2022 CanLII 9076 (ON LRB)

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0833-21-U**

Janina Molina De Leon, Applicant v Canadian Union of Public Employees, Local 1590-01, Responding Party

BEFORE: Patrick Kelly, Vice-Chair

APPEARANCES: Jason Huang-Kung, Christina Sapone, Evan Wang and Janina Molina De Leon appearing for the Applicant; Elizabeth Nurse, Joanna Polihronidis and Jeff Van Pelt for appearing for the Responding Party.

DECISION OF THE BOARD: February 7, 2022

1. This is an application filed under section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended, ("the Act") alleging a breach of the duty of fair representation by the responding party ("CUPE" or "the Union") contrary to section 74 of the Act.

2. The applicant (or "Ms. De Leon") was terminated from her roughly 20-year employment as a Personal Support Worker on February 4, 2021 for allegedly failing to respond to requests for assistance concerning residents of the employer's retirement home on January 17, 2021 and January 21, 2021, and for allegedly yelling at a new agency employee. The termination was carried out at a meeting on February 4, 2021 at which she and her Union Steward, Joanna Polihronidis, attended with management. The applicant says that Ms. Polihronidis did not consult with her prior to the meeting, did not advocate or otherwise represent her during the meeting, and did not meet with her afterward or provide any information or advice. Furthermore, the applicant alleges that her requests for assistance from the Union, including an express request to grieve her termination some four months later, went unheeded, and that no investigation of the discharge took place.

3. The Union contends that the applicant accepted her discharge from employment, told the Union that she did not want to fight her termination, and delayed making a request to file a grievance until well after the expiry of the time limits under the collective agreement without a reasonable explanation.

4. This matter was dealt with by way of consultation. Normally, the Board does not hear oral evidence during a consultation, but in this proceeding, there were two factual matters in dispute. One such matter concerned whether Ms. Polihronidis consulted with Ms. De Leon immediately after the termination meeting on February 4, 2021 concerning any action the applicant might want to take in response to her discharge. The other concerned the extent, if any, of the applicant's awareness of her rights as a unionized employee. I directed evidence on those issues, and both Ms. De Leon and Ms. Polihronidis testified and were subject to cross-examination.

5. CUPE became the bargaining agent for employees of Hazelton Place Retirement Residence ("Hazelton") in 2002 pursuant to an application for certification. Ms. De Leon was employed by Hazelton at that time. She testified that she did not participate in the representation vote.

6. CUPE negotiated a number of collective agreements on behalf of the employees of Hazelton over the years. CUPE had a bulletin board in the staff lunch area, on which it would communicate with bargaining unit employees. CUPE filed grievances as well, although none on behalf of the applicant. Ms. De Leon contended in her testimony that she never participated in any ratification votes, knew virtually nothing about the collective agreements that applied to her, and never heard anything about CUPE filing grievances, or what a grievance entailed. She did acknowledge that she received wage increases over the years of her employment, and she conceded this was due to the efforts of CUPE, but she professed not to know that employee wages were codified in the collective agreement.

7. The applicant has been disciplined on approximately six occasions since 2011. Ms. Polihronidis attended every disciplinary meeting involving the applicant in which discipline was imposed. In each instance, Ms. De Leon did not contest the facts alleged against her by the employer and accepted the discipline levied by the employer. Given Ms. De Leon's acquiescence, Ms. Polihronidis took no action, such as

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filing a grievance on behalf of the applicant, on those occasions she was disciplined, one of which included a five-day suspension.

8. The events that led to the applicant's termination took place on January 17, 2021 and were investigated on January 21, 2021. Ms. De Leon participated in that investigation. Immediately after the investigation, the applicant was forced to quarantine at home for two weeks because of exposure to COVID-19. She was scheduled to return to work on February 5, 2021. However, she was summoned to come to the workplace on February 4, 2021 purportedly to be given a COVID-19 test in order to clear her for duty the next day. However, the true reason for her attendance at the workplace on February 4, 2021 was that the employer intended to terminate her employment.

9. Upon Ms. De Leon's arrival, arrangements were made by the employer to have Ms. Polihronidis, who is a Cook for Hazelton, leave her workstation in the kitchen and come to the termination meeting. Ms. Polihronidis was not informed of the purpose of the meeting, but she did learn a few days earlier that the applicant was likely to be fired. When she arrived at the office of the General Manager, Ron Khan, Ms. De Leon and Anette Alconcel, the Nursing Manager, were present.

10. Mr. Khan or Ms. Alconcel read out the entirety of a termination letter to Ms. De Leon. The termination letter referred to events of January 17, 2021 (Ms. De Leon's alleged verbally abusive treatment of an agency worker, and her alleged failure to respond to calls from staff for assistance to deal with an emergency involving a resident). The termination letter cited the applicant's lack of remorse and her dishonesty in explaining why she did not respond to the staff's calls for assistance. In addition, the termination letter relied upon recent discipline imposed against the applicant, including a final written warning on May 27, 2020 and a one-day suspension served on January 18, 2021. Finally, the termination letter outlined that Ms. De Leon would receive two weeks' pay and continue to be covered for health and dental benefits until February 16, 2021.

