



ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **3495-12-U**

Douglas Murdoch, Applicant v International Association of Heat and Frost Insulators, Local 95, Responding Party v Dew Point Insulation Systems Inc., Intervenor

BEFORE: Lyle Kanee, Vice-Chair

DECISION OF THE BOARD: October 12, 2017

Introduction

1. This decision addresses the applicant's claim for lost income damages that he alleges resulted from harm to his mental health caused by the union's failure to properly investigate the circumstances of the termination of his employment on March 29, 2012.

2. The applicant has suffered severe anxiety and emotional distress for the past five years. Treatment, including medication and counseling, has largely been ineffective. The applicant, who enjoyed a lengthy and productive career, has been unable to work since his employment ended. His family life has suffered greatly. In her testimony, his psychiatrist indicated that it was her hope that a resolution to the "process", meaning these proceedings, would permit the applicant to move on. Of course, she recognized that an unfavourable result would not be as satisfying as a favourable one. Nonetheless, she felt that progress was unlikely so long as this process was ongoing.

3. In light of this testimony, and in the interests of bringing this already prolonged process to as early a conclusion as possible, this decision will not review all of the evidence and arguments of counsel in great detail. Instead, it will focus on the primary positions advanced by the parties and the evidence relevant to the conclusions reached.

Procedural Background

4. In an application filed February 28, 2013, the applicant complained that the International Association of Heat and Frost Insulators, Local 95 (the "union") breached section 74 of the *Labour Relations Act* (the "Act"), its duty to fairly represent him, with respect to the termination of his employment relationship with Dew Point Insulation Systems Inc. ("Dew Point" or the "employer") on March 29, 2012.

5. In a decision dated January 28, 2014, the Board upheld the applicant's complaint and found the union acted arbitrarily when it failed to properly investigate the circumstances surrounding the termination of the applicant's employment with Dew Point before withdrawing the grievance it filed on his behalf. The Board was particularly concerned that the union had not spoken to the steward who was present during the termination meeting and provided a statement that was largely supportive of the applicant's description of the meeting. The Board reserved jurisdiction to address the appropriate remedy arising from the union's breach.

6. The applicant's counsel outlined the remedies sought by the applicant in correspondence dated October 21, 2014. In response, the union brought a motion to dismiss the applicant's claim on the basis that there was no legal foundation for any of the remedies sought by the applicant beyond a declaration.

7. In a decision dated April 24, 2015, the Board dismissed some of the remedies sought by the applicant and not others. One of the remedies the Board did not dismiss at that time was the applicant's claim for loss of income. The applicant conceded that his employment with Dew Point could not be reinstated due to the completion of the construction project he had been working on. Further, the applicant became disabled the day following the termination of his employment and remained totally disabled and in receipt of disability benefits. The applicant claimed that he suffered post-traumatic stress disorder "as a result of the conduct of the Union and its breach of its section 74 duty". The applicant claimed loss of earnings and employment benefits in the sum of \$98,592 based upon the difference between the amount he received in disability benefits for two years and what he would have earned working full-time on the project with Dew Point. Further, he claimed an additional \$109,152 for future loss of earnings for two years.

8. The Board addressed the applicant's claim for loss of income at paragraphs 21 - 23 of its April 24, 2015 decision:

21. The union submits that there is no possible causal connection between the loss of income the applicant alleges he experienced and the failure of the union to properly investigate the circumstances surrounding the cessation of the applicant's employment with the employer.

22. I respectfully disagree. The medical evidence supplied by the applicant indicates he has suffered psychological and psychiatric illnesses that have interfered with his ability to return to work since his work ended in March 2012. He has no prior psychiatric history. Each of the reports (mental health counselor; psychiatrist; family physician) draws a connection between the applicant's mental health issues and "problems with the union" and "the way his union has treated him". While the reports do not specifically address the failure to properly investigate the circumstances surrounding his termination, they do not exclude that part of the applicant's narrative either. At this stage of the inquiry, I am not prepared to say that there are no possible connections between the union's breach and the applicant's mental health condition. Of course, nor am I concluding that there is such a connection.

