Act*. That power is expressly limited by s. 23(2):

> Before taking action pursuant to subsection (1), an inspector or peace officer shall take reasonable steps to find the owner or person in charge of the animal and, where the owner is found, shall endeavour to obtain the owner's co-operation to relieve the animal's distress.

This is a prerequisite to seizure.

124 The Deputy Minister could have decided that the lead inspector had found the owner before seizure, when she spoke to the people in the house at the pasture, in the beginning of the seizure, when she was told who "mostly" owned the herd, or in the middle of the seizure when Mr. Nelson Millett finally gave her the admission she wanted for the criminal investigation. No other finding is possible. In any of these three cases, the obligation to "endeavour to obtain the owner's cooperation to relieve the animals' distress" arose.

125 The province takes issue with "endeavour" in s. 23(2), saying that its meaning is not precise. It does not mean doing nothing.

126 The seizure was unlawful. The finding to the contrary is untenable. While the obligation belonged to the inspector, not the Minister, what was the Minister to do when confronted with a review of a decision not to return animals illegally seized? At least, he might have given explicit consideration to Mr. Millett's evidence about how Rocky Top Farm could improve conditions.

127 In my opinion, the erroneous findings were essential to the deputy's decision. The unreasonable findings of fact afford alternate grounds for setting aside the decision.

Duty of Fair Representation

[46] If the Review Officer's decision is not supportable on the Record, and if the lengthy delay in pursuing the grievance was mainly caused by the actions or inactions of the Union, was there a breach of the duty of fair representation?

[47] In *Davison v. Nova Scotia Government Employees Union*, 2005 NSCA 51, Cromwell J.A. (as he was then) discussed the duty of fair representation and the need for a union to treat its members in good faith, objectively and honestly, not arbitrarily, capriciously, in a discriminatory way or with "serious or major negligence":

> 68 The common law duty of fair representation arises from the union's exclusive power to speak for the members of the bargaining unit: Gagnon at 526. The focus of this duty of fair representation, therefore, is the employment relationship regulated by the collective agreement. The employee's rights and responsibilities in all matters which in their essential character arise out of the interpretation, administration or alleged violation of the collective agreement are to be determined in the dispute resolution processes established by the collective agreement: see, eg., *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. In such matters, the union is generally both the exclusive spokesperson for the employee and the ultimate decision-maker about whether and how a grievance will be pursued. While unions often undertake a much broader mandate to serve the interests of their members, the union's duty of fair representation is anchored in the collective agreement.
>
> 69 The duty of fair representation balances the overall interests of the membership with those of individuals. It is the nature of collective bargaining that what is in the overall best interests of the unit will be contentious and may conflict with the personal interests of some individual members. The union's duty is to fairly represent the interests of all the members of the bargaining unit. Where the interests of individual members must be balanced with those of the bargaining unit as a whole, the union has considerable discretion as to how this should be done. And, as Gagnon makes clear, the standard is not perfection. The union is free to exercise its judgment concerning the best interests of the bargaining unit provided that it does so in good faith, objectively and honestly. It must not act arbitrarily, capriciously, in a discriminatory way or with "serious or major" negligence: Gagnon at 527-528. What is in the best interests of the bargaining unit is generally a multi-faceted question with no one, right answer. The duty of fair representation is imposed to prevent abuse of the union's exclusive power to represent the members of the unit, not to allow courts to second guess the union's judgment calls.

The Medical Records

[48] No medical records were ever requested by the Union relating to the March 23, 2011 grievance. However, the Review Officer included both grievances together in excusing the delay by the Union in dealing with the grievances.

[49] The Review Officer dismissed Ms. Nickerson's complaint under s. 56A(2) of the *Trade Union Act*. As a result, the Union was never asked to respond or add to the Record in accordance with s. 56A(3). The Record presented on this judicial review does not include all correspondence referenced in the provided communications. Nonetheless, a review of the available Record regarding the facts related to the provision of Ms. Nickerson's medical records relevant to the October 6, 2011, grievance is necessary in order to determine the reasonableness of the Review Officer's decision.

[50] In her letter of April 16, 2013, Susan Coen, Legal & Legislative Representative for CUPE, wrote to Marianne Welsh of CUPE:

> 3. Medical information/file not provided
>
> My prior letter (dated March 14, 2012) delineated six main reasons why we need medical evidence. This was reiterated to Sister Nickerson by Kim Cail in her letter dated April 5, 2012. Despite these requests and explanations, Sister Nickerson has thus far refused to provide the needed medical evidence. As we have discussed, this severely constrains the Union in preparing and presenting its case at arbitration. It effectively closes certain avenues which we could and should explore.
>
> I also reviewed the materials from the Lancaster House Audio Conference on March 21, 2013, "High Conflict Personalities: Dealing with Difficult Behaviors and Personality Disorders". We are not making any assumptions or conclusions as to whether Sister Nickerson falls within this ambit; and we do not have the medical evidence to confirm or deny it. So, since the medical evidence is lacking, we can only consider this possibility. Although I hesitate to mention this, we are obliged to consider the possibility, as indicators appear to be present. Of course, we would need a doctor to provide some answers, which hasn't happened.
>
> 4. Evidence (documentary and *viva voce*) at arbitration hearing.
>
> As discussed, the inability to obtain and assess medical evidence, and prepare for arbitration, presents obstacles for the Union. The arbitration with Arbitrator Gus Richardson is scheduled for July 23, 24, 31 and August 1. If the Grievor decides to provide medical evidence, you will need the medical professional(s) to testify. Delay will cause problems. Late disclosure could mean an adjournment or an inability to use the documents/reports.

> …
>
> I hope this provides further direction. If you feel it appropriate, please feel free to share this letter with the Local and with Sister Nickerson. Once again, I would recommend that she share the letter with her doctor, so her doctor is aware of the Union's repeated request for medical evidence. [Emphasis added]

[51] The letter of April 16, 2013, reveals that the Union was convinced that Ms. Nickerson had refused to provide them with her medical information. That letter also references Ms. Coen's prior letter "dated March 14, 2012" (the March 14, 2012, letter is not part of the Record). Therefore, thirteen months passed between Ms. Coen's first letter and her second letter. Ms. Coen claimed that Ms. Nickerson "refused to provide the needed medical evidence".

[52] In her email of April 24, 2013, to Sandra McKinley, Marianne Welsh and Jennifer Dimoff of CUPE, and Janet Stevenson, legal counsel, Ms. Nickerson wrote:

> Hi Marianne,
>
> I hope this letter finds you well.
>
> Thank you for your forwarding Susan's response. Now more than ever I feel it is necessary to meet with Susan, Jacqui, and my lawyer. Susan's correspondence clearly states that she still believes that I have refused to provide the union access to my medical documents and this is simply NOT correct, as I clearly indicated my willingness to do so in my letter to Susan dated March 21, 2012 and forwarded to you on July 24, 2012. I have copied and pasted the relevant sections for your ease of reference.
>
> > "I am more than willing to cooperate and will provide ALL of the medical documents in my files and any additional documentation at your request. I am not, however, comfortable with any non-medical persons speaking to my doctors. Leanne MacMillan was not given permission to speak to my doctor on my behalf and she attempted to sway my physician's medical opinion about my health. I feel very strongly that this crossed a professional boundary and had an overall negative impact on my well-being. Leanne had no basis for making an assessment of my health as this was our first and only meeting."
>
> And:
>
> > "You stated that the "limits and restrictions" I place on the information the union receives-by not granting consent to speak directly with my medical professionals- means that I must accept that there may be consequences. My response is to reiterate that I am happy to provide all the documentation that is already on my medical files AND I am happy to

> solicit (in written form) any additional medical information from my doctors at your request."