11. When Mr. Khan or Ms. Alconcel finished reading the content of the termination letter, Ms. De Leon asked to be given a second chance. Mr. Khan declined. The applicant then inquired about retrieving her belongings, and asked that her daughter, who also was employed by Hazelton in the kitchen with Ms. Polihronidis, be permitted to collect her personal items. The meeting then ended. Ms. De Leon testified that she was in shock over being fired.

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12. Ms. De Leon and Ms. Polihronidis differ on what happened next. The applicant testified that she left the meeting on her own and went to the parking lot where her daughter had been waiting for her. The applicant testified that Ms. Polihronidis said nothing at all during the meeting and nothing to Ms. De Leon afterward. Ms. Polihronidis, on the other hand, testified that she and the applicant exited Mr. Khan's office through a doorway leading to a staircase, and that Ms. Polihronidis asked if the applicant wanted to fight to get her job back, that she could file a grievance. According to Ms. Polihronidis, Ms. De Leon was surprisingly calm, and said, "No, I'm fine, I'm okay with everything" and indicated that she wanted to leave to see her granddaughter who was waiting for her. That was the last time they spoke to one another.

13. Approximately two weeks passed, and then on February 19, 2021, Ms. De Leon contacted the CUPE National Servicing Representative, Jeff Van Pelt, by telephone. The applicant got Mr. Van Pelt's phone number from a December 15, 2020 communique that he authored advising the bargaining unit members that their collective agreement had expired and was up for renewal, and that the members had an opportunity to voice any concerns they had about wages, staffing levels, vacation or any other topic of interest. Ms. De Leon informed Mr. Van Pelt that she had been terminated. He asked her to send him a copy of the termination letter, which she promptly did via e-mail. Mr. Van Pelt responded, thanking the applicant, and requesting Ms. Polihronidis' phone number, which the applicant was unable to provide.

14. On March 1, 2021, Mr. Van Pelt sent an e-mail to the applicant in which he wrote: "Just following up on what your wishes are regarding this termination information that you sent me." On March 14, 2021, Ms. De Leon replied: "Hi Jeff, sorry for my late response. I need advice please, on how to start the process of obtaining my COLLECTIVE BARGAINING AGREEMENT or how to receive my severance pay".

15. On March 25, 2021, not having heard from Mr. Van Pelt, the applicant sent him an e-mail in which she reminded him that this was her second message, and adding, "I need your advice on how to get my collective bargaining agreement and/or how to receive my severance pay."

16. Mr. Van Pelt replied on March 29, 2021, stating "When a member is terminated there is no severance other than the outstanding vacation or wages that remain. I have included your collective

agreement. The CA should have been available online." Mr. Van Pelt attached the collective agreement to his e-mail.

17. By letter dated April 9, 2021, Ms. De Leon sent the following to a Toronto law firm, Waxman and Associates:

> Dear Sirs,
>
> I require legal assistance in respect to the termination of my employment. The enclosed letter is self-explanatory.
>
> The allegations against me are misrepresentations and distortions of the circumstances. When you interview me. I can readily explain the circumstances and rebut those allegations.
>
> Based on the facts – as opposed to the alleged facts – I can only conclude that the allegations were intentionally elicited and compiled with a view to terminating my employment. There was no warning to me and no process; it was presented to me as a *fait accompli* at the meeting on February 5. Had I been given advance notice and an opportunity to defend myself, I could have rebutted those allegations. However, since I received neither advance notice nor an opportunity to rebut the allegations, it is obvious that my termination was a foregone conclusion – signed, sealed and delivered before I was even made aware of the allegations. It was an organized firing squad, pure and simple.
>
> I categorically reject Hazelton's position that there are grounds for dismissal for cause. Even if the allegations were valid – which they are not – the alleged infractions would warrant a disciplinary warning but not termination of employment. I have been a loyal, diligent and valued employee for over twenty years. For example, I successfully completed a two year program which qualifies me as a Food Service Supervisor. However, I elected against changing positions because I prefer my work on the "front lines" – which is to say that I very much enjoy direct interaction with the residents at Hazelton. Contrary to the allegations and tone of the termination letter, I have always been very caring and conscientious and have always been very popular with the residents.

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> Also, contrary to the Hazelton letter. I have been very mindful of the threat presented by the Covid-19 virus. In that regard, I took special training and have diligently observed all protocols.
>
> There are many Hazleton [sic] residents who would gladly give me enthusiastic performance assessments, if requested.
>
> Finally, it should be noted that after twenty years of loyal service I was summarily discharged in the middle of the pandemic which has caused a major recession and high unemployment. I am sixty years old and unemployed.
>
> I look forward to hearing from you.
>
> Yours very truly,
>
> Illegible
>
> ______________
>
> Janina De Leon

The above letter was not copied to CUPE. Ms. De Leon told the Board that she alone wrote the letter without assistance from anyone.