23. Further, there are the applicant's allegations that the union was responsible for his termination. Certainly the medical evidence presented by the applicant draws a potential connection between those allegations and the applicant's ill-health.

9. In its decision, the Board also specifically permitted the applicant to pursue his claim that the union had caused him to be terminated from his employment in March 2012 and the Board directed the applicant to further particularize that claim.

10. In particulars filed with the Board dated May 8, 2015, the applicant claimed that Jamie Bourne ("Bourne"), one of the business agents with the union, informed representatives of Dew Point and of the project's general contractor that the applicant had been smoking drugs during lunch breaks. The applicant claimed he became aware of this from the project superintendent, Mike O'Neil ("O'Neil"), in the presence

of Ralph Potter ("Potter"), the union's steward. The applicant further claimed in the particulars that Bourne also informed representatives of Dew Point and the general contractor that the applicant was bullying and harassing other employees on the job site and was facing harassment charges. Subsequent to these events, the applicant claims George Speer ("Speer"), a principal of Dew Point, terminated his employment.

11. In a decision dated August 22, 2016, the Board found that the applicant failed to present a *prima facie* case that Bourne or the union caused him to be terminated and the Board dismissed that allegation from the applicant's claim.

12. The remaining outstanding issue was the applicant's claim that he suffered harm to his mental health as a result of the failure of the union to properly investigate the circumstances of his termination. The Board addressed this issue at paragraphs 30 – 31 of its May 8, 2015 decision:

30. The union asks that this aspect of the applicant's case be summarily dismissed. It argues that the medical evidence produced to date indicates that the applicant was disabled from March 29, 2012. The union's failure to properly investigate the termination could not have caused the applicant to be disabled six months before it decided not to advance the applicant's grievance.

31. It is possible that the union's breach exacerbated the applicant's medical condition. I acknowledge that this is a remote possibility, however the applicant is entitled to an opportunity to produce medical evidence to support this proposition.

13. A hearing into this issue took place on May 24, 25 and 31 and August 2, 2017. The applicant, his psychiatrist, his counselor and his former common-law partner testified. Able argument was presented by both counsel.

14. Counsel for the applicant, relying heavily on tort law, argued that the union's failure to investigate the applicant's termination contributed to his post-traumatic stress disorder and the union should have foreseen that the applicant would suffer some mental illness from the breach of its s.74 duty. As such, he submitted that the union is liable for the damages sustained by the applicant. Labour relations policy is

advanced if unions are held accountable for the losses resulting from the breaches of their statutory duty.

15. Counsel for the union argued that the evidence established that the applicant's disability due to a mental illness began the day after his employment terminated. This was approximately six months before the union informed the applicant that it was not going to advance his grievance to arbitration. The applicant has the onus of proving a factual connection between the union's statutory breach and the damages he sustained and he has failed to do that. The medical evidence does not support that connection. Further, even if such factual connection was established, the damages sustained by the applicant are too remote and were not foreseeable.

Relevant Background Facts

16. In April 2011, the applicant was working and serving as a job steward on a project for Pro Insul Limited. Allegations were made that the applicant was confrontational and threatening in various exchanges with other employees on the job relating to the distribution of overtime. Bourne was assigned to investigate the concerns and he concluded that the applicant had been threatening and intimidating people. Union charges were brought against the applicant under the Professional Craftsman Code of Conduct (the "Code of Conduct") and ultimately were resolved in November 2011 after the applicant had a meeting with the union's business manager. The applicant felt he had been treated very unfairly by the union and, in particular, by Bourne.

17. The applicant began working for Dew Point in October 2011 as an insulator mechanic and was serving as an onsite foreman.

18. On March 29, 2012 Dew Point called a meeting to discuss concerns about the applicant. The meeting took place in an onsite trailer. In attendance were Speer, O'Neil, Potter and the applicant. The applicant's employment with Dew Point ended during that meeting.

