IN THE MATTER OF THE ONTARIO *POLICE SERVICES ACT*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ISHAQ SYED ABUTALIB

- The Complainant

- and -

TORONTO POLICE ASSOCIATION

- The Union

AND IN THE MATTER OF A COMPLAINT that the Union failed to fairly represent the Complainant in a dismissal arbitration

Arbitrator: Howard Snow

Appearances:

On behalf of the Complainant:

Ira E. Book	- Counsel
Ishaq Syed Abutalib	- Complainant

On behalf of the Union

Michael N. Freeman	- Counsel
and others	

Hearing held April 26, 27, and 28, and June 14, 2010, in Toronto, Ontario.

AWARD

INTRODUCTION

This parking officer was dismissed by the Toronto Police Service in 2003. His Union pursued a dismissal grievance to arbitration in 2004 and 2005, however the Union settled the grievance against the wishes of the officer.

The parking officer made several allegations that the Union failed to represent him fairly following his dismissal. In one complaint he alleged that the arbitrator had acted improperly and the Union breached its duty of fair representation in failing to respond to this improper conduct. As a remedy he sought damages from the Union.

The Employer was not a party to this arbitration.

THE EVIDENCE

The Toronto Police Services Board, the Employer, operates the Toronto Police Service. Ishaq Syed Abutalib, the Complainant, was a civilian parking officer with the Toronto Police Service from 1982 until his dismissal in 2003. The Toronto Police Association, the Union, represents parking officers as well as other Police Service employees. The Complainant's employment was regulated by the Unit C collective agreement between the Employer and the Union. The collective agreement was governed by the *Police Services Act*.

The Complainant was opposed to the Union settling his dismissal grievance in 2005. He pursued a claim before the Ontario Labour Relations Board alleging a violation of the *Labour Relations Act*. The Labour Relations Board dismissed his complaint under the

Labour Relations Act on the grounds that his employment was not covered by that *Act*. He also sued the Union in court for a breach of the duty of fair representation. Because of changes in the adjudication of fair representation issues, the Court case was eventually referred to arbitration and I was appointed by the Ontario Police Arbitration Commission to deal with the Complainant's allegations concerning his Union's handling of his dismissal.

The Complainant alleged that the Union failed to represent him fairly because:

1. The Union disclosed to the Employer the unfavourable Report of the Independent Medical Examination (IME);
2. The Union failed to pursue flaws in the Employer's summary evidence of parking tickets;
3. The Union settled the grievance over the objection of the Complainant;
4. The Employer issued a fraudulent revised Record of Employment which indicated the Complainant had resigned instead of being dismissed and the Union did nothing about that fraud; and,
5. The Arbitrator conducted himself improperly and the Union failed to take action in response.

Summary of events

The Complainant worked for the Employer as a parking officer for some 21 years. Among other duties the Complainant issued parking tickets.

The Complainant had various medical issues during his employment. Of greatest relevance to this complaint, in 1988 he injured his right hand and later had surgery on it. He was also injured in a car accident. Finally, he had a gun pulled on him while at work

and that incident caused him ongoing stress.

About 2000 the Employer introduced performance standards for parking officers, commonly referred to as "quotas," and the Complainant was expected to write 45 parking tickets per shift. He asserted that he could not write 45 tickets because of the injury to his right hand.

Following the introduction of performance standards, the Complainant alleged that his Staff Sergeant was harassing him to meet the standard. The Union took up his complaint.

In 2002 the Complainant was suspended for writing "N/A" on a number of parking tickets. The Union grieved this and the matter was resolved.

In late 2002, because of his failure to write the expected 45 tickets per shift, the Complainant was subjected to a formal 90 day performance review.

The initial 90 day performance review did not go well for the Complainant and the Employer extended it. In May 2003 the Complainant was suspended pending dismissal. The Union grieved the suspension.

July 17, 2003, the Complainant was dismissed from his employment because of his failure to meet the performance standards. The suspension grievance became a dismissal grievance.

Roger Aveling, a lawyer employed by the Union, initially acted for the Union in the dismissal grievance. The dismissal grievance relied heavily upon the Complainant's

medical condition. Mr. Aveling met with three of the Complainant's physicians but had concerns about the physicians as possible witnesses in an arbitration and whether their evidence would demonstrate a valid medical reason for the Complainant's failure to issue 45 tickets per shift. He set out his concerns in a July 30, 2003, four page memo to the Union's Director of Legal Services, Martin Weatherill. While Mr. Aveling suggested pursuing the matter to arbitration "particularly since this is a discharge case", he also suggested that it would be "prudent" to refer the Complainant for an independent medical examination (IME).

That summer the Union, through its grievance committee, gave approval to arbitrate the dismissal grievance. Around the same time the Complainant retained Ira Book as his lawyer. Mr. Book acted as counsel to the Complainant throughout the dismissal process and he frequently communicated directly with Mr. Aveling and the Union.

The Union encouraged the Complainant to participate in the independent medical exam. Mr. Book expressed concerns initially but then agreed that the Complainant should participate in the IME and the Complainant did participate. The Union arranged for an IME in the fall of 2003 with Matrix Rehabilitation Services which subjected the Complainant to a number of tests. The report from the IME was delivered in January 2004 and that report concluded that there was no pathology in the Complainant's right hand, nor any other physical reason, that would prevent him from meeting the quota of 45 tickets per shift. The report suggested that the Complainant's behaviour at work could be accounted for by his belief that he was at risk of further injury if he wrote more than 20 tickets per shift and by his belief that the Employer had a duty to accommodate his disability.

At some point the Employer became aware of the IME. A copy of the report was

provided to Glenn Christie, Employer counsel, by Mr. Aveling, although it is possible that Mr. Christie already had a copy.

The parties selected Jules Bloch as arbitrator. The arbitration hearing began in the fall of 2004. On the first day of the arbitration the parties, through Mr. Christie and Mr. Aveling, delivered opening statements. The hearing was then adjourned to May 2005.

Before the resumption of the hearing the Union re-assigned Mr. Aveling to negotiations for several new collective agreements between the Union and this Employer. Mr. Aveling was no longer involved in the arbitration and thereafter Jonathan Strug, a lawyer in private practice, represented the Union.

When the hearing resumed in May, 2005, the Union led its evidence. No reason was provided in this arbitration to explain why the dismissal arbitration did not proceed in the usual manner with the Employer beginning with its evidence.

In any event, two of the Complainant's physicians testified. The Complainant then began to testify. Mr. Strug finished his direct examination of the Complainant and Mr. Christie began his cross examination.

Arbitrator Bloch asked to meet with counsel before the conclusion of the Complainant's cross examination. Arbitrator Bloch indicated to counsel that he did not find the Complainant to be a credible witness. There was a discussion of whether the matter could be settled. There was a suggestion that the dismissal might be changed to a resignation.

That same day Arbitrator Bloch also met with the Complainant, a friend of the

Complainant (Alston Roberts), Mr. Strug, and with the Union representative (Tom Froude). It was unclear who initiated this second meeting but it was agreed to by the two parties. Arbitrator Bloch communicated his views about resolving the grievance in that meeting, views similar to those which he had first shared with counsel.

The matter was not settled then and later that day the hearing resumed with the Complainant's cross examination. That cross examination was still incomplete when the scheduled hearings concluded.

In due course Mr. Strug communicated Arbitrator Bloch's opinion to representatives of the Union who had not been present at the arbitration. The Union decided that it would be advisable to settle the grievance. In a meeting September 13, 2005, Mr. Strug and Mr. Aveling met with the Complainant and advised the Complainant of the Union's decision to settle the grievance and the reasons for it.