18. In correspondence dated May 17, 2021, a lawyer from Waxman and Associates replied to Ms. De Leon, to confirm that the firm had not been retained to represent the applicant or to provide advice regarding the content of her letter of April 9, 2021. The lawyer also observed that the applicant should be mindful of any time limits that might apply to her complaint.

19. On May 26, 2021, the applicant wrote the following letter to Mr. Van Pelt:

> Dear Sir
>
> As a former employee of Hazelton Place Retirement Residency. I am seeking the Union's advice and guidance. I wish to institute grievance proceedings under the collective bargaining agreement on the grounds that my employment was unjustly terminated. The enclosed letter of termination is self-explanatory.

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The allegations against me are misinterpretations and distortions of the circumstances. When you interview me, I can readily explain the circumstances and rebut those allegations, *each and every one of them*. Based on the facts – as opposed to alleged facts – I can only conclude that the allegations were intentionally concocted for the purpose of terminating my employment. There was no warning to me and no process; it was presented to me as a *fait accompli* at the meeting on February 5. Had I been given advance notice and an opportunity to defend myself, I could have rebutted those allegations. However, since I received neither advance notice nor an opportunity to rebut the allegations, it is obvious that my termination was a foregone conclusion – signed, sealed and delivered before I was even made aware of the allegations. It was an organized firing squad, pure and simple – motivated by malice.

I categorically reject Hazelton's position that there are grounds for dismissal for cause. Even if the allegations were valid – which they are not – the alleged infractions would warrant a disciplinary warning but not termination of employment. I have been a loyal, diligent and valued employee for over twenty years – a career employee, not a casual employee. In fact, I joined Hazelton soon after it was established. I successfully completed a two-year program which qualifies me as a Food Service Supervisor. However, I elected against changing positions because I prefer my work on the "front lines" – which is to say that I very much enjoy direct interactions with the residents at Hazelton. Contrary to the allegations and tone of the termination letter, I have always been very caring and conscientious and have always been very popular with the residents. Also, contrary to the Hazelton letter, I have been very mindful of the threat presented by the Covid-19 virus. In that regard I took special training and have diligently observed all protocols.

There are many Hazelton residents who would gladly give me enthusiastic performance assessments, if requested.

I left the February meeting in a state of shock and confusion. During the meeting neither the Hazelton representatives nor the Union representative made any reference to a collective bargaining agreement – much less to my rights thereunder. Following the meeting, I reached

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> out to the Union, but so far I haven't received any meaningful assistance.
>
> Due to Hazelton's dishonest behavior and allegations, I have no interest in reinstatement. However, I categorically reject Hazelton's trumpery and am claiming severance pay.
>
> I am sixty years old and unemployed. I have been shabbily treated but I do not intend to be victimized.
>
> Thank you for assisting me in this matter.
>
> Sincerely,
>
> Illegible
>
> ________________
>
> Janina De Leon

20. By way of an e-mail of June 4, 2021, Mr. Van Pelt sent a copy of Ms. De Leon's May 26, 2021 letter to Sean MacIntyre, the newly elected President of the CUPE bargaining unit at Hazelton. In the e-mail, Mr. Van Pelt wrote:

> Good afternoon Sean. I got this email from a member who is looking to have a grievance filed over his termination. I am wondering if you could provide some sort of update regarding this members [sic] termination, whom did his meeting and is there a reason why he wasn't advised of any options? I would suggest he ought to know he is a member of a union and what that entails but a termination should always be reviewed for a grievance. Perhaps we could speak about this and you could follow up with this member.
> Thanks
> Jeff

21. Mr. MacIntyre replied on June 13, 2021, writing, "Hey Jeff sorry I'm just seeing 4his [sic] now it went to my junk mail. I can definitely follow up with this. I'm not back to work until Tuesday but will follow up with you then."

22. Mr. MacIntyre spoke with Ms. Polihronidis about the letter he had received from Mr. Van Pelt, and Ms. Polihronidis provided him with the materials she kept concerning the disciplinary history of Ms. De Leon.

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23. The applicant states that a trade union has a positive obligation to investigate and consider a long-term employee's termination of employment for a grievance, even if not requested to do so. The applicant submits that this is reflected in Mr. Van Pelt's own words in his e-mail of June 4, 2021 to Mr. MacIntyre when he observed that "a termination should always be reviewed for a grievance." Such investigation into the merits of the employer's alleged cause must be a meaningful one carried out in good faith, and not one done in a sloppy or careless manner, which includes seeking the member's side of the story (before the discipline is imposed), and coming to a conclusion as to whether a grievance is warranted. In the applicant's submission, a trade union cannot take a purely reactive approach in respect of the discharge of a long-term member of the bargaining unit. The applicant submits that none of the cases relied upon by the Union deal with the duty of fair representation in the context of the firing of a near 20-year employee.