19. The applicant has maintained throughout that his employment was terminated by Speer who he claims told him that the reason for his termination was that Bourne had brought harassment charges against him and therefore Dew Point had no choice but to terminate him. Further, he claims that Bourne told Dew Point that he was smoking drugs on the jobsite.

20. On June 20, 2012, the union advised the applicant that charges were being brought against him under the Code of Conduct, the International constitution and the local by-laws relating to his conduct in March 2012 at the Dew Point project. Those charges have been in abeyance since September 2012 due to the applicant's health.

21. The union filed a grievance on the applicant's behalf on June 27, 2012 alleging he had been terminated without just cause and seeking reinstatement.

22. On October 1, 2012, the grievance was referred to the Board for arbitration.

23. On October 29, 2012, the union's legal counsel informed the applicant in writing that the union was withdrawing the grievance.

24. During the course of earlier proceedings, Speer was called as a witness by the applicant. Speer denied that Bourne or any other union representative contacted him to raise concerns about the applicant or to suggest that the applicant be terminated. Speer testified that during the meeting on March 29, 2012 he raised concerns about the applicant improperly laying off an employee and about allegations of harassment and smoking drugs. He offered the applicant four options: 1) termination; 2) lay-off; 3) go back to work; 4) transfer to another job. According to Speer, the applicant said he would take a lay-off and the company issued a Record of Employment with "lay-off" as the reasons for the termination.

25. Potter, who, as mentioned above, had provided a statement about the termination meeting that was largely supportive of the applicant's version, did not testify in any of the proceedings before the Board.

26. The applicant put his name on the union out-of-work list shortly after his employment ended with Dew Point. He received a few calls from the union dispatch about jobs in or around September 2012 but he was disabled and not available to work. He asked that the union not call him further.

27. The applicant attended at a walk-in clinic on April 2, 2012 and received a note indicating he would be off work until the end of the month, at which time he would be reassessed. On May 2, 2012, he attended upon his family doctor, Dr. Bruno Di Paolo, and obtained a

stress leave note for a further 8 weeks. Dr. Di Paolo's chart note for that visit reads:

COMPLAINTS: This pt was all over the place. Seems to be very angry over his treatment at his employment. Apparently, it was a union start of one year ago and apparently things started going wrong for him at that point. Started talking about police being involved with him and investigating him for missing person. Apparently, in the past he had to go to court because of this. They also investigating his private life. He seemed to be very fidgety. He'd gone to a walk-in clinic and he got a note to stay off for approx 3 weeks because of stress. His wife is working. He is at home taking care of the children. Was not interested in any medications. Here at the office to get a note for stress leave. It was pretty hard at some point to follow his story.

DIAGNOSIS: Differential: Anger management. Paranoia. Schizophrenia although he is 40 and unlikely to have started at this point.

TREATMENT: Gave him a note for stress leave for eight weeks. I arranged an appt for a counsellor to see this pt.

28. Dr. Di Paolo spoke with the applicant on the telephone on May 24, 2012 and prescribed some medication. He also arranged for the applicant to see a counsellor affiliated with his office, Ms. Sandra Ionico, BSW, RSW. Ms. Ionico first saw the applicant on June 25, 2012 and has been seeing him regularly since for supportive counseling.

29. On January 24, 2013 Ms. Ionico prepared a report on the applicant's condition, which reads in part:

Mr. Murdoch has been diagnosed with Adjustment disorder, severe, with low mood and anxiety related to work problems. Mr. Murdoch has been attending counselling since then every two - three weeks.

History of Presenting Complaint:

Mr. Murdoch worked for Union Local 95 as a Union insulator for 15 years. He's been off work since March 29, 2012 due to work harassment by union management. According to Mr. Murdoch, the Union has

harassed him since 2011. The patient states that the union managers have lied about his work performance and has on two locations charged him for poor work standards without substantial evidence. The patient states that Local 95 has ruined his outstanding reputation as an insulator with the construction industry. This ongoing harassment since 2011 caused Mr. Murdoch extreme anxiety, panic attacks, and sleep deprivation. Mr. Murdoch felt that he was "walking on eggshells" every time he went to work, worried what the union would falsely accuse him with. This constant agitation led to his visit to Dr. DiPaolo who strongly suggested a leave from work.