The Union negotiated a settlement of the grievance in which the dismissal was changed to a resignation.

Complainant's evidence

The Complainant testified that after his dismissal in July 2003 he spoke with Martin Weatherill (the Union's Director of Legal Services), and with Roger Aveling (Union staff counsel), and that a grievance was then filed. He agreed that he had spoken to Mr. Aveling about the independent medical examination. The Complainant testified that he had understood that, if the IME report was not supportive of his grievance, the Union would not use it. He agreed that the results of the IME were not supportive of his grievance. Nevertheless, he said he felt the Union was supportive of going to arbitration to try and get his job back.

The Complainant said he was "shocked" to learn during the first day of the hearing that the Employer counsel, Mr. Christie, had a copy of the IME report.

The Complainant testified that during the arbitration he had met with Arbitrator Bloch, Mr. Strug (Union counsel), Tom Froude (the Union's Director of Civilian Administrative Services who was present at the dismissal arbitration as the Union representative), and Alston Roberts (a friend of the Complainant). The Complainant said that Arbitrator Bloch had advised that the evidence was "off track" and had asked the Complainant whether he would agree to provide a letter of resignation. The Complainant said he had first clarified that there would be no back pay and that he had then rejected the idea of a resignation. He said the meeting had lasted close to an hour.

The Complainant testified that he had been surprised by the meeting with Arbitrator Bloch as he understood that judges do not talk during cross examination and he was also surprised because he thought the hearing was going well.

The Complainant said he had discussed Arbitrator Bloch's comments with Mr. Strug and that Mr. Strug had advised him to accept the offer and resign.

The Complainant confirmed that he was still being cross examined when the hearing ended. He said he was being cross examined with respect to summary information about parking tickets and that he believed the summary information was incorrect. In this arbitration he reviewed that same summary evidence and there appeared to be errors in it. For example, the summary indicated that on several occasions the Complainant had issued parking tickets in two quite different parts of the city at exactly the same time. In his dismissal arbitration the Complainant asked to see the original tickets as he was sure

that the summary information was inaccurate.

The Complainant said he was called to Mr. Strug's office September 13, 2005. He said that he, Mr. Strug (Union counsel in the dismissal arbitration) and Mr. Aveling (Union staff counsel) were there. Mr. Aveling told him the Union had decided to withdraw from the arbitration. The Complainant recalled Mr. Aveling advising that the Union felt he could meet the parking ticket quota. The Complainant said that he was shocked by the Union's decision and did not recall any discussion during the meeting. He said he asked for the Union's decision in writing and left. He received a letter dated September 19, 2005, confirming the Union's decision.

The Complainant then reviewed some of his medical documentation and testified about his monetary losses from losing his job.

In cross examination the Complainant agreed that before his dismissal he had been aware of the collective agreement and the process for grievances. He said he knew that decisions regarding the pursuit of grievances were made by the Union grievance committee and that he knew the Union would provide a lawyer. Before his 2003 troubles began he said he had known several persons active in the Union, including Martin Weatherill, then the Director of Legal Services. He said that he had no reason then to think the Union wished to do him any harm. He agreed that on several occasions before his dismissal the Union had assisted him with employment problems. In particular, he agreed that the Union had responded quickly in trying to help him with the suspension which preceded the dismissal. He agreed that before 2005 he had no reason to complain about the Union.

As for the dismissal arbitration, the Complainant agreed that he had known the medical

evidence would be important and that his own credibility would also be important. The Complainant said he had felt his own medical evidence was sufficient but that the Union felt an independent medical examination (IME) should be obtained. He had agreed to the IME process and participated in it. He said that Mr. Christie had mentioned the IME in his opening statement but there had been no further mention of it in the dismissal arbitration.

The Complainant agreed that there had been a meeting between Arbitrator Bloch and counsel. He said that after the meeting Mr. Strug had advised that Arbitrator Bloch wanted to meet with the Complainant.

In his cross examination the Complainant testified at greater length about his meeting with Arbitrator Bloch. He said that at the start of the meeting he, Mr. Strug, Mr. Froude and Arbitrator Bloch had been present. Alston Roberts, a friend of the Complainant, had joined them later in the meeting. He said that Arbitrator Bloch had advised that he had concerns that the evidence had gone "off track." The Complainant recalled Arbitrator Bloch advising that he did not want to make a public decision against the Complainant and suggested a resignation. He said that Arbitrator Bloch indicated he would not talk in detail about the evidence nor where it had gone off track and that he advised the Complainant that he had not made up his mind. The Complainant recalled Arbitrator Bloch speaking of credibility issues. The Complainant also recalled Arbitrator Bloch indicating that a negative result would be on the public record and that a negative result might be harmful to the Complainant in the future.

The Complainant agreed that he had spoken to Mr. Strug at the dismissal arbitration about the meeting with Arbitrator Bloch and that the Complainant and Mr. Strug met later in Mr. Strug's office. The Complainant agreed that Mr. Strug and he had discussed Mr. Strug's own concerns about the case.

The Complainant testified that very little was said at the September 13, 2005, meeting when he was advised that the Union had decided to withdraw from the arbitration.

The Complainant acknowledged that the Union had arranged for the Union payment of his life insurance, accidental death and dismemberment insurance, and dependent's insurance during the dismissal arbitration. The Complainant also testified that at the time of the arbitration and his meeting with Arbitrator Bloch he was unaware that he would get sick pay if he resigned. He agreed that after the settlement he did receive sick pay in the amount of some $2,100.00.

Finally, the Complainant testified that he was unhappy that his record with the Employer and his record of employment (ROE) had been changed from a dismissal to a resignation as he had never resigned.

Alston Roberts' evidence

Alston Roberts worked for the Employer as a parking officer before his retirement. He said that he had attended the dismissal arbitration to provide the Complainant with moral support.

Mr. Roberts testified that he had attended a meeting with Arbitrator Bloch, Mr. Christie (Employer counsel), Mr. Strug (Union counsel), Mr. Froude (Union representative), and the Complainant. He said that he had joined the meeting late after the Complainant had requested his presence. Mr. Roberts testified that the Complainant had advised him that he was being pressured to resign and wanted Mr. Roberts' opinion. Mr. Roberts testified that when he arrived Arbitrator Bloch said he had advised the Complainant to resign rather than have Arbitrator Bloch rule on the dismissal. He said that Arbitrator

Bloch had indicated that the Complainant's credibility was questionable. Mr. Roberts said that he was about to offer his advice when Arbitrator Bloch said that he did not wish to overhear that advice, and Arbitrator Bloch and Mr. Christie then left.

Lubna Abutalib's evidence

Lubna Abutalib is the Complainant's wife. Mrs. Abutalib testified that she had attended one day of the dismissal arbitration and had been in the hearing room with Arbitrator Bloch, Mr. Christie and Mr Strug. She said that her husband and Mr. Froude were out of the room. She said there was a discussion of the thickness of a parking ticket and Mr. Christie had advised that he knew the answer. She said that Arbitrator Bloch had then said "Let him cook his own goose." She testified that she understood that comment to have been directed toward her husband.

In cross examination, Mrs Abutalib agreed that the dismissal arbitration had been a long time ago and that she could not recall whether there were other comments made at that time or, if there were, what those comments might have been. She agreed that Arbitrator Bloch had not identified her husband by name in his comment about "Let him cook his own goose," but that Arbitrator Bloch had given her the impression that he was referring to her husband.