24. The applicant relies upon the following authorities: *Switzer v. CAW-Canada*,1999 CanLII 20145 (ON LRB); *Noel v Société d'énergie de la Baie James,* 2001 SCC 39; *U.S.W.A., Local 3257 v. Steel Equipment Co. (1964),* 14 LAC 356 (Reville); *C.M.S.G. v. Gagnon*, 1984 CanLII 18 (SCC); *Plummer v. O.P.C.M.I.A., Local 172*, 1983 CarswellOnt 1179; *Plester v Polyone Canada Inc.*, 2011 ONSC 6068; and *Invista (Canada) Company v Kingston Independent Nylon Workers UNION,* 2013 CanLII 49191 (ONLA).

25. The Union says that Mr. MacIntyre intended to follow up with Mr. Van Pelt, who was off on vacation at some point in July 2021. However, apparently Mr. MacIntyre became distracted by personal issues and as well was preparing for collective bargaining. Nothing further was done about Ms. De Leon's situation by the time the application was filed with the Board on July 22, 2021. Mr. MacIntyre quit his job with Hazelton effective July 28, 2021.

26. The Union says that the Board's case law establishes that a trade union does not violate the duty of fair representation by failing to grieve in circumstances where the bargaining unit member makes no request for the trade union's assistance. A trade union is not presumed to have an obligation to act in such a situation. Trade unions are not required to make, or act upon, assumptions about what bargaining unit employees may or may not want them to do on their behalf, and a trade union cannot be found to have violated section 74 for failing to take

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steps it was not asked to take, even when dealing with terminations from employment.

27. Furthermore, the Union says that, even on the applicant's facts, the applicant was a long-standing employee who has previously been disciplined by the employer with union representation present, and that she was aware that she was represented by a union (since its certification on January 14, 2002, when the applicant was employed), had a union representative, and was covered by a collective agreement. The Union submits that it is reasonable to infer that the applicant was, at the time of her termination, well aware of the collective agreement's grievance procedure and that there were available means of challenging her discharge.

28. In support of its position, the Union referred me to the following authorities: *Richard McCormick,* [1985] OLRB Rep. Feb. 296; *Tony Medeiros,* [1986] OLRB Rep. Nov. 1541; *Huronia District Hospital,* [1990] O.L.R.D. No. 2002; *Centenary Health Centre,* [1999] O.L.R.D. No. 548; *Karrie-Lynn-Marie Burns,* [2005] OLRD No. 2419; *Gaudette v. Canadian Union of Public Employees, Local 2974,* 2013 CanLII 36179 (ON LRB); *Pabuna v Canadian Union of Public Employees, Local 966*, 2014 CanLII 32343 (ON LRB); *Grey v Ontario Secondary School Teachers' Federation,* 2015 CanLII 46920 (ON LRB); *Timothy Younie v Allied Construction Employees,* 2019 CanLII 123063 (ON LRB); *Jody Aldon Lasso v Unifor Local 324,* 2020 CanLII 51663 (ON LRB); *Canadian Union of Public Employees v. Beutel Goodman Real Estate Group,* 2001 CanLII 11163 (ON LRB); *Canadian Union of Public Employees v. 3584607 Canada Inc.,* 2002 CanLII 19347 (ON LRB).

Analysis and Conclusions

29. First, I deal with the facts in dispute. I do not accept Ms. De Leon's evidence that she was as ignorant of the collective bargaining process and of her workplace rights to the extent she claims. For one thing, she conceded that she understood that her wage raises over the years were the result of negotiation by the Union on her and others' behalf. Furthermore, she had plenty of disciplinary experiences in which she faced penalties from Hazelton. In each instance of discipline, her steward, Ms. Polihronidis, was present with her at the disciplinary meeting. I accept the evidence of Ms. Polihronidis that, whenever the applicant was confronted with the basis for her discipline she essentially admitted, or at least did not object to, the allegations made against her by the Employer. This is consistent with how she responded to the

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reading of her termination letter – she did not dispute the allegations, but rather requested another chance in order to avoid discharge.

30. In addition to her several experiences with the disciplinary process, Ms. De Leon had in her possession prior to her termination a communique from Mr. Van Pelt in which he described upcoming bargaining to renew the collective agreement and sought the input of the members of the bargaining unit.

31. Finally, I accept Ms. De Leon's uncontradicted testimony that she authored the letter she sent to Waxman and Associates without any assistance. This letter is not the product of an unsophisticated mind in matters of workplace rights. I realize, of course, that the letter post dates the applicant's termination by over two months, but even so, it seems improbable from a reading of that correspondence that the applicant was the naïve labour relations greenhorn that she claimed to be when she was let go from her job at Hazelton.