Mental Status:

...He worries excessively. He does not trust anyone anymore. He fears going out and therefore has withdrawn from any social activities with friends. Even during our sessions he remains very guarded (e.g. wears dark glasses, very rigid posture). He has difficulty concentrating and staying focused on tasks. He fears making decisions. He is extremely irritable and therefore avoids any situations that may involve interaction because he fears his possible anger reactions. He gets easily irritated. His sleep has been extremely poor. Overall, Mr. Murdoch feels extreme anger and disappointment as to how his union, who he has always supported has treated him so poorly. As he stated "it's killing me inside".

...

Psychiatric History

Mr. Murdoch has no prior psychiatric history. Mr. Murdoch was a very active man who enjoyed being with family and friends. He loved his work. He was an extremely hard worker and did a lot of overtime. He was involved in many high-profile jobs in the city.

...

Overall Mr. Murdoch has never had any psychiatric issues until 2011 when he feels the union began to harass him. He was a hard-working man who enjoyed being around family and friends and never thought he would feel victimized by his union.

30. Ms. Ionico testified that the applicant was with her when she wrote the portion of her report titled "History of Presenting Complaint" and that he essentially dictated that portion. She understood that the applicant was complaining about two incidents, one in 2011 and one in 2012, when the union brought charges against the applicant for poor work performance and the union did not have evidence to support the charges. The applicant never told her that the union had filed a grievance on his behalf and then withdrew it.

31. Over the next three years, Ms. Ionico continued to counsel the applicant regularly. Her chart notes reveal that there were many issues causing the applicant stress, including: having to complete forms for disability benefits and CPP; perceived errors on the part of Dr. Di Paolo; fears that union representatives would come to his house and intimidate him or were following him; a telephone call from the union's international president; finances; various aspects of the Board application process; frustrations with his lawyer's lack of progress; being blacklisted by the union; a car accident; and, legal costs. Ms. Ionico tried a number of different techniques to help the applicant but very little progress was achieved. She testified that the applicant needed closure and no real therapeutic progress could be made without closure.

32. In the approximately 30 entries she made in the applicant's chart, Ms. Ionico did not once mention the failure of the union to investigate the circumstances of the applicant's termination.

33. In October 2016, Ms. Ionico provided a report at the request of the applicant's counsel in which, for the first time, she mentions the union's failure to investigate. Under the heading "History of presenting problem", she writes:

...The Union's failure to investigate and provide fair and just representation for the circumstances that led to his cessation of employment at his last job site led to Doug's mental health issues. The patient further states that Local 95 has ruined his outstanding reputation as an insulator within the construction industry and this has caused great distress for Mr. Murdoch because he is a person who places a high value on his trades as well as his work ethics.

34. In cross-examination, she acknowledged that she likely consulted with the applicant regarding the wording of this paragraph. It became apparent that Ms. Ionico did not really understand what "failure

to investigate" meant. She believed the issue was the union's decision to charge the applicant "without substantial evidence". She was not aware that the union had filed a grievance on the applicant's behalf. Later she testified that she wrote "failure to investigate" to be consistent with Dr. Nagy's letter (discussed below). Dr. Nagy spoke with the applicant's counsel and prepared her letter and then Ms. Ionico reviewed Dr. Nagy's letter and wrote her own.

35. In response to questioning by the Board, Ms. Ionico indicated that she still does not have a clear understanding of the full story of the applicant's issues with the union. The applicant was often incoherent in therapy sessions, and she would get fragments of the story overtime. The overarching theme was that the system had failed him.

36. Dr. Nagy is a psychiatrist who has a relationship with Dr. Di Paolo's clinic. She first saw the applicant in May or June 2012 and saw him approximately six times in total. Ms. Ionico attended each of the sessions with Dr. Nagy. Dr. Nagy prescribed a number of different medications for the applicant. In her sessions with the applicant, he always talked about the union and his employer.