Martin Weatherall's evidence

During the court proceedings on the claim of a breach of the duty of fair representation, Martin Weatherall, the Union's Director of Legal Services during the dismissal and the dismissal arbitration, was unable to attend personally for examination for discovery. Instead, Mr Weatherall was examined by way of written questions and answers. The

parties agreed that those questions and answers would be admitted as evidence in this arbitration.

In response to questions regarding the independent medical examination, Mr Weatherall replied as follows:

> Medical evidence produced by a grievor could be slanted in favour of the grievor, just as medical evidence by the Toronto Police Service medical staff could be slanted in favour of the Service. An independent medical evaluation is more likely to show an un-biased medical opinion. This entire case depended on medical evidence and the only way that the Association could be fairly sure of an accurate medical opinion, was to get an evaluation that was independent. This is normal Association procedure in this type of medical case, when considering arbitration.
> . . . When arbitration is being considered, this can be a very costly proceeding and the Association must have a reasonable [sic] good idea that the results of the arbitration will be successful. At this stage, only favourable results from an independent medical assessment would give the Association confidence to consider continuance of the grievance. [Answers provided January 22, 2008]

Roger Aveling's evidence

Roger Aveling is a lawyer who has been employed by the Union since 1985. He said that he was hired primarily to act as a negotiator but when he had additional time he was involved in grievances. He said that in bargaining years his time was devoted to the negotiations but in non-bargaining years he did collective agreement administration and arbitration.

Mr. Aveling indicated that the Union and Employer have six different collective agreements - one for the sworn officers and five for various groups of civilian employees. He indicated that the Complainant was in the bargaining unit which is referred to as Unit C. He said that the Employer had the right under that collective agreement to dismiss

employees but the Union had a role to play in ensuring that the right to dismiss was exercised properly. He outlined the grievance process followed in a dismissal. He indicated that the Union had a grievance committee with five voting members. Its main function was to decide whether to arbitrate a grievance. He said that the Committee looked at a number of factors in deciding whether to arbitrate, including the wishes of the employee and whether the Union had an arguable case. Given the impact on the employee, the tendency in a dismissal was to arbitrate unless the case was hopeless.

Mr. Aveling testified that he acted as counsel for the Union in many arbitrations - he estimated 50 to 100 - and outside counsel have been used for other arbitrations. Whether to use outside counsel depended, in large part, on Mr. Aveling's workload. No matter who acted as counsel, the Union was the client.

Mr. Aveling said that the Complainant had hired Mr. Book to help the Complainant and it was uncommon for an employee to have his own lawyer throughout the arbitration process.

Mr. Aveling testified that as he began preparing for the Complainant's dismissal arbitration he learned that the Complainant had had a number of earlier dealings with the Union. He said that he had first become involved during the suspension grievance. Following the dismissal, the suspension and dismissal grievances were consolidated.

In terms of his preparation Mr. Aveling said he met with the Complainant and obtained from him what the Complainant felt was relevant. He said he had then obtained the Complainant's personnel file and examined the medical evidence. He next followed up with the Complainant's physicians. He said he had tried to assess whether the physicians would make decent witnesses in an arbitration and, after having done that

assessment, he wrote a memo to Martin Weatherall setting out his concerns about the medical evidence. Mr. Aveling testified that he had concerns about each of the physicians as witnesses. He said that the recurring theme from the physicians was that, while there was a physical problem, there were also psychological problems. One of the physicians indicated that she had reached the conclusion that the Complainant could only write 20 tickets per shift because the Complainant had told her that was all he could write. Another of his physicians had indicated that the Complainant had the physical ability to write 45 tickets per shift.

In August 2003 the Union grievance committee decided to pursue the Complainant's dismissal to arbitration.

Mr. Aveling testified that he recalled meeting with the Complainant at the Union offices and discussing an independent medical examination. Mr. Aveling said he had outlined to the Complainant the concerns he had with the existing medical information. He said he had asked the Complainant if a psychological issue was getting in the way of writing 45 tickets per shift and had been advised that it was not. Mr. Aveling said that he wanted to obtain an IME and the Complainant seemed to understand the need and did not object. Mr. Aveling said that at that point he felt the Union case was not strong but it was worth pursuing because it was a dismissal from employment.

Mr. Aveling said he had correspondence with Mr. Book about the independent medical examination and Mr. Book had agreed that if one was needed he would advise the Complainant to participate.

Mr. Aveling testified that he recalled no discussion about a negative IME being "buried".

After the report of the IME was obtained, Mr. Aveling recalled that the Complainant was unhappy as he felt the report was negative. The Union shared that view to some extent but Mr. Aveling said he felt there were also some positives and the Union could argue that a quota of 45 tickets per shift was unreasonable for the Complainant, due to a mixture of physical and psychological problems.

Mr. Aveling said he felt the Union would use the report in the dismissal arbitration. He also testified that the Employer was aware of the report and before the first day of the arbitration Mr. Christie had asked for the report. Mr. Aveling said there was no reason not to produce a copy, so he had provided a copy to Mr. Christie.

Mr. Aveling said that he had carriage of the case until after the first day of hearing. He said that he had presented the Union's opening statement but the matter was handed to outside counsel, that is to Mr. Strug, before the second hearing day. Mr. Aveling said he was involved in negotiations and had been instructed by the Union to reassign all his grievance litigation.

Mr. Aveling said the Union had sought reinstatement in the dismissal arbitration. The Union position had been that it was unreasonable to expect the Complainant to write 45 tickets per shift. He said that it was clear that credibility, especially the Complainant's credibility, would be extremely important. He said he felt the medical evidence would be very important. He said that he did not attend later days of the arbitration but Tom Froude, the Union's Director of Civilian Administrative Services and a member of the Union's grievance committee, attended for the Union.

Mr. Aveling commented on his experience with arbitrators meeting with the parties during a hearing. He said that it was not uncommon. He said that some arbitrators were

more interventionist than others. He said that labour arbitration was unlike civil litigation, that labour arbitration was more like a marriage in which there were spats and the parties looked for labour relations solutions to their problems.

Mr. Aveling testified that at some point after June 2005 he was advised that the arbitration was going badly for the Union and the Complainant, that the Complainant's credibility was "in tatters". He said it was common for the Union to evaluate cases on an on-going basis. He said the Union decided to pursue a settlement and arranged for the dismissal to be changed to a resignation. He said that the Union experience was that a civilian employee who had been dismissed by the Employer had trouble finding other employment and that it would be especially difficult if there was an arbitration award on the public record upholding the dismissal and finding that the Complainant was not credible, was not forthright, and was lazy. Mr. Aveling said that the cost of the arbitration was not a factor. Mr. Aveling said that he had not sought the Complainant's view but that others may have done so.

Mr. Aveling said the Union's grievance committee had already decided the Union would withdraw from the arbitration when he and Mr. Strug met with the Complainant September 13, 2005.

Mr. Aveling outlined in considerable detail the issues discussed at that September 13 meeting, relying on notes he made at the meeting. The Complainant was advised that the arbitration was not going at all well, that the Union had taken the matter as far as it was sensible to take it. The Complainant was also advised that he had a great deal to lose when, not if, he lost his arbitration - he would end up dismissed, and probably with findings that he was not forthright and was lazy. Those would be objective findings of an impartial individual which would carry more weight than the Complainant's own opinion. Mr. Aveling said that there was then a discussion of whether the Complainant

could continue the arbitration on his own and he was advised he could not do so. Mr. Aveling noted that Arbitrator Bloch met with the parties before the issues regarding discrepancies in the ticket summaries arose. The Complainant suggested that the Union had been against him from day one but Mr. Aveling had disagreed and reviewed the steps the Union had taken on the Complainant's behalf. At that point the Complainant said that other lawyers knew what was going on and were 100% behind him. Mr. Aveling said that it was apparent that the Complainant was not "coming on side." After the Complainant said he was not concerned about an arbitration decision, Mr. Aveling said that he should be, that the Union would not let him go "over the precipice" and that the Union had an obligation toward the Complainant. Mr. Aveling said that the Complainant was advised that Mr. Aveling would write to Mr. Strug and to the Complainant, and that Mr. Strug would write to Mr. Christie and Arbitrator Bloch. Mr. Aveling testified that the Complainant then abruptly left the meeting.