32. I also do not believe the applicant's version of events that transpired immediately after the termination meeting ended. The reason is that the version offered by Ms. Polihronidis is consistent with Ms. De Leon's evidence that her daughter was waiting for her in the parking lot. Ms. Polihronidis' testimony was that the applicant indicated that a relative of hers (the applicant's granddaughter, according to Ms. Polihronidis) was waiting for her. That is a fact Ms. Polihronidis could not likely have known or guessed at had she not spoken with the applicant after the meeting. According to Ms. De Leon, there was no conversation whatsoever between her and Ms. Polihronidis at any time before, during or after the meeting. I reject that testimony. I prefer the evidence of Ms. Polihronidis that, immediately following the meeting, during a very brief conversation that did not exceed 30 seconds, she offered assistance to Ms. De Leon, and that the applicant declined the offer.

33. The issue is, did the Union breach its duty of fair representation by failing to file a grievance on behalf of the applicant following her interactions with Mr. Van Pelt notwithstanding the fact that she declined assistance from Ms. Polihronidis?

34. Section 74 reads:

Duty of fair representation by trade union, etc.

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> 74 A trade union or council of trade unions, so long as it continues to be entitled to present employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

35. The applicant places significant reliance upon a passage in the *Switzer* decision, *supra*, which reads:

> 20. Most duty of fair representation cases concern the failure or refusal of a trade union to file or pursue a grievance for an employee. It is well established that the duty of fair representation does not absolutely require a union to either file a grievance or to take a grievance to arbitration just because an employee wants it to. But it does require a union to give fair and objective consideration, not only to an employee's request to proceed with a grievance, but also to whether a situation merits a grievance even if no employee has complained or requested one. A union is not entitled to sit back and take a purely reactive approach to representative. Indeed, few unions do. Most diligently monitor the adminis-tration of their collective agreements in order to protect the integrity of collective bargaining interests, the most important of which (from the perspective of unions if not generally) are the interests of the employees, who are who collective agreements are for after all. The duty of fair representation therefore requires a union to be proactive where circumstances warrant.

36. The applicant submits that this is precisely the kind of case that the Board in *Switzer* had in mind when it concluded that certain circumstances warrant a trade union taking the initiative even where the grievor may not have requested assistance. The applicant says that an applicant of twenty years service facing the ultimate sanction of termination deserves more from a trade union than a 30-second conversation immediately following the discharge, and deserves better than the allegedly tepid and ineffective advice that she was provided once she made clear that she required the Union’s assistance, first to obtain severance pay, and later to challenge the discharge by filing a grievance. In the applicant’s submission, the Union ought to have conducted an investigation into the discharge, including an assessment of whether she engaged in wilful misconduct that disentitled her to severance pay under the *Employment Standards Act, 2000,* S. O. 2000, C. 41, as amended, (“the ESA”). The applicant says that, had the Union

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done so, it would have concluded that the termination was disproportionate in all the circumstances, and that most certainly there was no evidence of wilful misconduct that disentitled the applicant to severance pay under the ESA. Counsel for the applicant submits that the Union's purely reactive approach – only acting for a member of the bargaining unit if the person expressly asks for assistance or expressly challenges – and the applicant's complete lack of awareness of her rights under the collective agreement, created a perfect storm resulting in catastrophic consequences for Ms. De Leon.

37. The Union submits that the excerpt from *Switzer* is *obiter* and ignores the Board's case law that says an employee has a positive duty to ask the trade union for assistance. It says that paragraph 20 from the *Switzer* decision has never been followed in a subsequent Board decision. In the Union's submission, the Board's case law before and after *Switzer* imposes a positive duty upon an employee to ask the trade union to act on the employee's behalf, and in the absence of such a request, a trade union does not breach section 74 if it takes no steps on its own initiative.

38. *Switzer* was a case in which the complainant alleged that his trade union violated its duty of fair representation in connection both with his termination from employment for theft in August 1992 and his post-termination claim for long term disability benefits under the terms of the collective agreement. Initially, the Board dismissed both aspects of the complaint based on preliminary motions brought by the trade union and the employer. However, on reconsideration, the Board determined that the complaint against the trade union concerning its refusal to assist the employee with his claim for disability benefits should proceed on the merits.

39. The Board in *Switzer* ultimately concluded that the trade union violated section 74 of the Act. The Board determined that the trade union was aware of the complainant's hospitalization in a psychiatric ward around the time of his termination. The complainant had informed union representatives who visited him in hospital that he had been diagnosed as suffering from a major depressive illness. Accordingly, the Board rejected the trade union's claim that it had no basis to think the complainant was disabled or that he had been traumatized by his arrest for theft and his discharge from employment. The Board went on to suggest that, with the information the trade union had about its long time member, it ought to have made further inquiries, including regarding the possibility that the complainant might have had a

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disability that pre-dated his termination and a legitimate claim for disability benefits under the collective agreement notwithstanding that he had been fired, and despite the fact that the complainant had not made any request to that end at the time of his hospitalization.