37. Dr. Nagy eventually diagnosed the applicant as suffering from post-traumatic stress disorder.

38. Dr. Nagy testified that if the union had helped the applicant, he may not have felt as threatened. He still might have lost his job but he would not have felt betrayed by the union. She acknowledged that this was merely an assumption based upon the facts as she understood them from the applicant. She admitted that there may have been other stressors in the applicant's life and his termination on March 29, 2012 may have put him over the edge. In her sessions with the applicant, he was completely preoccupied with the union and his employer. The applicant told her that the union caused him to lose his job. His narrative was frequently hard to follow or incomprehensible.

39. On January 16, 2013 Dr. Nagy provided Dr. Di Paolo with a report on the applicant which read in part:

...He has been off work for some time due to a very complicated situation. He explained that he had been "harassed" by his union the year before his current problems occurred. He had argued on his behalf, and the situation was resolved completely. He said that he was then given a "great job" being in charge of the

insulation for a very major construction project in Hamilton. Unfortunately, he again had problems with his union. He says that he had run for election within the union and believes that he "became a target". Mr. Murdoch explains at great length and in detail the ways in which he has been mistreated. He says he has been "harassed and bullied" by his Local as well as the International Union for over the past year. He says that he and his family have been threatened over the phone, and that his "International" even threatened his mother by phone. He also had letters from the insurance company on a weekly basis, which he also finds very stressful. He also talks about the police having been involved and somehow sent to his home by his employer or the Union. It is difficult to follow all the details at times, as Mr. Murdoch has a great deal to say on the subject.

...

...Mr. Murdoch said he is determined to clear his name, and he will not accept the fact that he is persecuted by his union. His objective is to have the truth be told and that it be recognized that he was wrongfully dismissed from his job.... He is certain that if he would ever try to return, if his name was cleared, the same process of persecuting him would begin again. He says he believes he has had to sacrifice his career by "standing up to them". Mr. Murdoch feels that the unions are able to do anything that they like to him and that he has been threatened at high levels. He believes that they would be able to do virtually anything to him because of their power. He sees this is largely political; however, he will not give up his attempts to defend himself. He says that he was notified that his phone is tapped and believes that, "They are doing everything to screw me."

40. This report, which was written a few months after the union informed the applicant it was withdrawing his grievance, does not mention the union's failure to investigate the applicant's grievance or anything whatsoever about a grievance. The primary concern raised in the report is the applicant's perception that the union has harassed him for several years through a variety of means.

41. On March 20, 2014, Dr. Nagy provided a report to the applicant's counsel following a telephone conversation between them. The report reads in part:

Further to our discussion regarding Mr. Douglas Murdoch today, March 20, 2014, I am providing a brief statement of opinion regarding the connection between his psychological problems and his experience with his union and employer. I understand that Mr. Murdoch is currently involved in litigation against his union.

...

Mr. Murdoch's condition has been basically unchanged over the past two years, and it is quite clear that the issue for him is the extreme distress he has perceived and experienced in the way his union has treated him. Based on the fact that Mr. Murdoch does not have any psychiatric history, and that his symptoms are absolutely connected with his problems in the workplace, it is highly likely that his health is being negatively impacted.

Should Mr. Murdoch be successful in his litigation against his union, it is my opinion that his symptoms will not be quickly resolved....

42. On June 26 2015 Dr. Nagy provided an additional report to the applicant's counsel:

...Over the past several years, Mr. Murdoch's psychological state has been deteriorating. This is without doubt his reaction to the ongoing issues between him and his union and employer. Mr. Murdoch's symptoms are definitely in the severe range, and it is my opinion that he will very likely never return to work in his profession as an insulator. His perspective with respect to how badly he has been treated has become entrenched beliefs about the likelihood of ongoing discrimination. He lives with a high level traumatic type of stress response with extreme anxiety and overvalued ideas without actually becoming paranoid.