[53] According to Ms. Nickerson's email, she had expressed her willingness and interest in providing her medical information to the Union by way of letter to Ms. Coen as early as March 21, 2012, forwarded to Ms. Welsh on July 24, 2012. Neither the letter to Ms. Coen, nor the forwarded correspondence to Ms. Welsh were included in the Record, but they are referenced in Ms. Nickerson's April 24, 2013, email. Ms. Nickerson's only "restriction" was that she wanted all requests to be in writing as she was not comfortable providing *carte blanche* permission to the Union to speak directly to her doctors. Ms. Nickerson wanted a reviewable record of what was being requested by the Union from her health care providers as she was concerned about the tone of the Union's conversations with her doctor. No reason was provided in the Record as to why the Union did not reply to Ms. Nickerson's letters of March and July 2012.

[54] Additionally, no reason was provided to explain why the Union did not send Ms. Nickerson written authorization and consent forms in 2012 to allow them to obtain the necessary medical information or make written requests for Ms. Nickerson's medical information following her letters of 2012.

[55] In a letter dated May 15, 2013, 14 months after Ms. Nickerson expressed her willingness to provide her medical information to the Union if the requests were made in writing, Marianne Welsh wrote to Ms. Nickerson in response to her April 24, 2013, email:

> Thank you for your April 24th email indicating your willingness to provide copies of your medical files and to submit to a psychological assessment.
>
> I am attaching an authorization and consent form that I would ask that you complete and sign, and provide to the medical professional(s) whose files you are willing to have disclosed on your behalf. Please arrange for the files to be couriered to my attention at the CUPE Atlantic Regional Office. I understand that you have not given me permission to speak with any of the professionals who will be providing medical information. CUPE Local 3912 will pay the fees and expenses associated with the provision of the files. Please send any invoices and/or receipts to this office and I will forward to the Union for payment.
>
> I ask that you schedule an appointment with your General Practitioner (GP) as soon as possible to request a referral for a psychological assessment. The choice of psychologist is a decision to be made with your GP. Please keep me updated on the status of the referral. CUPE Local 3912 will pay the costs associated with the referral and assessment. Again, please send any invoices and/or receipts to

> this office and I will forward to the Union for payment. For a copy of the assessment to be released to me, you will also have to provide the psychologist with a completed and signed authorization and consent form.
>
> Thank you for your cooperation. We will review and discuss your medical information and psychological assessment in preparation for the arbitration hearing scheduled July 23rd, 24th and 31st, and August 1st. If you require alternative arrangements for payment of expenses, fees or costs, please let me know so that I can provide direction to the Union.

[56] The Record does not clarify when Ms. Nickerson provided the authorization and consent forms. However, some light is shed on this mystery by Mr. Mason, Q.C.'s letter to the Labour Board dated November 25, 2014:

> (ii) Consent to Release Medical Information – CUPE continues to assert that Ms. Nickerson has refused to release to the Union her medical records. This astonishing statement continues to be made even though Ms. Nickerson's family doctor's file was provided to CUPE on May 31, 2013 and Dr. Rosenberg's report was forwarded to them on July 2, 2014.
>
> The only restriction Ms. Nickerson has placed on the release of medical information is that CUPE's contact with her physicians be in writing. This restriction was placed on CUPE as, early on in the process, CUPE officials attempted to pressure Ms. Nickerson's family doctor to revise a previous diagnosis pertaining to Ms. Nickerson's health. CUPE's actions were inappropriate and potentially medically harmful, and forced Ms. Nickerson to take this step.
>
> Ms. Nickerson has repeatedly advised CUPE that it may write to her physicians for medication information. CUPE only recently notified Ms. Nickerson that it was not in possession of (the May, 2013 drafted) medical release form. This form, Ms. Nickerson signed on May 29, 2013 and presumed was it included in the medical file her doctor's office forwarded to CUPE on May 31, 2013. The fact that Ms. Nickerson's doctor's office has confirmed that they do have a copy of the signed consent form (dated May 29, 2013), casts doubt on CUPE's claims not to have received it.
>
> Otherwise, Ms. Nickerson's concerns surrounding the medical consent forms has been limited to simply requesting minor revisions as some of the forms proposed permitting access to unqualified (and unnecessary) local executives.
>
> [Emphasis added]

[57] According to Mr. Mason, Q.C.'s letter, Ms. Nickerson executed the requisite authorization form on May 29, 2013 (within one month of its receipt) and by May 31, 2013, her medical file had been forwarded to CUPE. The date of the receipt of

Ms. Nickerson's medical file is confirmed in later correspondence from the Union dated May 28, 2014.

[58] Ms. Nickerson continued to correspond with the Union. On June 19, 2013, she wrote via email to Marianne Welsh to inquire about the requested personality assessment being prepared by GPS (Genest Psychological Services):

> Hi Marianne,
>
> I was just wondering if you've made a decision regarding the personality assessment? Should I schedule the appointment with GPS? Also, I am still hoping to hear back from you regarding the unaddressed questions and concerns in my April 24th letter.

[59] On July 3, 2013, a letter from Marianne Welsh was sent to Ms. Nickerson denying her request to meet with Susan Coen:

> I am writing in response to your request to meet again with Susan Coen, Legal and Legislative Representative, and others to discuss Sister Coen's letter dated April 16, 2013.
>
> When the psychological assessment to which you have agreed has been completed and the report received and reviewed, a determination will be made whether a meeting with Sister Coen is warranted.
>
> I hope this information is of assistance to you.

[60] In her July 8, 2013, email to Sandra McKinley, Marianne Welsh and Jennifer Dimoff of CUPE, Ms. Nickerson then wrote:

> Hi Marianne,
>
> Thank you for finally answering my question regarding my earlier meeting request. I was disappointed, however, to see that you didn't address any of the other concerns I posed in my April 12, 2013 response letter to Susan (ie. The fact that Susan indicated her belief that I had at some point refused to provide my medical files, when in fact I had not – as can be seen in previous email threads; and my question regarding the relevancy of the personality assessment to the upcoming arbitrations; and also my concern that Susan did not address CAUTs finding that not only was I NOT insubordinate by continuing to ask questions about the university's jurisdiction with respect to my course notes being posted to facebook, but that they indeed breached my academic freedom by threatening me to remove them).
>
> If you could please address these concerns (originally submitted April 12, 2013) as soon as possible I would be very grateful.

[61] Ms. Nickerson then wrote an email on July 25, 2013, to Marianne Welsh:

> …I was wondering if you would send me a copy of the letter that notified the university and arbitrator of the postponement? The copy attached above was addressed only to myself and cc'd to Jennifer Dimoff. Since it concerns me, I would like a copy of the letter that notified SMU and the arbitrator for my personal records.
>
> I am also requesting a response (for the third time) to the questions/concerns I posed in my April 12, 2013 response letter to Susan's assessment (ie. The fact that Susan indicated her belief that I had at some point refused to provide my medical files, when in fact I had not – as can be seen in previous email threads; and my question regarding the relevancy of the personality assessment to the upcoming arbitrations; and also my concern that Susan did not address CAUTs finding that not only was I NOT insubordinate by continuing to ask questions about the university's jurisdiction with respect to my course notes being posted to facebook, but that they indeed breached my academic freedom by threatening me to remove them).
>
> If you could please address these concerns (originally submitted April 12, 2013, and again on July 8, 2013) as soon as possible I would be very grateful.