In cross examination, Mr. Aveling agreed that the Union represents employees in their employment relationship with the Employer, that membership in the Union is compulsory and that the Union had carriage of the grievance at arbitration. He agreed that the Union had a duty to represent the Complainant fairly. Mr. Aveling said that he felt the duty to represent fairly did not require the Union to do as an employee wanted, nor to act solely in an employee's interests, but rather to act in the Union's interests. Mr. Aveling said that he felt the Complainant had tunnel vision as to his own interests and, while it may sound patronizing, the Union settled the matter as it believed it was in the Complainant's best interests. Mr. Aveling said that when the matter was settled the Employer had not put in its evidence, that the assessment was made on the basis of the Union's medical evidence, Mr. Strug's report that the physicians did not say the Complainant was unable to write 45 tickets, and Mr. Strug's opinion that the Complainant's testimony was not to be believed, along with Arbitrator Bloch's views.

Mr. Aveling agreed that the Complainant had failed to write 45 tickets per shift for some 10 years and that the Employer had tolerated this.

In re-examination Mr. Aveling said that the Union had tried to persuade Arbitrator Bloch that the Complainant could not write 45 tickets in a shift because of medical limitations but that the Union had changed its view when it became clear that Arbitrator Bloch was not persuaded by the Union evidence.

Glenn Christie's evidence

Glenn Christie is a lawyer in private practice who represented the Employer in the dismissal arbitration.

Mr. Christie testified that he recalled some of the details of the grievance and the arbitration but not all of it. He said that one of the main issues was the Complainant's productivity and whether he could meet the performance standards. He said there was an issue of accommodation of the Complainant and his disability. He said that he had some medical reports from the Complainant's physicians before the arbitration hearing as part of his preparation and had provided that material to the Union. He said he also had access to the tickets the Complainant had written. He said that following his preparation for the arbitration he felt the Employer's case was even stronger than he had initially thought it was. He said the Complainant often wrote a flurry of tickets and then had long breaks in his ticket writing.

Mr. Christie agreed that Arbitrator Bloch had sought a meeting with counsel during the hearing. Mr. Christie testified that Arbitrator Bloch was an interventionist arbitrator, that

he desired to mediate, that he did not like to be passive. Mr. Christie said that he felt that after two and a half days of hearings Arbitrator Bloch had been impressed by the Employer's evidence about the Complainant's productivity, or lack thereof. Mr. Christie said he thought Arbitrator Bloch had been influenced by the evidence of one of the Complainant's physicians who seemed to say there was no limitation on the number of tickets the Complainant could write. Her evidence had been that the 20 ticket limit she had suggested was not something she had decided, but instead was something which had come from the Complainant. She had testified that she thought a ticket every 6, 8 or 10 minutes was possible. In any event, Mr. Christie said that he had felt his cross examination of the Complainant and his physicians was "going great," that he was "hitting his objectives", and that the Union's case was in trouble. Mr. Christie said his objectives included demonstrating that the limitation on tickets was of the Complainant's own making and was not based on the medical situation.

Mr. Christie said he felt Arbitrator Bloch did nothing improper. He said parties had to trust arbitrators to know their role.

Mr. Christie said that in the meeting with Arbitrator Bloch he learned that Arbitrator Bloch had been impressed with the Employer's case. Arbitrator Bloch had discussed the cross examination, the medical evidence, and his concerns about the Union's case. Mr. Christie said Arbitrator Bloch wanted to know what the Employer would do to resolve the matter. Mr. Christie said he had advised that the Employer would accept a resignation. Mr. Christie said he had no recollection of the Complainant coming into the room to meet with Arbitrator Bloch, nor of Mr. Roberts joining the meeting.

Mr. Christie also testified that he had no recollection of he, Mr. Strug and Arbitrator Bloch all being in the hearing room and Arbitrator Bloch saying "Let him cook his own

goose". He said he would have been surprised if Arbitrator Bloch had made such a statement.

In cross examination, Mr. Christie said it was not unusual for an arbitrator to talk to the parties during an arbitration. He said that in his view the difference between labour arbitration and civil courts was that labour arbitration involved a relational contract and that arbitration lacked the formality of civil litigation. While arbitrators were impartial they often met with both counsel, or with one counsel, or with one counsel and that party. Mr. Christie repeated that he had no recollection of Arbitrator Bloch making any "Let him cook his own goose" comment.

Finally, Mr. Christie testified that he thought he had obtained the report from the independent medical examination (IME) from his client and that he had no recollection of asking Mr. Aveling for it.

THE COLLECTIVE AGREEMENT AND STATUTE

The Complainant's employment was regulated by the Unit C collective agreement between the Union and the Employer. However, no provision in that collective agreement was relied upon by the parties.

It was accepted by both parties that the Union had an implied duty of fair representation under the *Police Services Act*. The hearing proceeded on the shared view that the implied duty is enforceable through arbitration.

COMPLAINANT'S POSITION

Counsel for the Complainant began with a review of the authorities below, concentrating on *Gagnon* and on *Lucyshyn*, which he submitted set out the legal principles involved in this matter.

Counsel for the Complainant submitted that the Union had acted in an arbitrary way in the arbitration. He further submitted that in settling the matter and agreeing to have the Employer substitute resignation for dismissal in the Record of Employment, the Union had committed a fraud. The Record of Employment was dishonest.

Counsel then reviewed the Complainant's employment history, noting that he had a good work record at the beginning and had later developed medical issues from his work. Counsel suggested that it was clear that the Complainant could not write 45 tickets per shift. The Complainant had medical reports from his physicians supporting his position. The Employer had filed no medical opinions to the contrary such that the Complainant's medical opinions were uncontradicted.

The independent medical exam was not performed by the Complainant's treating physicians. Why had it been released to the Employer? It was improper to provide this report to the Employer in order to enable the Employer to cross examine the Union witnesses in the dismissal arbitration.

The only evidence the Employer had to contradict the Complainant's physicians was the ticket summary and it was clear that there were problems with that evidence. The Union should have investigated the summaries much more fully as part of its duty of fair representation. Counsel for the Complainant submitted that the Union had failed to properly investigate the matter, had simply reacted to the arbitrator's comments and had failed to consider the consequences of a settlement for the Complainant. In the face of

solid medical evidence and doubtful Employer evidence, the Union had settled the grievance.

Arbitrator Bloch was overheard saying "Let him cook his own goose," a statement which was clearly improper. The Union should have told Arbitrator Bloch to remove himself from the case for that comment and for the apprehension of bias, as Arbitrator Bloch had prejudged the matter.

The Union should have balanced the interests of the Complainant and the members of the bargaining unit. The Complainant had a good case against the dismissal and it was wrong for the Union to settle it as it did. The Union had acted arbitrarily. The Complainant had no standing to pursue the dismissal on his own. It would be an injustice if the Complainant had no recourse against the Union.

As for remedy, the Complainant sought $751,916.55 plus costs.