...Based on many individuals I have met who experience this high-level traumatic stress, I would be very surprised that Mr. Murdoch recovered well enough to work at any time in the foreseeable future in any

capacity. Obviously, this cannot be known as a certainty; however, it is based on many years of clinical experience. Unfortunately, Mr. Murdoch is an individual who has developed very significant and persistent psychological symptoms as a result of the negative experience he encountered at the workplace, as well as following these events. Although Mr. Murdoch is very compliant with treatment, there has not been any improvement in the intensity of his symptoms.

43. In cross-examination Dr. Nagy clarified that her reference to "negative experiences encountered in the workplace" relates to the applicant's termination and experience with the union. The applicant told her he was unjustly terminated and accused falsely and the union got the police after him.

44. At the request of counsel for the applicant, Dr. Nagy provided a further report dated September 16, 2016:

Further to our recent discussion regarding Mr. Douglas Murdoch, I am providing a brief statement of opinion regarding the relationship between Mr. Murdoch's mental health and the failure of the Union to investigate the circumstances of Mr. Murdoch's cessation of employment with Dew Point. I have provided reports attempting to establish this connection in 2013, 2014 and 2015.

...It is my understanding that prior to his termination of his employment with Dew Point; he was a very hard worker who rarely visited his family physician. The contents of our sessions with Mr. Murdoch are completely absorbed by his emotional reactions to the circumstances around the loss of his job and in particular his union's failure to investigate the circumstances. I can say that from a psychological perspective, Mr. Murdoch has been severely, negatively persistently impacted by the way in which he perceives his situation was mishandled by the Union.

... The loss of his job and the ensuing lack of support was profoundly damaging to Mr. Murdoch's self-worth, as well as his ability to trust others. It is quite clear that there is a direct connection between events, which occurred from the time Mr. Murdock was terminated, and to his current psychological symptoms.

45. In her testimony, Dr. Nagy spoke more generally about the applicant feeling that he had been betrayed by the union. Not only had the union not supported him but "certain people in the union had spoken against him and accused him of things he had not done." The applicant conveyed to Dr. Nagy that the union was "out to get him" and was "acting deliberately". It had become clear to the applicant that "the union had played a large part in his termination". Everything that went wrong with him and his job was the union's fault.

46. In cross-examination Dr. Nagy testified that if the union had taken the applicant's grievance to arbitration and he lost, it probably would not be helpful. She also testified that the applicant told her he was totally disabled from working immediately following the termination of his employment on March 29, 2012.

47. The applicant talked about the union all the time and Dr. Nagy could not follow exactly what he wanted the union to do. She had no recollection of him saying that the union had filed a grievance and had referred it to the labour board.

48. Dr. Nagy acknowledged that she had not used the phrase "failure to investigate" in any earlier reports and she only used it in her 2016 report after speaking to the applicant's counsel and reviewing the Board's decision. She found it tough to follow the sequence of events described by the applicant and "it was never clear what was happening".

49. The applicant's former common-law spouse testified that the applicant had been a happy, productive partner and father throughout their relationship, which began in 2005. However, beginning in March 2012, she noticed a change. He told her how he lost his job but she cannot recall the details. She noticed an immediate change in him. He felt like he was bullied. It looked like he would not work again for some time so she went back to work herself in April 2012. He was in his own world and did not want to listen to her or the children about anything. He lost most of his friends and lives mostly with his mother. They separated some time in 2013.

Analysis and Decision

50. In *Canada Cement Lafarge Ltd.* [1981] OLRB Rep. December 1722, the Board awarded damages against the international and local unions arising from their unlawful failure to execute a collective agreement after a majority of their members voted in favour of

accepting the employer's offer and instead maintained their strike for an additional five weeks. The employer sought damages representing expenses it incurred as a result of the continuation of the strike. In considering the approach the Board should take to damage awards for breaches of the Act, Chairman Adams cautioned against strictly adopting damage award principles applied in tort and breach of contract cases, noting that the aims of contract and tort law do not necessarily advance the same policy interests as labour law.