[62] In an email dated August 8, 2013, Ms. Nickerson wrote to Sandra McKinley, Marianne Welsh and Jennifer Dimoff of CUPE:

> Dear Marianne,
>
> I am writing to request a meeting with Jacqui Bramwell to discuss concerns that I am being discriminated against on the basis of your belief that I have a personality disorder.
>
> Your letter dated July 3rd, 2013 states: "When the psychological assessment to which you have agreed is completed and the report received and reviewed, a determination will be made whether a meeting with Sister Coen is warranted." This suggests that your and Susan's willingness to meet with me to answer my questions about Susan's decisions about my case is dependent upon the outcome of my personality assessment. It is my feeling that this, coupled with your failure to respond to any of my requests for clarification on the relevance of my upcoming personality assessment to the cancelled arbitration, and your open hostility toward me during meetings (as noted by both Janet Stevenson and Judy Haiven), is suggestive of discrimination on the grounds of perceived disability.
>
> If a meeting with Ms. Bramwell is not possible at this time, please direct me to the appropriate protocol so that I may take the correct steps.

[63] On August 28, 2013, Ms. Nickerson then wrote to Jacquie Bramwell, CUPE:

> I apologize for contacting you this way but my request (below) sent to Marianne on August 8th has remained unanswered for three weeks.
>
> I am writing to request a meeting with you to discuss concerns that I am being discriminated against by Marianne Welsh on the basis of her belief that I have a personality disorder.
>
> Please find my letter to Marianne, below…

[64] Ms. Bramwell wrote back to Ms. Nickerson on September 13, 2013:

> This is in response to your letter dated August 28, 2013. Please feel no need to apologize. Feel free to correspond as you wish. I apologize for not responding earlier. I've been away from the office.
>
> …
>
> 4. Throughout her handling of this file, Marianne has been diligent. For example, I know that she ahs worked with the Local and tried her best to get the assessment done in a timeframe that would have allowed the arbitration to proceed on the summer dates as scheduled. Unfortunately, Genest Psychological Services were unable to accommodate that timeframe. As Genest was your choice of service (and no doubt a good choice; it is a highly respected service), this left no alternative but to adjourn those summer dates.
>
> …
>
> 6. New arbitration dates depend upon whether or not the expert from Genest will testify, as the parties must work around the expert's schedule. Once that is known, then the parties', witnesses', and arbitrator's availability will be used to find new hearing dates.
>
> Based on the above, and since everything is moving along, I see no need for you to meet with me at this point. I would hope that everyone would move forward in a positive fashion, in a way that is respectful and healthy, and focus on preparing for the arbitration. Of course, if you have information or issues to raise beyond those in your August 28 letter, I'd be happy to consider a further request for a meeting.

[65] Ms. Nickerson replied to Ms. Bramwell on November 27, 2013:

> Thank you for your letter dated September 13, 2013. I'm sorry for my late response. The itemizations below correspond to those in your letter.
>
> …

> 4) I am quite certain that Marianne has not been diligent with respect to my file. I will call your attention to the fact that last year at least three or four months passed between her attempts to schedule arbitration. Actually, it will be four years this December from the time I first reached out to my union for help (though, at your request, one month of that time was taken for medical reasons). It seems to me that four years is an unacceptable amount of time.

[66] Until a letter was sent on May 28, 2014, from Marianne Welsh to Ms. Nickerson, the Record does not disclose any further mention by CUPE of the medical records. The only supportable conclusion apparent on the Record is that the Union received Ms. Nickerson's medical files up to May 29, 2013, as that date is mentioned in the May 28, 2014 letter. Yet twelve months later, having done nothing with that medical information, the Union was asking for an update:

> Thank you for your forwarding Barry Mason's letter of May 27, 2014. On behalf of the Union, I again will respond in brief by saying that the letter contains inaccuracies and points of disagreement; however, the purpose of this letter is not to delve into them.
>
> The medical evidence I have received to date consists of records from Dr. Fiona McGrath, GP, for the period May 01, 2009 to May 29, 2013. The Union requests that you provide the remainder of Dr. McGrath's file.
>
> The Union also requests that you provide any other files/records from medical professionals related to disability, whether physical or mental.
>
> The Union further requests that you provide written consent/authorization for Susan Coen, Jacquie Bramwell and Steve Cloutier to be provided with a copy of the Genest report in its entirety.

[67] Marianne Welsh then wrote to Ms. Nickerson on October 23, 2014:

> Since you have not provided written consent for the Union to contact Dr. McGrath, we rely upon you to relay our request for information to the doctor (and other health professionals). Accordingly, we ask that you provide this letter to Dr. McGrath (or other health professionals)…

[68] This letter of October 23, 2014, ignores the fact that Ms. Nickerson advised the Union that she was agreeable to provide her medical information to the Union in 2012, that she merely wanted all requests and responses regarding her medical file to be in writing, that she had provided authorization for her physician to provide such medical information as far back as May 2013 (within one month of the Union sending her the authorization to execute) and that the Union had

received such medical information, some eighteen months prior to writing the October 23, 2014 letter.

[69] In a letter dated October 30, 2014, Mr. Mason, Q.C. wrote to Marianne Welsh in an effort to clarify the ongoing confusion:

> 2) **Written consent** – CUPE's statement that Professor Nickerson has refused to "provide written consent" for CUPE to write to her physicians is not accurate. Professor Nickerson has repeatedly advised that you may write to her physicians to obtain information. You wrote that on April 5, 2012, the union asked Professor Nickerson to provide her medical professional(s) with Ms. Coen's letters to Peter Baxter dated March 14, 2012 and March 27, 2012. You wrote that you "did not receive a medical report answering the medical questions" posed in those letters. This was simply because Professor Nickerson did not receive a reply from CUPE in answer to her request to have the questions presented more clearly. Her April 6, 2012 letter stated:
>
> > "The March 14th and 27th letters are five and six pages, respectively, in length. My doctor asks that the questions be presented clearly and precisely in point form so that she may have a better understanding of what she is to comment on."
>
> Further, your June 17th, 2014 letter that "these medical questions be answered", was a muddled request at best, you wrote:
>
> > "One of the attachments is a letter from Susan Coen to Peter Baxter dated March 14, 2012. On page 5 (sic) Sister Coen outlined medical questions. While the union awaits Dr. E. Rosenburg's report, I am advising that should his report not answer these questions, the union still asks that they be answered."
>
> Ms. Welsh, there are no questions outlined on page five of Ms. Coen's March 14th letter. In fact, there are no questions outlined on ANY page of Ms. Coen's March 14th letter.
>
> Simply put, if you have questions of Dr. McGrath concerning accommodation or any other matter you should write to her directly;

[70] In his November 21, 2014, letter to Marianne Welsh, Mr. Mason, Q.C. again attempted to sort out the confusion regarding the medical information:

> (3) Medical Authorizations – CUPE is wrong. The correspondence on file does not support your position. This issue will be canvassed by the Department of Labour.
>
> …
>
> There are numerous errors in your November 19, 2014 letter.