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40. Subsequently, when the complainant's lawyer made clear in December 1995 an expectation that the trade union file a grievance for disability benefits, the trade union made no response and did not initiate a grievance. Following further inquiries by the complainant's lawyer, the trade union finally did respond in writing, it was clear to the Board that the union officials had made incorrect assumptions about the complainant's entitlement to benefits and had no understanding of the collective agreement's disability provisions or of the state of the law, nor had they made any effort to obtain legal advice on either. Essentially, the trade union's mind was closed to any possibility that the complainant might have an entitlement to disability benefits under the collective agreement, and as a result it did nothing for or in respect of the complainant.

41. I am not persuaded that the Board's comments in *Switzer* at paragraph 20 of that decision (reproduced at paragraph 35 of this decision) are merely *obiter* comments. It seems to me that, to the contrary, they are quite central to the conclusion reached by the Board in that case that the trade union ought to have taken proactive steps early on to make inquiries when it had some information about the possibility of the complainant having a disability, and certainly should have commenced an investigation when first prompted by the complainant's lawyer to file a grievance on the complainant's behalf.

42. On the other hand, the facts in this case are quite different from those in *Switzer*. The Union did not simply do nothing in response to the applicant's termination. Ms. Polihronidis offered to assist Ms. De Leon immediately after she was fired, which assistance the applicant declined. Upon being contacted by the applicant and informed of her termination approximately two weeks later, Mr. Van Pelt asked for and received from her a copy of the termination letter, and he subsequently followed up with the applicant about her wishes concerning the information contained in that letter. She replied that she wanted a copy of the collective agreement and assistance with obtaining severance pay. Mr. Van Pelt responded with a copy of the collective agreement and his view that a terminated employee is not entitled to severance pay, but only outstanding vacation and wages.

43. The applicant did not appear to accept this, and ultimately made it very clear to Mr. Van Pelt that she wanted a grievance filed on the basis of unjust termination. She clarified that she was not seeking reinstatement but was claiming severance pay (notwithstanding Mr. Van Pelt's previous advice). At this point, Mr. Van Pelt referred the matter to the Local president, who then took steps to gather information from Ms. Polihronidis. However, nothing came of it, the Union did not contact Ms. De Leon, and having given the Union approximately six weeks to respond to her request, the applicant filed this application.

44. In my view, there are two problems in the Union's defense of this application. One, Mr. Van Pelt offered no rationale as to why Ms. De Leon was disentitled to severance pay. There is no express right under the collective agreement to severance pay, but under the ESA, a unionized employee's claim for a statutory benefit can be advanced by the trade union through the applicable grievance procedure. Unless the Director of Employment Standards considers it appropriate, a unionized employee cannot make a claim independently. Accordingly, a unionized employee generally has no other recourse to enforce her statutory rights pursuant to the ESA other than through the grievance process (including arbitration). Moreover, under the ESA, the trade union has a discretion whether to seek the enforcement of the statute.

45. It was open to the Union to exercise its discretion not to advance an ESA claim for severance pay on Ms. De Leon's behalf, so long as its decision was not arbitrary, discriminatory, or motivated by bad faith. The problem with Mr. Van Pelt's explanation to the applicant that terminated employees are not entitled to severance pay is that it seems to presuppose that, because an employee has been terminated, the Union has no discretion to enforce a claim for severance pay under the ESA. Moreover, there is nothing in Mr. Van Pelt's response to suggest that he or anyone else in the Union had thought about, and reached a conclusion, as to whether the applicant had been "unjustly discharged" within the meaning of article 9.06 of the collective agreement. Depending upon the circumstances, a just discharge might disentitle the discharged employee from termination pay or severance pay under the ESA.[1] However, it is not evident that the Union turned its mind to that issue.

[1] Under subsection 9(1) of *O. Reg. 288/01*, an employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer is not entitled to severance pay. Subsection 2(1), dealing with termination pay, is to the same effect.

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46. The second problem for the Union is that it did not respond at all to Ms. De Leon's request that it file a grievance claiming that her discharge was unjustified. Steps were taken, it is true, to look into the matter, but ultimately no action one way or the other was taken about a grievance. Things appear to have slipped through the cracks. Having said that, in my view, the applicant, having received no response for about six weeks from her last correspondence, did not act precipitously in filing the instant application. At that stage, she had no reason to think the Union was taking the matter seriously, and certainly the Union could have perhaps forestalled the complaint by informing Ms. De Leon shortly after receiving her letter of May 26, 2021 that it was looking into her request. As it is, the applicant had no answer and no severance pay.

47. I do not think it is any answer for the Union now to say that it is unlikely that, had it filed a grievance in response to Ms. De Leon's clear request of May 26, 2021, it would have been met with a strong argument from the employer that the grievance was out of time and unlikely to be remedied by an arbitrator pursuant to subsection 48(16) of the Act. Indeed, that was among the Union's arguments at the consultation (and alluded to in its response to the application). However, that rationale was not offered by the Union to explain to the applicant its position about her request to file a grievance. In fact, no explanation was forthcoming. Nor did Mr. Van Pelt make any reference to time limits in his very brief advice to the applicant that terminated employees are not entitled to severance pay.