In reply to the Union submission, counsel for the Complainant said that Arbitrator Bloch had acted improperly, should not have intervened when he did and should not have talked with the parties during the cross examination of the Complainant. Moreover it was gross negligence to give the independent medical examination report to the Employer. Settling the matter showed gross negligence.

Counsel for the Complainant referred to the following authorities: *Canadian Merchant Service Guild v. Gagnon* [1984] 1 S.C.R. 509 (SCC); *Gendron v. Supply & Services Union of the Public Service Alliance of Canada, Local 50057* [1990] 1 S.C.R. 1298 (SCC); *Centre hospitalier Régina Ltée v. Québec (Labour Court)* [1990] 1 S.C.R. 1330 (SCC); *Pham v. Amalgamated Transit Union Local 113 v. Toronto Transit Commission*

[1997] O.L.R.D. No. 3148; *Campbell and Teamsters Local Union 938 and United Parcel Service Canada Ltd.* [1999] CIRB No. 8; *Butt v. United Steelworkers of America* [2002] N.J. No. 323 (NCA); *Esposito v. Canadian Union of Public Employees, Local 79 v. City of Toronto* [2002] O.L.R.D. No. 2331; *Freamo v. Canadian Union of Public Employees, Local 79 v. City of Toronto* [2005] O.L.R.D. No. 1742; *Beatty and Saskatchewan Government and General Employees Union and Northlands College* [2006] S.L.R.B.D. No. 27; and *Lucyshyn v. Amalgamated Transit Union, Local 615* [2010] CanLII 15756 (SKLRB).

UNION'S POSITION

The Union submitted that there were a number of issues raised in this hearing which were "red herrings". All I needed to decide was whether, in deciding to withdraw from the dismissal arbitration and negotiate a settlement, the Union was in breach of the duty of fair representation. The Union submitted it had not breached its duty, that instead it had a long history of responsiveness, support and focus on the Complainant's interests.

The Union reviewed the facts. The Union said that while it was not my job to decide whether the Complainant could write 45 tickets in a shift, I should nevertheless try and put myself in the position of Arbitrator Bloch and the parties to the dismissal arbitration in 2005 and, in so doing, I would have a clear picture of what transpired then. This would assist in evaluating the Union's actions and also assessing the merit, or lack thereof, in the Complainant's claim in this matter.

The Union reviewed its authorities, below, and submitted that five principles emerge as follows:

- The Union does not have to be right, but it does have to make a reasonable

decision.

- Where a breach of the duty of fair representation is alleged, one must evaluate not just the Union decision but also the process leading to the decision.
- The question of whether to proceed to arbitration and, having done so, whether to withdraw from that process is one for the Union, not the individual employee.
- It is reasonable for a Union to rely upon the advice of outside counsel.
- The decision to settle a grievance is subject to a reasonableness test, assuming there is no evidence of bad faith, or ill will, etc.

The Union said there was no evidence of bad faith, ill will, or dishonesty on the part of the Union. The only issue was whether the Union had acted arbitrarily in reaching the settlement. The Union then reviewed the evidence related to the settlement and said it was done fairly. Arbitrator Bloch had concerns. He expressed them in a manner which was neither uncommon nor inappropriate. Arbitrator Bloch expressed his views to counsel and then, as he was requested to do, to the Complainant personally. At that point the Union had to step back and review the matter. What was in the Complainant's best interests? Should the Union continue and likely end up with an award that found the Complainant to be lazy or even a liar, or should the Union settle for a result which would have a better long term effect for the Complainant. The Union chose to settle and clearly communicated the reasons to the Complainant although he appears to have chosen not to hear those reasons.

The Union exercised discretion in settling the grievance and it decided to settle based on the Complainant's own interests. The Union represented the Complainant with integrity and competence and without negligence or hostility. The Union considered only relevant factors and it followed the advice of outside counsel. The Union had initially accepted the Complainant's assertion that he could not write 45 tickets in a shift,

had tried to persuade Arbitrator Bloch of it and, when it was clear that Bloch was not buying the submission and there was no chance of winning, the Union settled.

The Union asked that the complaint be dismissed.

The Union referred to the following authorities: *Canadian Merchant Service Guild v. Gagnon* [1984] 1 S.C.R. 509 (SCC); *Robertson v. United Food and Commercial Workers International Union AFL-CIO, Local 114P v. Canada Packers Inc.* [1990] OLRB Rep. August 886; *Sobeski v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) Local 636 v. TRW Automotive (Kelsey-Hayes Canada Ltd.)* [2000] OLRB Rep. July/August 731; *Satkunendrarajah v. United Steelworkers of America Local 3* [2002] O.L.R.D. No. 2340; *De Silva v. Toronto Police Association* [2004] O.J. No. 5038 (OSC); *Symington v. U.F.C.W. Local 1000A v. National Grocers Co. Ltd.* [2005] O.L.R.D. No. 2197; *Ali v. United Food and Commercial Workers Canada Local 175 & 633 v. National Car Rental (Canada) Inc.* [2007] O.L.R.D. No. 3828; and *Sharma v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) & its Local 462 v. Gesco Limited Partnership* [2008] O.L.R.D. No. 4162.

CONCLUSIONS

Under the Canadian system of collective bargaining unions act as equals to employers. A union acts as an independent party, separate from the employees it represents. A union has the right to negotiate a collective agreement with the employer and that agreement then regulates the employment relationship of all the employees within the bargaining unit. A union has the right and responsibility to administer the collective agreement, that is to ensure that the employer abides by the collective agreement. Most

labour statutes and most collective agreements provide that a difference arising under the collective agreement, called a grievance, which cannot be resolved by discussions between the union and employer is to be resolved by arbitration.

Although there are some collective agreements which provide otherwise, in most instances it is the union which decides whether to pursue a grievance. The union then decides whether, when, and on what terms it will settle a grievance. It is the union which decides whether to arbitrate the grievance. Most employees have no individual access to arbitration and cannot take a grievance to court.

In those instances where a grievance is about a basic job right, such as here involving the Complainant's dismissal from his employment, the union control over whether to grieve, whether to arbitrate, and whether, when, and on what terms to settle the grievance, gives the union great power over each employee's employment relationship.

It is possible for a union to abuse its power under this system of collective bargaining.

As a check against union abuse of its control over bargaining and administering the collective agreement, the Canadian system requires the union to represent its members fairly. This notion of "fair representation" was first recognized by the courts in the 1960's and it was seen as an implicit provision of the labour relations statutes which gave unions their authority. The union's implicit duty to represent its members fairly was administered by the courts. Beginning about 1970 many Canadian labour relations statutes were amended to make explicit a union's duty to represent its members fairly and under most of those statutes the explicit duty of fair representation is administered by a labour relations board or similar labour relations tribunal.

The Ontario *Police Services Act* does not explicitly include a duty for this Union to represent its members fairly. It is clear, however, that the duty of fair representation is implicit in this *Act* (see, for example, *De Silva v. Toronto Police Assn.*, above). In the 2004 *De Silva* case this duty of fair representation was enforced by the courts.

Recently, the general trend in Canadian legislation and in court decisions has been to have all labour relations matters adjudicated by specialized labour relations tribunals rather than by the courts. As part of this general trend, in 2006 the Ontario Court of Appeal affirmed that the *Police Services Act* includes an implicit duty of fair representation (see *Renaud v. Town of Lasalle Police Association* [2006] CanLII 23904, 216 O.A.C. 1 (Ont. C.A.)) and concluded that this implicit duty of fair representation should be enforced through labour arbitration rather than by the courts. While the *Renaud* decision is very brief, the Court decided that since there is no tribunal under the *Police Services Act* equivalent to the Ontario Labour Relations Board which administers the duty of fair representation under the *Labour Relations Act,* claims of a breach of the duty of fair representation should be decided by arbitration conducted under the *Police Services Act.*

When this Complainant first alleged a breach of the duty of fair representation following the 2005 settlement of his dismissal arbitration, this implicit duty of fair representation in the *Police Services Act* was enforced in the courts and so the Complainant began his claim in court. I understand that following the decision in *Renaud,* above, this Union sought to terminate the court proceeding and to move this dispute to arbitration under the *Police Services Act*.