[71] CUPE's November 19, 2014, letter is not found in the Record.

[72] In his November 25, 2014, letter to the Labour Board, Mr. Mason, Q.C. wrote:

> …
>
> CUPE refused to write to Ms. Nickerson's physicians.
>
> …
>
> CUPE has refused to write to Ms. Nickerson's physicians to determine the impact a failed mediation would have on her condition.
>
> …
>
> (ii) Consent to Release Medical Information – CUPE continues to assert that Ms. Nickerson has refused to release to the Union her medical records. This astonishing statement continues to be made even though Ms. Nickerson's family doctor's file was provided to CUPE on May 31, 2013 and Dr. Rosenberg's report was forwarded to them on July 2, 2014.
>
> The only restriction Ms. Nickerson has placed on the release of medical information is that CUPE's contact with her physicians be in writing. This restriction was placed on CUPE as, early on in the process, CUPE officials attempted to pressure Ms. Nickerson's family doctor to revise a previous diagnosis pertaining to Ms. Nickerson's health. CUPE's actions were inappropriate and potentially medically harmful, and forced Ms. Nickerson to take this step.
>
> Ms. Nickerson has repeatedly advised CUPE that it may write to her physicians for medication information. CUPE only recently notified Ms. Nickerson that it was not in possession of (the May, 2013 drafted) medical release form. This form, Ms. Nickerson signed on May 29, 2013 and presumed was it included in the medical file her doctor's office forwarded to CUPE on May 31, 2013. The fact that Ms. Nickerson's doctor's office has confirmed that they do have a copy of the signed consent form (dated May 29, 2013), casts doubt on CUPE's claims not to have received it.
>
> Otherwise, Ms. Nickerson's concerns surrounding the medical consent forms has been limited to simply requesting minor revisions as some of the forms proposed permitting access to unqualified (and unnecessary) local executives.
>
> CUPE continues to write to Ms. Nickerson blaming her for their failure to obtain medical information. CUPE's comments are put forward in an attempt to shield themselves from their own misdeeds. Their statements are false and represent a clear act of bad faith; …

[73] In his December 4, 2014, letter to Marianne Welsh, Mr. Mason, Q.C. said:

> If you feel that Dr. McGrath's opinion has been impacted by the "mistaken impression" you mention in your letter, then simply write to Dr. McGrath for clarification. This is a standard course of action. But, no, time and time again, throughout the course of this grievance, CUPE chooses to try to undermine the uncontradicted medical opinion on file rather than seek clarification. If CUPE was interested in seeking clarification and getting the truth, it would write to Dr. McGrath or Rosenberg if it had questions concerning their opinion. Of course, CUPE does not do that – it prefers to ignore the medical opinion on this file and engage in a process that is not in their member's best interest and is exacerbating her depression. …

[74] Finally, in his December 31, 2014, letter to Marianne Welsh, Mr. Mason, Q.C. again noted the confusion surrounding Ms. Nickerson's medical information:

> … Interestingly, this is one area where CUPE has been consistent – it has refused to take any steps to inquire into the correct process to accommodate Professor Nickerson's major depression.

[75] The Review Officer suggests that the Union's March 3, 2014, letter confirms Ms. Nickerson's lack of cooperation regarding the collection of her medical evidence. The March 3, 2014, letter states in part:

> 3. Scheduling: The Union cannot get back to Shannon shortly on a date for the first arbitration. We can't commit to dates (or expect the Employer to do so), or ask the Arbitrator to set dates, until the scope of the hearing regarding medical evidence is determined. This depends on what we hear from and receive from Shannon.
>
> We have already tried to get dates for arbitration, but the dates (and number of days) depends upon whether or not the Union is relying upon medical evidence, and the scope of that evidence. We are waiting for Shannon to decide what medical evidence Shannon does (or doesn't) want the union to raise. If we are relying upon medical evidence (including physical and/or medical information), then we must disclose to the Employer, and the Employer may (or may not) retain a medical expert to testify. The Employer might also demand production, which we might oppose, which might require additional days (or conference calls) to resolve disclosure/production issues.
>
> So, we want to make sure that Shannon is not expecting to hear about arbitration dates shortly. We have moved forward as much as we can; we look forward to hearing from Shannon so we can take next steps.

[76] The Review Officer found that Ms. Nickerson was partly to blame for the delay because she obstructed the Union's efforts to obtain her medical information. Contrary to the Review Officer's finding, based on the Record, the Union's failure to move Ms. Nickerson's matter along while waiting for medical information that it either had or should have had if they had reviewed the correspondence more carefully was the responsibility of the Union. Put another way, finding that Ms. Nickerson played a significant role in delaying the progress of the grievances is not a reasonable conclusion based on the Record. I cannot see how the Review Officer determined that Ms. Nickerson was responsible for the delay in the progress of the grievances. Ms. Nickerson merely asked the Union to put all requests for her medical information in writing.

[77] The Review Officer also found that the strained relationship between Ms. Nickerson and the Union interfered with the Union's ability to collect evidence and schedule dates. There is nothing in the Record that reflects Ms. Nickerson interfering with the Union's ability to collect evidence. When the Union directed that Ms. Nickerson undergo psychological testing to determine whether she had a personality disorder, Ms. Nickerson agreed and chose Genest Psychological Services to conduct this examination. A scheduled date for arbitration had to be adjourned to accommodate the GPS testing schedule. The test results confirmed that Ms. Nickerson did not have a personality disorder. It is hard to conceive that any delay resulting from the psychological testing was the fault of Ms. Nickerson. When the Union requested psychological testing she fully cooperated in the assessment, but the assessment did not materially advance her grievance.

[78] While Ms. Nickerson objected to the timing of the mediation due to an onset of depression, when the mediation was adjourned, the time scheduled for the mediation was used for settlement discussions, the matter was resolved during that same time and, therefore, no actual delay occurred.

[79] The Review Officer's determination of the facts regarding the delay in this case was not reasonable. Ms. Nickerson did not play a "significant role" in the delay as stated by the Review Officer. In fact, she did not play much of any role in the delay. The only conclusion possible on the Record is that delay was caused by the inattention and lack of follow up by the Union.

Can a Delay by a Union in Pursuing a Grievance Constitute a Breach of the Duty of Fair Representation?

[80] Ms. Nickerson alleges gross negligence on the part of the Union leading to delay such that the Union breached the duty of fair representation. Can a significant delay by a Union in pursuing a grievance amount to a breach of the duty of fair representation? In my view, such a delay, combined with deficient communication by the Union and prejudice to the grievor/complainant, can establish such a breach.