48. The authorities upon which the Union relies provide some support for the notion that a trade union may not be in breach of its duty of fair representation in circumstances where it knows of some workplace-related difficulty that a bargaining unit employee has experienced and that might be remedied by the filing of a grievance, but does nothing about it because the employee makes no request for assistance. In fact, I authored one of those decisions – *Burns v. Sheet Metal Workers' International Association, Local Union 540*, 2005 CanLII 21427 (ON LRB), and it has been cited with approval in several other of the Union's authorities. In that matter, the complainant was a probationary employee who was terminated for taking extended breaks, not wearing safety glasses, and wandering around the plant aimlessly. Probationary employees, like other employees in the bargaining unit, enjoyed "just cause" protection under the collective agreement. There was no evidence to show that the complainant made any request of the trade union to do anything at all on her behalf as a result of her

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termination. Accordingly, the Board dismissed her duty of fair representation application.

49. The facts in the *Burns* case are a far cry from those in the instant matter. Ms. De Leon was a 20-year employee. Furthermore, although she declined the offer of Ms. Polihronidis to fight her termination and possibly get her job back, she did approach Mr. Van Pelt about two weeks after her discharge specifically about the termination. Not long after that she sought Mr. Van Pelt's assistance to obtain severance pay. Ultimately, she asked for the filing of a grievance, to which the Union never responded. These facts distinguish the *Burns* decision. In any event, the Board in *Burns* did not set down a hard and fast rule that a trade union need never take any action on behalf of a member so long as the member makes no request for assistance. Nor do the other cases relied upon by the Union come to such a conclusion. What is more, none of the Union's authorities dealt with a termination in which the complainant was a worker of 20 years' seniority.

50. In *Plummer v. Operative Plasterers' & Cement Masons' International Association, Local 172*, 1983 CanLII 867 (ON LRB), the complainant's (Plummer) union representative, Enman, learned of the company's intention to discharge Plummer for deteriorating work performance and to rely upon several verbal warnings. Enman worked out an arrangement with the company to characterize the discharge as an indefinite layoff. When Plummer learned of the layoff, he approached Enman who may have explained his reasons for having made the arrangement he did with the company but did not ask for Plummer's version of events. Enman further advised Plummer that a grievance challenging the layoff would not succeed because Plummer had too many verbal warnings on his record and Enman could not find any employees who would support Plummer.

51. The Board upheld Plummer's complaint against the union. At paragraphs 47 and 48, the Board stated:

> 47. The decision not to process a grievance for an employee who has been disciplined or discharged may, depending on the circumstances, be a justified and responsible exercise of a union's prerogatives. Where, however, an employee has been discharged there is an obligation on a union to provide a satisfactory explanation for its decision not to process a grievance. While the legal burden in a section 68 complaint is on the individual complainant, once it is established that a union member has suffered the ultimate sanction of

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> discharge, this Board expects a persuasive account from the union to justify its refusal to file a grievance, or having done so, to carry the grievance to arbitration.
>
> 48. The union's explanation in the instant situation that it did not grieve Plummer's termination because Plummer had received verbal warnings about his work performance and because none of his fellow employees would support him is inadequate because, as detailed above, the union did not ascertain from Plummer his side of the story. The union cannot be said to have directed its mind to the merits of a grievance or potential grievance if it has not ascertained the grievor's version of the situation. In the Board's assessment Enman's "investigation" and handling of Plummer's situation was so superficial, cursory and ultimately antagontistic [sic] that it constitutes arbitrary representation in contravention of section 68 of the Act. Moreover, we are not persuaded that the vote taken among the general membership after Plummer had filed his section 68 complaint was sufficient to cure the prior breach of the Act. (See North York General Hospital, [1982] OLRB Rep. Aug. 1190.)

52. Although there was no evidence in the instant matter of any antagonism by the Union against Ms. De Leon, as there was in the *Plummer* case, the evidence does disclose that not only was Mr. Van Pelt's explanation about severance pay extremely cursory and, frankly, unfathomable, there was no explanation given by the Union at all in response to the applicant's request for a grievance and her outline of the reasons that, in her view, made her termination unjust.

53. A case even more on point, but which neither party cited, is *Kristopher Flores v Canadian Union of Public Employees - Local 79*, 2017 CanLII 81407 (ON LRB). In that matter, the complainant's employment ended after 14 years of service with the City of Toronto. Like the applicant in the instant matter, the complainant did not seek reinstatement but rather approached his trade union for the purpose of obtaining termination and severance pay. He was told by two different union officials on two separate occasions that he had no entitlement to termination and severance pay under the collective agreement. Neither union official gave the applicant any form of reasoning as to why he had no valid claims, and no investigation was conducted by the trade union into the possibility that the complainant's claims might be valid under the ESA. The trade union and the employer both argued at the ensuing consultation into the duty of fair representation complaint that the complainant had no meritorious claims under the ESA. The Board

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declined to make any ruling on their arguments, or as the Board put it, to make the kind of inquiry into the substance of the complainant's claims that the trade union ought to have done before the complaint was filed. Ultimately, the Board found the trade union's dealings with complainant to be entirely perfunctory, and a violation of the Act.