32 Earlier in this opinion we said that compensation awarded under section 89 and the other remedial provisions should draw its purpose from the *Labour Relations Act* and the particular substantive provisions in issue. Principles of damage assessment developed in contract and tort law may provide useful analogies but, in the final analysis, labour law principles must prevail. Legal concepts such as "reasonable foreseeability", "causation" or "remoteness" all tend to reflect the aims of either contract law or tort law. When studied carefully, they amount to formulae by which loss and risk are allocated in light of what contract and tort law are trying to accomplish. In essence, they amount to policy determinations in particular cases.

51. Chairman Adams went on his decision to review examples in which, for labour relations policy reasons, the Board chose not to award damages that would likely have been recovered if breach of contract remedy principles had been applied (para.33). Chairman Adams emphasized that, "A labour board should be concerned more with the core purpose of a complaint and the remedies necessary to achieve that purpose." (para. 34).

52. I agree with Chairman Adams that damage awards for breaches of the Act should advance the policy interests of the Act rather than the policy interests that govern tort and contract law. The statutory duty imposed by s.74 recognizes that unions must take reasonable steps to investigate incidents of alleged breaches of the collective agreement. They must not act in an arbitrary or discriminatory manner or in bad faith. They are however, given broad discretion to decide whether or not to advance a grievance to arbitration. Excessive or far reaching damage awards risk interfering unduly with that discretion and encouraging unions to advance unmeritorious grievances in order to avoid liability.

53. In its decision of January 28, 2014, the Board found that the union had failed to properly investigate the circumstances surrounding

the termination of the applicant's employment prior to withdrawing the grievance filed on his behalf. At that time, the Board did not have before it, sufficient evidence to assess the merits of the grievance or the likelihood that the grievance would succeed at arbitration.

54. In most cases, when the Board finds that a union has failed to properly investigate a grievance, it will either direct the union to conduct a fair and thorough investigation or will direct the union to advance the grievance to arbitration. By the time the issue of remedy was addressed before the Board in this case, the work project was complete and the applicant was totally disabled from returning to work, so reinstatement was not possible. Therefore, both parties agreed that there was no value in the Board directing a further investigation or arbitration.

55. During the course of subsequent proceedings before the Board, the applicant adduced evidence from Speer that would have been critical testimony if the applicant's grievance proceeded to arbitration. Speer's testimony was inconsistent with the applicant's. He denied that the applicant was terminated. He testified that the applicant was given several options and chose to take a layoff. Speer also denied that the union had done anything to jeopardize the applicant's employment. This evidence was unchallenged as Speer was the applicant's witness. In light of this evidence, it is highly unlikely the union would have succeeded at arbitration.

56. In the seminal duty of fair representation case, *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 SCR 509, 1984 CanLII 18 (SCC) at p. 522, the Supreme Court of Canada referred to *Fisher v. Pemberton* (1969), 1969 CanLII 726 (BCSC), 8 D.L.R. (3d) 521. In that case, the court found that the union acted arbitrarily in its representation of the plaintiff but concluded that, in any event, the plaintiff's chances of success at arbitration were negligible. Therefore, the court only awarded nominal damages. The headnote of the case reads in part:

...where the union men who appear on the member's behalf are hostile to him, and are anxious to see him out of the company's mill, and where they make no effort to obtain from the member and other witnesses an account of the events constituting the alleged breach of company regulations, so that a defence of the member is never put up, there is a breach of the duty of fair representation, and an action lies against the trade union for damages for breach of this duty.

However, where the member would not have been reinstated by the company regardless of the representations which the union might have made and where the prospects of his gaining an arbitration award in his favour are negligible, the case is one for nominal damages only.

57. Similarly, in this case, if the applicant was simply seeking damages for the loss of opportunity to have his grievance proceed to arbitration, I would award only nominal damages as the evidence does not establish any realistic chance of success at arbitration.