[81] In *Re Campbell*, [1999] C.I.R.B. No. 8, the union failed to return phone calls or to ensure that it had received certain documents the grievor said he would provide. The Canada Industrial Relations Board said:

> 35 The Board on numerous occasions has held that a lack of communication *per se* does not constitute a violation of the Code... There is, however, one exception, namely that the lack of communication must not prejudice the complainant.
>
> 36 This position was adopted in *Jacqueline Brideau* (1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRB no. 550), where the Board held:
>
> > Although the lack of communication between the union and Brideau in the instant case did not result in a violation of section 136.1 [now section 37], this does not mean that the Board does not consider communication to be an element that can never give rise to a section 136.1 [now section 37] violation.
> >
> > In handling a grievance and dealing with the employer, it is incumbent on the union to ascertain, from all necessary sources, the facts giving rise to the grievance. These facts can be elicited from either the grievor, other persons knowledgeable about the incident ... or documentary evidence.
> >
> > ...
> >
> > Thus, there is no obligation to communicate with the grievor, but if the lack of communication results in a situation which prejudices the position of the grievor, then that omission can result in a violation of section 136.1 [now section 37]. (pages 239-240; 269-270; and 14,109)
>
> 37 This view has been supported by the Board in other decisions (see *Marc Lapointe* (1990), 80 di 42 (CLRB no. 786); *Bruce A. Cassman* (1994), 95 di 137 (CLRB no. 1087); *Ronald Shanks* (1996), 100 di 59 (CLRB no. 1157); and *Luc Gagnon* (1992), 88 di 52 (CLRB no. 939)). As the Board stated in *Luc Gagnon*, *supra*:

> We share this view. In fact, if the Board concluded that poor communication between a union and an employee did not constitute generally a violation of section 37, it is mainly because it had determined, rightly in these cases that the union's conduct in the actual processing of the grievance still met the minimum requirements of the Code.
>
> ... past Board decisions reveal that if a lack of communication "is not per se a violation of a union's duty of fair representation" (*Clarence R. Young* (1989), 78 di 117 (CLRB no. 753), page 121), it is nevertheless a factor the Board must often take into account in properly assessing a union's conduct.
>
> ...
>
> In conclusion, the evidence reveals that Mr. Gagnon did not receive this minimum representation to which he was entitled from his union. Its inaction or superficial action until November 1990 shows, in our opinion, such a total abdication of its responsibilities that the problem is not one of simple communication, but rather of a lack of representation. ... (pages 71 and 74)

38 The lack of investigation and the lack of communication with the grievor were considered to be determinative by the Board in *Bruce A. Cassman, supra*:

> The Board considers that the matter of lack of communication, although in itself usually not considered a violation of section 37, is noteworthy. Had there been any communication with the grievor, this matter may well have been resolved early on. It is also a fact that had the proper file been in place and had the decision not to proceed been committed to the file, the grievance officer would have been able to convey this information to Mr. Cassman in October rather than telling him that the Union was awaiting an arbitration date. (pages 143-144; emphasis added)

39 The present case does not simply involve a lack of communication with a grievor concerning the union's disposition of a grievance. Here, Mr. Campbell was under the impression that his grievance would be pursued once the union received the repair receipts. Given that the business agent was waiting for evidence he required from Mr. Campbell prior to making a decision with respect to the pursuit of the grievance, it was incumbent upon him to return the complainant's telephone calls. Contact with the complainant would have resolved the question of the receipts requested by the union had that remained in issue, and would have ensured that the union had all the information it needed to properly decide on its course of action. Consequently, in the particular circumstances of this case, the failure to return the complainant's calls following the meeting or to make any effort to contact him, in the Board's opinion, did in fact constitute a failure to fully investigate and resulted in a situation that prejudices the complainant's position.

> 40 In sum, the Board finds that the union did nothing before or after the grievance meeting to ensure that it represented the complainant in a manner consistent with the requirements of the Code. Its summary and expeditious approach to the complainant's case and the absence of an investigation that would have enabled it to obtain the supporting documentation and to consider all relevant information in order to deal with the grievance in an informed manner showed a perfunctory treatment of the case. Such treatment was tantamount to arbitrary conduct in contravention of the Code (see *Gary Ferguson* (1997), 105 di 56 (CLRB no. 1213)). [Emphasis added.]

[82] In *Ronald Shanks* (1996), 100 di 59, [1996] C.L.R.B.D. No. 20, the Canada Labour Relations Board held that there was a breach of the duty of fair representation where the union lost track of a grievance and took no action for some two years:

> 56 The Board's jurisprudence establishes that failures in communication, while regrettable, are not in themselves determinative of a violation of the duty of fair representation unless it results in prejudice to the position of the grievor. Unions are by no means held to an absolute standard of representation and may, in good faith, make mistakes that do not necessarily constitute violations of section 37. As to Mr. Dunster's admission regarding the Union's handling of these grievances, it is not in itself conclusive of a breach of the duty and must be considered in the context of all of the circumstances of the case.
>
> 57 Having considered the whole of the circumstances, the Board concludes that the Union has transgressed the acceptable boundaries of simple error or failure of communication. The failures in communication, be it between Messrs. Dubois and Dunster or with Mr. Shanks, did prejudice Mr. Shanks' position. He had a right to the diligent pursuit of his claim and interest; at the very least, he was entitled to closure. That being said, the central issue here is by no means simply poor communication but rather one of sustained neglect and inaction on the part of the Union in the exercise of its exclusive authority. However caused, the loss of the files as well as the inaction of the Union in pursuing the grievances indicated a casualness and lack of diligence amounting to indifference.
>
> 58 Nor can one argue that the Union showed diligence commensurate with the importance of the grievances as the evidence indicates an almost total absence of responsiveness, especially at the local level. It would appear that Mr. Shanks' grievances did indeed go "into limbo" and were kept there for close to two years by neglect and inattention. We were led to conclude that during this period the Union's conduct resulted in an absence of representation, which we find in the circumstances constitutes serious or major negligence. Given the course of conduct of Messrs. Dunster and Dubois, there is reason to suppose that neither might have seriously given further consideration to these grievances had Mr. Shanks not filed his complaint with the Board. [Emphasis added.]

[83] Accordingly, the Board concluded, at para. 59, that "[t]hrough its lengthy neglect, inaction and inattention to Mr. Shanks' grievances, the Union has acted in a superficial, perfunctory and arbitrary manner and has breached its duty of fair representation."

[84] In *Peacock v. Union of Canadian Correctional Officers*, 2005 CRTFP 9, [2005] C.P.S.S.R.B. No. 11, the Canada Public Service Staff Relations Board said:

> 42 … This is not a case where the bargaining agent considered all the facts of the case, the relevant law, and made a reasoned decision that the case was lacking in merit and determined not to proceed further with the grievance. Unfortunately, this is a case where the local representative of the bargaining agent dropped the ball and failed to file the transmittal forms to move Ms. Peacock's grievance on to the second and third levels of the grievance process. Further, the local representative did not communicate his error to Ms. Peacock and did not take any steps to repair his error. The evidence before me clearly indicates that Ms. Peacock did not intend to abandon her grievance, that she signed the forms to advance the grievance, that she arranged for its timely transmittal to the local president of bargaining agent, and that she inquired on a regular basis to determine the status of her grievance.
>
> …
>
> 45 This is not a case where the bargaining agent acted in bad faith, with any lack of integrity, or with hostility towards the complainant. This is not a case in which the employee is asking the Board to review the bargaining agent's exercise of discretion in the handling of her grievance. It is a case where there is serious and major negligence by a local president of the bargaining agent in failing to present the grievance at the second level of the grievance process, and then failing to inform Ms. Peacock that he had not presented the grievance that he had undertaken to present on her behalf. The local president failed to communicate with Ms. Peacock concerning her grievance and failed to take steps to repair his negligence. This case was important to Ms. Peacock, and it would not have taken much effort to transmit the forms that she provided to the bargaining agent's representative. It is apparent, and it is conceded by the bargaining agent, that it failed in its duty to represent Ms. Peacock. The bargaining agent concedes that the conduct of Mr. Houghton in failing to file the forms is serious and negligent. In my view, the bargaining agent's failure to present the grievance at the second step of the grievance process amounts to arbitrary conduct. The bargaining agent is responsible for the acts of negligence of its local representative, at least where those acts relate to the failure to file a grievance, when it had undertaken to do so. On the facts of this case the bargaining agent has breached section 10(2) of the PSSRA.