54. In a decision dated January 24, 2022, I invited the parties' submissions concerning the *Kristopher Flores* decision. The parties provided their submissions. Perhaps not surprisingly, the applicant says that the *Kristopher Flores* decision is "on all fours" with this matter. The Union, on the other hand, contends that it is a commonly held view that employees terminated under a collective agreement are not entitled to termination or severance pay under the ESA. Mr. Van Pelt was not aware that a unionized employee terminated for just cause under the Collective Agreement may still be entitled to severance pay under the ESA if they had not engaged in "wilful misconduct". For that matter, the applicant herself (and the legal counsel she retained for a period of time) did not appear to appreciate that it was the ESA in which her claim for severance pay was grounded, and she did not bring the ESA to Mr. Van Pelt's attention. Moreover, this has not been an issue that appears to have been commonly argued before and addressed by labour arbitrators. The Union submits that Mr. Van Pelt's and CUPE's lack of knowledge of the possibility of ESA entitlements was not unusual, in particular for lay people who are not legally trained, and should not constitute a violation of the Act, particularly where that specific question was not brought to their attention.

55. In my view, the Union's argument places an unrealistic responsibility on the rank-and-file member to properly frame the legal basis for a grievance. Ms. De Leon approached Mr. Van Pelt for advice on how to obtain severance pay. It is not reasonable to have expected her to explain the source of her claim to Mr. Van Pelt. I do not know the extent of Mr. Van Pelt's knowledge of the ESA or whether he held what CUPE says is a common (but incorrect) view that employees terminated under a collective agreement are not entitled under any circumstances to termination or severance pay under the ESA. What is clear, however, is that Mr. Van Pelt arrived at a conclusion without any explanation, which suggests he did not fully turn his mind to the issue raised by Ms. De Leon. Like the trade union in *Kristopher Flores*, CUPE's response to Ms. De Leon's request for severance pay was superficial and cursory. It was arbitrary within the meaning of section 74 of the Act.

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56. The Union also did not respond to Ms. De Leon's letter of May 26, 2021 in which she requested the filing of grievance alleging that her termination was unjust. To fail to respond to a twenty-year employee who faced the ultimate workplace sanction of discharge falls squarely into the category of uncaring, arbitrary conduct, even though Mr. Van Pelt took steps to have the matter investigated and cannot be said to bear the responsibility for the institutional failure of the Union in this regard.

57. For these reasons, the application succeeds.

58. In the course of the consultation, on the issue of remedy, counsel for the applicant requested, among other things, an order that the Union file a grievance alleging unjust dismissal and seeking reinstatement and to be made whole for all losses, or damages in lieu; and in the alternative, if just cause is established, relief in the form of severance pay. In its oral submissions in response, the Union did not expressly oppose such an order in the event of a finding of a violation of section 74 of the Act. However, in its most recent written submissions concerning the *Kristopher Flores* decision, CUPE now says that if the Board finds a violation by the Union for failing to investigate Ms. De Leon's claim for severance pay, the Board's order should, as in *Kristopher Flores*, be limited to that breach by ordering the union to file a grievance claiming such statutory entitlements on Ms. DeLeon's behalf.

59. With respect, I cannot agree with the Union's argument on the limited scope of the grievance that ought to be filed. The Union breached section 74 by not turning its mind to the applicant's request for termination pay *and* by utterly failing to respond to her letter of May 26, 2021 in which she demanded a grievance challenging the justness of her discharge. Accordingly, the grievance should encompass both aspects of the relief she sought.

60. The Board declares that the responding party breached section 74 of the Act. The aim of remedial relief is to put the applicant back in the position she would have been but for the breach of the Act. The applicant requested the Union's assistance to obtain severance pay, and then later, to challenge her termination generally. The Union did not turn its mind to either request. Accordingly, the Board orders the Union forthwith to file with Hazelton a grievance alleging that the applicant's discharge was not for just cause, in violation of Article 7.01 (c) of the collective agreement; in the alternative, if there was just cause, the

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grievance is to claim statutory termination and severance pay pursuant to the ESA. The Union is further ordered to investigate fully the merits of advancing the grievance to arbitration, including obtaining a legal opinion from an independent law firm of the Union's choosing. If following its investigation the Union determines to advance the grievance to arbitration, Hazelton is directed to waive any time limits and any other procedural objections it may have under the collective agreement to prevent an arbitrator from dealing with the grievance on the merits.

61. I decline the applicant's request for an order of damages against the Union, as no evidence or information was provided in support of such an order.

"Patrick Kelly"

for the Board

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