The Complainant had also filed a complaint with the Ontario Labour Relations Board alleging a breach of the explicit duty of fair representation contained in the *Labour Relations Act*. The Ontario Labour Relations Board decided that it had no jurisdiction as

the *Labour Relations Act* did not apply because the Complainant was an employee of a police force. Instead, the *Police Services Act* regulates the collective bargaining for employees of police forces.

After what has undoubtedly been a lengthy and frustrating effort in trying to pursue his claim of a violation of the duty of fair representation, the Complainant arrived at this arbitration and both parties agreed that I had the jurisdiction to consider his complaint.

What, then, is the extent of the duty of fair representation which is implicit in the *Police Services Act*?

The Supreme Court of Canada considered the duty of fair representation in *Gagnon*, above. While that case was not decided under the *Police Services Act*, the duty of fair representation is accepted as being generally the same under various pieces of labour legislation. The Court summarised its conclusions about the scope of the duty of fair representation as follows:

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

The above summary from the Supreme Court has been widely accepted as an accurate statement of the legal principles involved (see, for example, *De Silva,* above) and it was relied upon in this arbitration by both parties. I apply this interpretation of the duty of fair representation.

While the Union is obliged to "fairly represent" the Complainant (paragraph 1), the Union also "enjoys considerable discretion" (paragraph 2). This notion of considerable discretion is appropriate as it is a duty of fair representation, not a duty of correct representation.

Paragraphs 3, 4 and 5, above, set out limits on the exercise of a union's discretion, describing what the union must do in exercising the discretion (paragraph 3) and what it cannot do (paragraph 4). In paragraph 5 there is another description of how the discretion is to be exercised.

While the Complainant's employment was at issue in his arbitration, it is worth noting that there is no special obligation imposed upon a union in dismissal arbitrations, no special obligation to see dismissal grievances through to the completion of the arbitration process. Instead, in dismissal cases the union is subject to the same duty of fair representation as in another type of grievance although, as noted in paragraph 3 in the extract from *Gagnon* above, the union must consider the significance of the issue and its consequences to employees as one of the factors in its decision making. There is no doubt that dismissals are much more important to employees than are grievances over matters such as wages, bereavement leave pay, etc.

I turn now to this claim. Considering its representation of the Complainant, was the Union

fair, having in mind that it had considerable discretion in how it conducted its work, but that this was a dismissal and of great importance to the Complainant?

The Complainant raised five main complaints regarding the Union's handling of his dismissal grievance:

1. The Union disclosed the Report of the Independent Medical Examination (IME) to the Employer;
2. The Union failed to pursue flaws in the Employer's summary evidence of parking tickets;
3. The Union settled the grievance over the objection of the Complainant;
4. The Employer issued a fraudulent revised Record of Employment which indicated the Complainant had resigned instead of being dismissed and the Union did nothing about that fraud; and,
5. Arbitrator Bloch conducted himself improperly and the Union failed to take action in response.

1. The Union disclosed the Report of the Independent Medical Examination (IME)

At some point before the arbitration hearing began, Mr. Christie, Employer counsel, asked the Union for a copy of the report of the independent medical exam.

One of the goals of the Canadian system of labour relations is to have the parties resolve their own disputes and it is accepted that a settlement is more likely if both parties have access to all the relevant information.

Production of documents in advance also enables the parties to make more efficient use of the time at the hearing. Arbitration is not meant to be a process in which one party

surprises the other in the midst of the hearing with new documents, documents which may necessitate an adjournment to give the other party time to consider them.

For these reasons, the general trend in labour arbitration is for each party to produce to the other party all documents which may be relevant to the dispute. Arguably relevant is the common standard for whether a document should be produced.

This independent medical report, which dealt with the Complainant's medical situation and ability to perform his job, addressed issues likely to arise in the arbitration. I also note that Mr. Aveling testified that he anticipated that the Union would use the report of the IME in the arbitration. This report was at least arguably relevant to the issues to be determined in the arbitration. It is very probable that any arbitrator asked by the Employer to order the Union to produce this document to the Employer would have ordered its production.

I would also note that although the IME report was referred to by Mr. Christie in his opening statement, it was never in evidence in the hearing and seems to have played no direct part in influencing the arbitrator.

I find that for the Union to have provided a copy of the IME report to the Employer did not breach the Union's duty of fair representation.

2. The Union failed to pursue flaws in the Employer's summary evidence of parking tickets

The Complainant submitted that the Union had breached its duty of fair representation by failing to properly investigate the Employer's summary records of the parking tickets the

Complainant had issued in the past. There were concerns raised about this evidence at the dismissal hearing, about the time the hearing was adjourned.

In this hearing it was clear that there were errors in that material, that the Complainant could not have written parking tickets in two distinct parts of Toronto at the same time, as the summary indicated he did on several occasions.

A Union has a responsibility to investigate relevant facts. But the main issue in the dismissal hearing was not precisely how many tickets the Complainant had written in the past. It was accepted that the complainant had, for several years, failed to write the required 45 tickets per shift.

Instead the dispute was whether his failure to write 45 tickets was due to medical reasons and whether there was persuasive medical evidence that he could not write 45 tickets per shift in the future. If his reasons were medical, the Employer might have a duty to accommodate him under the *Human Rights Code.*

Accepting that there were flaws in the summary evidence about the tickets, how would the pursuit of these flaws in the ticket summaries have assisted the parties in deciding whether there were medical reasons for the Complainant being unable to write 45 tickets? I cannot see how the pursuit of this issue would have helped with that decision. I am unable to see any basis upon which the Union's failure to pursue the details of inaccuracies in the summary evidence was a breach of the duty of fair representation. Instead, I find that the Union quite properly understood what were the relevant issues in dispute and focussed on those issues.

3. The Union settled the grievance over the objection of the Complainant

A union is an independent entity in the labour relations process. A union does not function in the same way as a lawyer who takes instructions from the client. That is, a grievor is not a union's client. Instead, the union is able to reach its own settlement, over the opposition of a grievor.

After the spring arbitration hearings Mr. Strug, Union counsel, reported Arbitrator Bloch's views and his own views to Union officials who had not been present at the arbitration and the Union re-evaluated the case. It is sensible for this or any Union to re-evaluate a grievance as the arbitration progresses. Faced with the advice of its outside counsel, its knowledge of Mr. Aveling's original concerns, and its knowledge of Arbitrator Bloch's views, the Union concluded that it could not persuade Arbitrator Bloch of the merits of the grievance. While he did not put it quite that bluntly, Mr. Christie as Employer counsel in the dismissal arbitration, was clearly of the same opinion. That is, both parties were confident the Employer would be successful in the arbitration. Faced with a grievance it was convinced it would not win, the Union reached a settlement. I am unable to see how it can be unfair for the Union to settle a grievance which this Union has reasonably concluded it could not win.

Moreover, I conclude that the Union process of review after the spring hearings, that is its consultation with outside counsel as well as staff counsel, followed by a vote in its grievance committee, was a reasonable process for the Union to have followed. I note that the Complainant did not complain about this process.