[85] In *Senia v. Ontario Public Service Employees Union, Local 213*, 2011 CanLII 43086, the Ontario Labour Relations Board found that a two year delay in moving a grievance forward as a result of the Union's inattention, even without specific prejudice, amounted to a breach of the duty of fair representation. The Board stated, at para. 11:

> It is clear to me that the union's failure to refer Mr. Senia's grievance to arbitration until the passage of more than two years from the date of the employer's Step 3 grievance reply constitutes a violation of section 74. The union says it is guilty of no more than an honest mistake. I disagree. The timely referral of a termination grievance is a critical step. The failure of the union steward has not been explained, but more importantly, the union has not explained how it is that the error, if that is what it was, went undetected and uncorrected for more than two years. This would suggest there were no checks and balances in place in the union's internal processes, or that, if there were, they were not engaged. The unexplained failure to make a timely referral of a termination grievance to arbitration constitutes gross negligence or a flagrant error consistent with a non-caring attitude. That is so particularly when one considers what was at stake for Mr. Senia, who had every reason to believe, based on communications from union representatives sincere in their belief, that an arbitration hearing would proceed and that, accordingly, his chance for reinstatement at least remained viable.

[86] In *McAuley v. Chalk River Technicians and Technologists Union*, 2011 FCA 156, [2011] F.C.J. No. 668, the court said:

> 18 As a final ground of complaint, the applicant raises the Union's unreasonable delay in pursuing his case and failure to communicate with him in a timely fashion. The Board addressed this issue in its reasons, called the situation "unfortunate", but held that there was no breach of the duty of fair representation.
>
> 19 In light of the evidentiary record, it was open to the Board to conclude as it did. Its decision falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and the Code...

[87] The Federal Court in *McAuley* did not specifically reject the proposition that union delay in pursuing a grievance could lead to a finding of a breach of the duty of fair representation.

[88] Based on the Record, the Review Officer's decision regarding a lack of bad faith was based on unreasonable factual findings. Therefore, it cannot be said that his decision regarding the lack of bad faith, and the breach of the Union's duty of

fair representation, fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

Prejudice to Ms. Nickerson

[89] Ms. Nickerson complains that she was not fairly represented by the Union and that the Union's conduct was unacceptable because of the lack of action taken in relation to her grievance.

Medical Opinions

[90] Ms. Nickerson provided the Review Officer with medical reports from both her family doctor, Dr. McGrath, and her psychiatrist, Dr. Rosenberg. The Review Officer determined that he could not rely on these reports for reasons discussed below.

Dr. McGrath

[91] Ms. Nickerson argues that the Review Officer made improper determinations about the credibility of Dr. McGrath's report. Ms. Nickerson also complains about the Review Officer's finding that while Ms. Nickerson may have been physically and mentally disabled at the time of the mediation and settlement, there was not sufficient evidence to show that the way the grievances proceeded had a direct impact on her disability.

[92] On the basis of the contents of Dr. McGrath's report, the Review Officer's finding that Dr. McGrath's opinion was negatively impacted by her misunderstanding of the legal process in which Ms. Nickerson was engaged was one reasonable conclusion available to the Review Officer. The Review Officer pointed specifically to the opening paragraph of Dr. McGrath's Report which states:

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

[93] The Review Officer reasonably determined that proceeding through mediation as opposed to arbitration would not have shut Ms. Nickerson out as a mediated settlement would have required Ms. Nickerson's personal agreement and compliance.

Dr. Rosenberg

[94] The Review Officer referred to p. 8 of Dr. Rosenberg's Report in determining that his opinion was negatively impacted by his misunderstanding of the legal process in which Ms. Nickerson was engaged:

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

[95] The Review Officer also found that Dr. Rosenberg's medical opinion at times became more of a medical/legal opinion, for example where he describes the basis for Ms. Nickerson's dismissal as "tenuous" and that she could "refute" certain of the University's allegations. Finding that Dr. Rosenberg weighed in on the legitimacy and legality of the University actions and, therefore, provided opinion outside of his expertise, was one reasonable conclusion available to the Review Officer.

Use of the Medical Opinion

[96] The Review Officer's conclusion that the Labour Board would not be able to rely on either Dr. McGrath's or Dr. Rosenberg's legal opinions in relation to certain issues was within a range of reasonable, acceptable outcomes that are defensible based on the facts and the law. The Review Officer found the credibility of those medical opinions to be tarnished regarding issues relating to Ms. Nickerson's arguments that the Union had a duty to accommodate her request for arbitration and her request to adjourn the scheduled mediation. However, the

Review Officer made no such negative finding regarding these doctors' opinions on the impact of the delay on Ms. Nickerson. As Dr. McGrath noted in her letter dated October 20, 2014:

> Frankly, I am outraged at the length of time this whole process has taken and the toll it has taken on Ms. Nickerson. I have witnessed the personal cost to her. A number of times I have asked her if it was worth her distress to see it through, but she does not want anyone else to ever face such a situation. I have been amazed at her persistence and bravery.
>
> First of all, she has been unable to continue at her job thereby losing her livelihood. I have now completed her second annual social services form. Her shame about this is terrible. She has not been able to work for close on four years. She has suffered the consequences of poverty. She has lost her identity as a college professor. She has lost her raison d'etre.
>
> Secondly, she has been affected by depression and anxiety which wax and wane as the stressors of this case do. She has been made profoundly ill by this process. She has been stripped of her privacy and pride. I have lost count of the number of times we have copied bits of or her complete file for different people. Twice she has undergone psychiatric assessment when the only psychiatric pathology is depression and anxiety largely resulting from the struggle to address the difficulties arising in order to resolve this case.
>
> Shannon Nickerson has been deleteriously affected by the initial trauma at work and repeatedly reinjured by the process that was meant to protect and help her resolve those issues. It is essential that her case be resolved so that she can have closure, eliminate the exacerbating stressors and be able to move on and restart her life. The life she enjoyed previous to all of this is unlikely to be regained. She has lost near to four years of income and life as she previously enjoyed it. She now has trust and confidence issues that will not be easily remediated in both her personal and professional life. She has suffered prolonged depression.
>
> Please see to it that this process is fairly, transparently, and immediately resolved. I would like to use the words promptly or quickly, but it is 4 years too late for that. Allow Ms. Nickerson access to the process. If this means arbitration rather than mediation, so be it. Anything less can only serve to exacerbate both her suffering and illness. She has had more than enough of both.

[97] Similarly, Dr. Rosenberg stated in his June 30, 2014 report:

> Prior to the onset of difficulties in her university standing, Ms. Nickerson experienced symptomatology of depression and semi-circular canal dehiscence. Ms. Nickerson's family history is positive for depression in her mother and a brother, suggesting that there is a biological tendency toward this condition in Ms. Nickerson. Semi-circular canal dehiscence is a physical condition wherein inner ear functioning is compromised leading to various symptoms including dizziness

and autophony, both of which make lecturing in front of a class, while standing, difficult.