58. However, what the applicant claims, is that the union's very act of failing to investigate the applicant's grievance caused or contributed materially to his disability, thereby causing him a loss of income. In which case, he argues, it does not matter whether the grievance would have been successful. The union should have foreseen that its perfunctory handling of the applicant's grievance would cause the applicant mental harm and it should be held liable for the consequential loss.

59. It is conceivable, that circumstances could arise in which a union could be held liable for causing mental distress arising from its breach of its s.74 duty. However, at a minimum, the applicant would need to present strong medical evidence establishing that the union's unlawful conduct caused the mental distress. Further, if loss of income is claimed, the applicant must establish that the mental distress caused by the union's conduct led to the loss of income. In this case, the applicant has established neither.

60. Neither the testimony of Dr. Nagy or Ms. Ionico establishes that the mental illness suffered by the applicant resulted from the union's failure to fairly investigate the applicant's grievance. It is clear from the evidence that the grievor became disabled the day following the termination of his employment. His condition has been virtually constant throughout. Both caregivers identify a number of stressors that may have contributed to his condition. Certainly, both testified that the applicant feels that the union harassed him and is responsible for all of his troubles including the loss of his employment. However, neither recall the applicant telling her that the union had filed a grievance on his behalf and then withdrew it. Neither noted an exacerbation of his symptoms in the fall of 2012 when the union advised the applicant that his grievance was being withdrawn. Neither mentioned the union's failure to investigate in any of her notes or reports, until 2016 when the

applicant's counsel specifically asked Dr. Nagy to comment on the connection between the failure to investigate and the applicant's health and provided her with a copy of the Board's decision of May 8, 2015.

61. It is logical to assume that the union's conduct that gave rise to the Board's finding of a breach of s.74 upset the applicant and caused him stress. But that is a long way from establishing that the union's conduct caused, exacerbated, or prolonged the applicant's illness. The applicant was already ill to the point of being unable to work. He believed the union was out to get him and harassing him. He believed the union had caused him to be terminated. He believed the union was sending the police after him. He was concerned that the union was going to come to his home. He was obsessing over these concerns to the exclusion of his normal activities including his family responsibilities. This, in turn, was causing more difficulties in his relationships and with his finances, resulting in more stress.

62. As discussed above, had the union fully investigated the circumstances surrounding the applicant's termination of employment, it would not likely have advanced his grievance to arbitration and if it had, it would not likely have succeeded. In light of the much broader and extensive concerns that the applicant had about the union, it is unlikely that his condition would have improved had either of these outcomes occurred. Certainly, the evidence does not suggest that the applicant would have recovered to the point of being able to return to work. The applicant has testified in these proceedings on several occasions and has had an opportunity to tell his story. Being able to tell his story, without having his story vindicated, has not proven to cause his condition to improve. There is no reason to believe that being able to tell his story to an arbitrator, without the arbitrator upholding his grievance, would have helped.

63. Accordingly, there is no evidence upon which I can reasonably conclude that the specific conduct which founded the finding of the s.74 breach, the failure to properly investigate the applicant's grievance, caused, exacerbated, prolonged or materially contributed to the mental illness suffered by the applicant. Further, there is no evidence upon which I can reasonably conclude that the applicant's loss of income is connected directly or otherwise with the union's failure to properly investigate.

Conclusion

64. The applicant's circumstances are tragic. He was a productive, skilled tradesperson with a history of regular employment and increasingly responsible positions on complex projects. He was a good father, son, partner and friend. He was happy.

65. For the past five years, mental illness has wreaked havoc on his life, destroying his career and his relationships and causing him great anguish and pain.

66. The processing of this application has been protracted. The decisions that followed the initial finding of a s. 74 breach have been disappointing for him.

67. This is not the decision that he hoped for. It is likely to cause him more disappointment and distress. He is likely to feel, again, that the system has let him down. I understand that. I wish this process could have been more helpful to his recovery. However, I am confined by the evidence and law that governs me.

68. I hope that, to some degree, the conclusion of these proceedings will provide some closure and permit him to focus on his health and his path to recovery.

69. The application for damages is dismissed.

"Lyle Kanee"

for the Board