With the exception of the Union's consideration of Arbitrator Bloch's conduct, an issue which I address later in this award, I find nothing in this settlement which suggests a Union breach of the duty of fair representation.

4. The Employer issued a fraudulent revised Record of Employment which indicated the Complainant had resigned instead of being dismissed and the Union did nothing about that fraud

This concern had to do with the revised Record of Employment (ROE) prepared and issued by the Employer after the settlement. This revised ROE accurately reflected the parties' agreement that the dismissal would be recorded as a resignation. The Complainant submitted that the Employer's revised ROE was a fraud, that it was dishonest.

As noted, the Employer was not a party to this arbitration and I am hesitant to describe an Employer action as dishonest without the Employer being a party. But it is sufficient for me to deal only with the question of whether the Union breached its duty of fair representation.

There are two parts to this concern - as part of the settlement of a grievance can the Union agree that a dismissal should henceforth be recorded as a resignation and, if so, can the Employer issue a revised ROE to record that agreement, without the Union violating its duty of fair representation. The Complainant's counsel did not make it clear why he believed that the Union could not reach such a settlement.

I agree with the Union that most employees faced with a choice between dismissal for cause or resignation would choose resignation.

But can a union agree to a resignation if the employee does not agree to resign?

I can see no reason, labour relations or otherwise, that a union cannot agree to substitute a

resignation for dismissal for cause in the settlement of a dismissal grievance. In particular, I do not see how, in this instance, the Union violated its duty of fair representation.

Moreover, having decided that the Union and Employer can agree to resignation as a settlement, the Employer's records should actually reflect that settlement. I fail to see how it can be a Union breach of its duty of fair representation for the Employer to issue a revised ROE which was in keeping with the parties' settlement.

Although the Complainant did not agree to resign, I find that the Union did not breach its duty of fair representation in agreeing to this settlement, nor did it breach its duty in allowing the Employer to issue a revised ROE indicating a resignation.

5. Arbitrator Bloch's conduct and the Union's failure to take action in response

Arbitrators sometimes make mistakes or act inappropriately. Our legal system has a process for dealing with these concerns about arbitrators. In Ontario, concerns about arbitrators' mistakes or misconduct can be referred to court for judicial review. For example, in a judicial review of an arbitration award upholding a dismissal for cause, a union could seek a court order setting aside the arbitrator's award and sending the matter back for a new hearing.

In the event of arbitrator misconduct the parties could also agree that an arbitrator has acted inappropriately, and they could agree to dismiss that arbitrator and begin the hearing before a different arbitrator. Failing agreement, one party can always ask an arbitrator to remove himself or herself from the arbitration because of misconduct.

A union which learned of arbitrator misconduct but did nothing about it might be open to a complaint regarding its representation of a grievor. A union's duty in response to arbitrator misconduct would be one of fair representation, the same duty it has in other arbitration matters.

What about the actions of Arbitrator Bloch? Were his actions improper, such that the Union by doing nothing about them violated its duty of fair representation?

There were two basic issues raised:

Can an arbitrator engage in mediation during the arbitration? and, if so,

What are the limitations on an arbitrator who engages in mediation?

Can an arbitrator engage in mediation during the arbitration?

There is a distinction between an arbitrator and a mediator. In simple terms, an arbitrator hears the evidence and submissions and then makes a decision which is imposed upon the parties to the dispute, that is the parties are bound by the arbitrator's decision. On the other hand, a mediator assists the parties in reaching their own resolution of their dispute - he or she acts as a facilitator but does not impose a decision upon the parties. He or she can encourage a particular result but the parties are free to accept or to reject the mediator's suggestions.

Complainant's counsel argued strenuously that mediation was inappropriate conduct for a judge, and also for an arbitrator.

Whatever may be the appropriate conduct for a judge, I note that many arbitrators do exactly as Arbitrator Bloch did - they attempt to mediate grievances.

If there is a difference between civil litigation and labour arbitration with respect to mediation it is no doubt due, at least in part, to the fact that labour arbitration is a different process from civil litigation, as both Mr. Aveling and Mr. Christie testified. Parties to civil litigation do not generally sue one another on a regular and repeated basis, whereas this Union and this Employer meet frequently in arbitrations in an effort to sort out conflicts between them. Recall that Mr. Aveling said he had personally done 50 to 100 labour arbitrations for this Union with this Employer and that outside counsel have been used in other arbitrations. Mr. Aveling described the Union/Employer relationship as being like a marriage. Mr. Christie referred to it as a relational contract. That is, these parties try and work out problems as they arise for the benefit of the long-term health of their relationship.

Consistent with this approach of considering the parties' ongoing relationship is the notion that the parties should be able to hire an arbitrator whom they jointly anticipate is well suited to the matter they are arbitrating and well suited to enhancing their ongoing relationship, including an arbitrator who will try to mediate the grievance. Most, if not all, arbitrators are aware of the parties' desire to work out their problems and so an arbitrator who perceives a possible settlement can reasonably be expected to raise it with the parties.

Arbitration can be an expensive and time consuming process. Mediation during an arbitration has the potential to not only assist the parties in reaching their own settlement of the grievance, but mediation also has the potential of saving the parties considerable time and expense.

These benefits of mediation are no doubt the reason that mediation by arbitrators has

become so common.

Given the nature of the collective bargaining relationship and the potential for assisting the parties, I conclude that there is no general prohibition against an arbitrator engaging in mediation.

Turning to this case, the parties jointly selected Arbitrator Bloch. Arbitrators have different styles. In this instance the parties selected an arbitrator who, according to the evidence of Mr. Christie, Employer counsel, was known to be interventionist and to encourage settlement if he felt it appropriate. Although neither side referred to it explicitly, I note that in Arbitrator Bloch's April 8, 2004, letter accepting his appointment, Arbitrator Bloch indicated to the parties that he was pleased to accept their invitation to act as "arbitrator/mediator" in the dismissal grievance.

This Union, like any union, has a discretion to hire an arbitrator whose record and style the Union thinks is appropriate for a particular grievance. In this instance the Union and the Employer jointly hired an experienced arbitrator who was known to mediate when the opportunity arose.

Having hired an arbitrator who was known to mediate and subsequently having encouraged him to do so, I see nothing improper about the fact that Arbitrator Bloch mediated and I find no Union violation of its duty of fair representation.

What are the limitations on an arbitrator who engages in mediation?

The processes of arbitration and mediation are quite different and there are risks for an arbitrator and for the arbitration process when an arbitrator attempts to mediate during an

arbitration. While the arbitrator has the power to compel a result by way of an award, a mediator has only the power of persuasion. But when an arbitrator engages in mediation, he or she does so at a time when both parties are obviously aware that the arbitrator/mediator who encourages the parties to agree to a particular solution can, if unsuccessful in the mediation, ultimately compel that same suggested solution by way of an award. That is, an arbitrator who acts as a mediator wields a particularly large stick.

Whether or not an arbitrator chooses to mediate, the arbitrator must still conduct a proper and fair hearing.

Arbitration is a form of adjudication. Relying upon common law principles, a basic notion of an adjudication process in Canada has long been that justice must not only be done, but it must also be seen to be done. That is, both the ultimate outcome and the process are important elements of a fair adjudication process. A fair hearing assumes that an unbiased person will listen to the evidence and submissions and will make a decision based upon the evidence and the submissions.

For an arbitrator to intervene as mediator and express any conclusions, tentative or otherwise, about the evidence received may suggest that the arbitrator has reached a decision based on only part of the evidence. As a result, the risks for an arbitrator who becomes a mediator during an arbitration hearing are greater if the mediation occurs once some evidence has been presented. Once an arbitrator has heard evidence, it is difficult when functioning as a mediator not to convey some conclusions as to that evidence.