Although suffering with both depressive symptomatology and symptomatology of semi-circular canal dehiscence, Ms. Nickerson continued teaching on a regular basis. When specifically asked, Ms. Nickerson stated she had scheduled her surgical procedures to be performed at a time when she did not have teaching obligations. As well, I am unaware of any time away from teaching, which may have been missed by Ms. Nickerson as a result of depressive illness.

During the period of turmoil with the university (2010-2011), Ms. Nickerson was exposed to considerable psychological stress. An individual suffering with depression who experiences external psychological and/or physical stress will also experience an augmentation and sustaining of depressive symptomatology. It is my opinion that this has happened to Ms. Nickerson, and continues at this time.

…

It seems reasonable that Ms. Nickerson should have considerable input to any dealings that her union has with her employer. Further, it is Ms. Nickerson's view (and I can find no contradiction to this view) that her behavior involving transgressions of university policy were not as alleged by the university. Vindication will be of prime importance in the relief of any present depressive symptomatology, and in maintaining a sense of personal integrity and dignity. The actions of Ms. Nickerson's employer – described by her as "bullying and harassment," and the inaction of her union in not actively pursuing her grievance for three years has, in my opinion, contributed to the sustaining of Ms. Nickerson's depressive symptomatology.

…

Please consider the following DSM-V classification of Ms. Nickerson's emotional difficulties:

> 296.35 – Major Depressive Disorder, recurrent episode, with anxious distress, in partial remission.

The prognosis for future recovery from depressive illness in Ms. Nickerson remains good to excellent, with a return to full work status.

…

3. Relief of the continuing stressor in her life at the present time will, in my opinion, prove to be far more valuable than specific psychotherapeutic intervention in the management of Ms. Nickerson's depressive symptomatology. It is my expectation that Ms. Nickerson will be able to return to full employment status with resolution of the matters involving her employer and her union, and with vindication of her status. Ms. Nickerson will have to be an active participant in any procedure leading to resolution of the matters involving her employer and her union. Should the union proceed to grievance without Ms. Nickerson's consent and participation, and without Ms. Nickerson's vindication regarding her

> claims of harassment and bullying, it is predictable that her depressive symptomatology will be augmented and sustained.
>
> 4. Ms. Nickerson should review any resolution of her grievance with her treating caregivers prior to finalization, in recognition of possible indecision present as a result of depressive illness.

[98] In this case, due to the length of the delay, the Record indicates that Ms. Nickerson suffered prejudice related to some fundamental issues: 1) her health; 2) her employment status; 3) her ability to maintain herself financially; and 4) the stigma associated with losing her employment, the loss of her professional identity and the associated stress.

[99] Due to her specific and serious health issues, of which the Union was aware, there was clear evidence in the Record that Ms. Nickerson was prejudiced by the Union's delay in pursuing her grievance. Using the standard of review of reasonableness, the Review Officer's determination that there was no breach of the duty of fair representation because of the delay was not within a range of acceptable, possible outcomes because of the unreasonable findings of facts.

Relationship Between Grievor and the Union

[100] I have found in favour of Ms. Nickerson in relation to one ground. I will order a remedy as a result. Because the standard of review is reasonableness and the Review Officer was dealing with his home statute, I will therefore not comment on Ms. Nickerson's other complaints. However, there is one theme that came up repeatedly in correspondence from Ms. Nickerson that I will comment about, that is the relationship between herself and the Union.

[101] Ms. Nickerson did not seem to appreciate the dynamic of the Union being both the exclusive spokesperson for her as a Union member as well as simultaneously being the ultimate decision-maker as to whether and how a grievance will be pursued. She argued that her depression and mental health issues constitute a disability and because she has this disability the Union had the obligation to accommodate all of her specific requests. In this case, Ms. Nickerson requested that the Union proceed through arbitration so that she would have an opportunity to testify and be "vindicated". Ms. Nickerson argued that her disability constituted a human rights issue and thereby elevated her complaint to a quasi-constitutional level. She said that as a result, the Union would have to accommodate her need for vindication.

[102] The relationship between Ms. Nickerson as the grievor and the Union lawyer is not the same as between Ms. Nickerson and a lawyer she retains privately and personally, for instance her relationship with Mr. Mason, Q.C. Neither is her relationship with the Union as a union member the same as between an employee and an employer, where there may be an employment contract. The words of Cromwell J.A. in *Davison* bear repeating:

> 69 The duty of fair representation balances the overall interests of the membership with those of individuals. It is the nature of collective bargaining that what is in the overall best interests of the unit will be contentious and may conflict with the personal interests of some individual members. The union's duty is to fairly represent the interests of all the members of the bargaining unit. Where the interests of individual members must be balanced with those of the bargaining unit as a whole, the union has considerable discretion as to how this should be done. And, as Gagnon makes clear, the standard is not perfection. The union is free to exercise its judgment concerning the best interests of the bargaining unit provided that it does so in good faith, objectively and honestly. It must not act arbitrarily, capriciously, in a discriminatory way or with "serious or major" negligence: Gagnon at 527-528. What is in the best interests of the bargaining unit is generally a multi-faceted question with no one, right answer. The duty of fair representation is imposed to prevent abuse of the union's exclusive power to represent the members of the unit, not to allow courts to second guess the union's judgment calls.

[103] In *Purolator Courior Ltd. v. Teamsters Union Local 938*, 2007 Canlii 73922, Arbitrator Surdykowski correctly stated:

> 7. I observed that Ms. Triano is an experienced and respected union counsel, and I explained that it is neither the Union's nor Union counsel's job or duty to do whatever a grievor wants them to in an arbitration proceeding. Indeed, they could be said to be derelict in their duty if they gave up all control to a grievor. Counsel's job is to decide what is relevant and useful in presenting the case for the grievance in the exercise her professional judgment. Not only is counsel not required to defer to a grievor's wishes in that respect, delegating that function to a grievor could constitute a breach of counsel's professional responsibilities.
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> …
>
> 14. It is no part of an arbitrator's job to make anyone "happy". Indeed, the nature of the process is such that someone is almost invariably not happy, either as the hearing moves along or when the decision is rendered. An arbitrator's job is to provide the parties (which do not include a grievor separate from the union) with a fair opportunity, in accordance with the legal principles of natural justice and the duty of fairness, to present their respective sides of the case at arbitration and to decide the case on the basis of the relevant evidence presented. Other than

prohibiting a party from raising irrelevant issues or calling irrelevant witnesses or evidence, and otherwise maintaining order in the hearing room, it is no part of an arbitrator's job to tell either any party how they should approach a case or what witnesses they should call. It is no part of an arbitrator's job to referee disputes within the ranks of a party to the proceeding unless and only to the extent that any such dispute interferes with the proper conduct of the hearing.

15. Every collective agreement in this jurisdiction must contain a grievance arbitration provision which provides a mechanism for producing a final and binding resolution of all disputes between the parties concerning the interpretation, application, administration or alleged violation of the agreement (section 57(1) of the *Canada Labour Code*). This includes alleged breaches of the rights or obligations of employees under the collective agreement. But unless the collective agreement provides otherwise (and none that I am aware of do), it is the union and not any employee who is responsible for the administration of the collective agreement and which has the obligation to represent the interests of bargaining unit employees in that respect. As the party to the collective agreement, the union "owns" the grievance and arbitration procedure on its side of the labour relations fence. It is the union and not any employee who controls the filing and processing of grievances, and it is the union that decides whether or not to take a grievance to arbitration, and how to conduct the case at arbitration. A union is under no obligation to file a grievance just because an employee wants it to. It is under no obligation to take a grievance to arbitration just because a grievor wants it to. And a union is under no obligation to call witnesses or ask questions merely because a grievor wants it to if in the union's judgment, with or without the advice of counsel, it is unnecessary, inappropriate, or a "bad idea" to do so. Although a grievor is a significant participant in a labour arbitration proceeding, she does not have carriage of the matter. She does not have right to dictate to anyone, including the union, how the matter will be litigated. She does not have the right to require the union to retain any particular counsel or to retain her own counsel for the proceeding. She does not even have the right to address the arbitrator directly (other than when testifying in response to questions asked of her if she takes the witness stand). The only obligation that a union has is to deal with the employees that it represents in a manner that is not arbitrary, discriminatory or in bad faith. Any complaint that a union has breached that obligation is a matter for the CIRB, not an arbitrator.

16. Sometimes a grievor disagrees with her union's conduct of the hearing and strategy at arbitration. When a union retains counsel for purposes of a grievance arbitration proceeding, counsel's client is the union, not the grievor. Accordingly, counsel takes her instructions from the union, not from the grievor. Although counsel may have a sort of "fiduciary" duty to her, the grievor is not counsel's client. The union is the client and that is who counsel owes her primary duty to.

17. If a grievor has an issue with counsel retained by her union, that is also a matter between her, the union and counsel, and if someone feels the need, the Law Society of Upper Canada. Although an arbitrator must control the hearing

> process and maintain order in the hearing room, refereeing relations between a grievor and her union or the union counsel is not part of the arbitrator's role. An arbitrator has no jurisdiction to enter into that fray.
>
> 18. Few grievors have any legal or labour relations training or experience. Even fewer can be objective about their own case. It is always disconcerting when a grievor, either on her own or on the "advice" of someone who has not been present for any part of the proceedings, thinks that she can present her legal case better than her union, whether or not the union has retained counsel, but particularly when that union employs or retains experienced labour relations counsel to present the case. It is the rare case, and generally only by happenstance that a grievor will be able to achieve anywhere near as good a result as the union will. Indeed, because of they lack experience or legal training, and their objectivity is compromised by their personal and often emotional involvement in the case, grievors who think they know better than their union or experienced labour relations counsel are invariably and sometimes tragically wrong.

[104] According to the available Record, Ms. Nickerson clearly has a serious medical condition, depression. While the Union has a duty to treat Ms. Nickerson fairly, she was not a full party to the proceedings between the Union and the University. I do not agree that her depression required the Union to accommodate her in the manner she demanded regarding the process of pursuing her grievance.

[105] Ms. Nickerson argued that unless the Union could show that accommodating her would create undue hardship, they would have to do everything she requested. According to the Record, Ms. Nickerson's matter was initially scheduled for arbitration. When the Union decided to forgo arbitration and proceed through mediation, Ms. Nickerson complained since she felt she would no longer have an opportunity to testify and be vindicated.

[106] The matter was then scheduled for mediation. When the mediation was adjourned at Ms. Nickerson's request, and over the Union's objections, the Union used that time to enter settlement discussions and resolve the case with the University. The Settlement Agreement, which Ms. Nickerson did not take advantage of, reinstated her with no loss of seniority, cleared her employment record of any allegations of wrongdoing and provided a small monetary settlement. It did not provide Ms. Nickerson with the opportunity to testify, it did not include an apology, and the monetary award was far less than Ms. Nickerson wanted.

[107] Ms. Nickerson argues that the standard of review in relation to whether the Union was required to accommodate her disability in this case is correctness. She

argues that if the Review Officer was wrong in his understanding of the law as to whether her disability required the Union to accommodate her request for arbitration then his decision in this regard was wrong.

[108] I have reviewed the cases provided to me by counsel on this issue including: *Canadian Merchants Guild v. Gagnon et al.,* [1984] 1 SCR 509; *Newfoundland Association of Public Employees v. Newfoundland (Green Bay) Health care Centre),* [1996] 2 S.C.R. 3; *Bingley v Teamsters, Local 91*, [2004] C.I.R.B. 291; *Central Okananagan School District v. Renaud*, (1993) 95 D.L.R. (4th) 577; *Buckboro v. Winnipeg Police Association,* [2000] M.L.B.D. No. 10; *Ontario Human Rights Commission v. Simpson* Sears, [1985] 2 S.C.R. 536; *Hydro-Quebec v. Syndicat des employé-e-s de techiques professionnelles et de bureau d'Hydro-Québec, section locale 2000(SCFP-FTQ),* [2008] 2 S.C.R. 561*; Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (B.C. L.R.B.); *Gungor v. Canadian Auto Workers Local 88*, 2011 HRTO 1760; *Switzer v CAW-Canada*, [1999] OLRB Rep. 757 (Ont. LRB); *CUPE, Local 108 v. Halifax (Regional Municipality),* 2011 NSCA 41; and *Traversy v. Mississauga Professional Firefighters Association*, 2009 HRTO 996.

[109] Having reviewed those cases, considering the reasonableness standard and the fact that the Review Officer was dealing with his home statute, on the specific facts of this judicial review, I do not need to decide whether Ms. Nickerson's mental health issue elevates this issue to a quasi-constitutional status or resulted in a failure of the Union to properly accommodate one of its members.

[110] The Union has a statutory duty under s. 54A(3) of the *Trade Union Act* to fairly represent Ms. Nickerson. The Union also has a mandate in accordance with the *Trade Union Act* to act in the best interests of the Union and to foster labour relations between the Union and the employer (see, for instance, the Preamble). If a matter can be settled reasonably by the Union, without the need for arbitration or mediation, thereby avoiding unnecessary financial expense to the Union and the inevitable acrimony that would arise through litigation between the Union and the employer, then settlement must be pursued by the Union. Requiring the Union to accede to Ms. Nickerson's demands regarding the process by taking the matter to arbitration or mediation, in order to accommodate her desire to testify, when the matter could be settled, would fly in the face of well-established principles of labour law. Settlements achieved without the need for arbitration or mediation are commonplace and vitally important to the well-being of our labour law system.

Conclusion

[111] Civil Procedure Rule 7.11 states:

> Order following review
>
> 7.11 The court may grant any order in the court's jurisdiction that will give effect to a decision on a judicial review, including any of the following orders:
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> (a) an order dismissing the proceeding;
>
> (b) an order setting aside the decision under review, or part of it, and terminating any legal process flowing from the decision, or the part;
>
> (c) an injunction preventing a respondent from doing anything, or requiring a respondent to do anything;
>
> (d) a declaration that the respondent lacks the authority or has authority to do something;
>
> (e) an order providing anything formerly provided by prerogative writ.

[112] The Review Officer dismissed Ms. Nickerson's complaint in accordance with s. 56A(2) of the *Trade Union Act*. In accordance with Civil Procedure Rule 7.11(b) I set aside the Review Officer's decision. Additionally, I direct that a different Review Officer reconsider Ms. Nickerson's complaint under s. 56A(1) of the *Trade Union Act*.

[113] With respect to costs, I direct that the parties make effort to resolve the issue between themselves and if no agreement can be reached by January 31, 2017, then I will hear submissions in that regard.

Arnold, J.