This risk of an arbitrator being viewed as biased or as having pre-judged the matter is even greater if no settlement is reached and the arbitrator must then continue the arbitration hearing. How can an arbitrator who has expressed a conclusion as to the

facts in a grievance, or as to the appropriate outcome of that grievance, and who may have tried to persuade the parties to agree to a particular settlement, resume the hearing of evidence and expect to be, and expect to be seen to be, impartial?

An arbitrator who engages in mediation needs to be extremely cautious as to how that mediation is conducted. The arbitrator needs to ensure that his or her conduct does not prevent the resumption of a fair adjudicative hearing in the event that the parties do not settle.

Another normal expectation of an adjudicative process in Canada, once again an expectation based on common law principles, is that both parties should be present at all times, both sides should hear all the information that is provided to the arbitrator, and each party should be able to respond to all of the other side's information. Discussions in the absence of one party are contrary to that normal expectation. Private meetings involving the arbitrator and only one party offend the notion of a fair hearing and should only be held with the agreement of the other party.

In this case, after two of the Complainant's physicians had testified, and during the Complainant's cross examination, Arbitrator Bloch intervened. The evidence was clear that intervention by an arbitrator wishing to mediate was not unusual, and in particular it was quite common for Arbitrator Bloch.

Moreover, in this instance Arbitrator Bloch first indicated his views privately to the two counsel. Either counsel could have advised Arbitrator Bloch that his client did not want Arbitrator Bloch's mediation assistance. There was no evidence that either counsel indicated any such thing. Instead, the evidence suggested that the parties through their counsel, in some manner, encouraged Arbitrator Bloch's mediation efforts.

Did Arbitrator Bloch meet with only one side? Although there was some difference in the evidence, especially in the evidence from Alston Roberts, I conclude that Arbitrator Bloch did meet with the Union (i.e., Mr. Strug, Mr. Froude, the Complainant, and Mr. Roberts) without any Employer representative present.

But here the evidence indicated that the Employer agreed to that meeting. Because the Employer knew of this meeting and accepted it, I see nothing improper about Arbitrator Bloch speaking privately with the Union about a possible settlement. I see no basis upon which the Complainant can assert that the Union failed to represent him fairly by meeting alone with Arbitrator Bloch.

The troubling aspect of Arbitrator Bloch's behaviour was the comment about which Mrs. Abutalib testified.

Recall the evidence from Mrs. Abutalib that Arbitrator Bloch said the words "Let him cook his own goose" to Mr. Christie and Mr. Strug, in the presence of Mrs. Abutalib. Mrs. Abutalib recalled the statement clearly. Mrs. Abutalib concluded that the comment referred to the Complainant. On the other hand, Mr. Christie testified that he could not recall all the details of the hearing, and he said he could not recall this statement, although he did suggest that he would be surprised if Arbitrator Bloch said this.

That was the extent of the evidence on this issue. Mr. Strug, Union counsel, was also present at that time but he was not called to testify at this hearing as he was working outside Canada. Arbitrator Bloch was not called as a witness.

Was this comment made by Arbitrator Bloch? Mrs. Abutalib was clear about this

comment. The alleged statement was consistent with the view that Arbitrator Bloch had expressed to counsel in private and the view he had expressed to the Union and the Complainant together. There was no evidence to the contrary. I find that Arbitrator Bloch did indicate to counsel that for the Complainant to pursue the arbitration rather than accept a settlement would result in the Complainant "cooking his own goose." I interpret that statement as suggesting that the Complainant would be worse off by continuing with the arbitration hearing than he would be if he were to agree to settle the matter with a resignation.

Notwithstanding the fact that Arbitrator Bloch had earlier been careful to qualify his comments as mediator as based on the evidence received so far, that he had earlier refused to discuss the evidence in any detail, and that he had earlier explicitly stated that he had not made up his mind, there was no evidence before me that the "cooking his own goose" statement was made in a similar way.

The colourful language, in hindsight, was unfortunate, but I can only conclude that a reasonable person hearing this comment in the way that Mrs. Abutalib did would have concluded that Arbitrator Bloch had made up his mind, that he had reached a conclusion about the dismissal grievance before hearing all the evidence or hearing the submissions, and that he was going to decide for the Employer.

On the evidence before me, I find that Arbitrator Bloch's comment to counsel of "Let him cook his own goose", a comment made in front of Mrs Abutalib, indicated Arbitrator Bloch's conclusion about the case and strongly suggested that for the Complainant to continue with the hearing before Arbitrator Bloch would be a waste of time as Arbitrator Bloch had already made up his mind. One hallmark of a fair hearing is that the arbitrator will listen to the evidence and submissions and will make a decision based upon that evidence and those submissions. Arbitrator Bloch's comment indicates to me that,

before hearing all the evidence and before hearing the parties' submissions, Arbitrator Bloch had reached his conclusion.

I would have no problem if a mediator had behaved in this manner. But Arbitrator Bloch was also the arbitrator and following his comment Arbitrator Bloch resumed the hearing as arbitrator and received further evidence. I find that it was inappropriate for Arbitrator Bloch to have returned to his role as arbitrator after he had prejudged the matter.

An arbitrator who reaches a conclusion without hearing all the evidence is open to having his or her award set aside on judicial review. But the matter did not proceed to an award. Instead, the Union agreed to a settlement over the objections of the Complainant.

Mr. Strug, Union counsel, was present when Arbitrator Bloch made this comment. Although there was no clear evidence that Mr. Strug actually heard this comment, given that Mrs Abutalib overheard it clearly, I find that the reasonable conclusion is that Mr. Strug did hear it. I find that the Union, through its counsel, knew of the comment.

There was no evidence that the Union considered Arbitrator Bloch's prejudgement of the case before, or as part of, its consideration of the settlement of the grievance. Was the Union's failure to consider this issue a violation of its duty of fair representation?

I acknowledge that there may have been a valid reason why the Union did not consider Arbitrator Bloch's behaviour, but Mr. Strug did not testify, and I heard no explanation as to why the Union failed to consider this. Had the Union considered Arbitrator Bloch's action, it may still have decided to settle and may have, in so doing, met its duty of fair

representation. But I heard no evidence that this matter was ever considered by the Union.

Under the principles set out in *Gagnon*, above, the Union was obliged to exercise its discretion "in good faith, objectively and honestly, after a thorough study of the grievance and the case". I conclude that by basing the settlement, in part, on Arbitrator Bloch's views of the merits of the case, while failing to consider that Arbitrator Bloch had pre-judged the grievance and had reached a decision before hearing all the evidence, the Union did not complete a "thorough study of the grievance and the case."

Moreover, under *Gagnon* the Union representation must be "fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence." I also conclude that by basing the settlement, in part, on Arbitrator Bloch's views of the merits of the case, while failing to consider that Arbitrator Bloch had pre-judged the grievance and had reached a decision before hearing all the evidence, the Union representation was not fair and genuine and did not demonstrate competence.

I conclude, then, that the Union failed to meet its duty of fair representation.

The Complainant had many criticisms of the quality of his representation by the Union. I emphasize that, apart from this narrow issue of its response to Arbitrator Bloch's actions, I find that the Union represented the Complainant very well. Unfortunately, the Union's failure to consider Arbitrator Bloch's prejudgement undermined its other good work.

To summarize, I find that Arbitrator Bloch made a comment in the midst of hearing evidence in the dismissal arbitration which indicated that he had already reached a

decision. I had no evidence that the Union considered Arbitrator Bloch's behaviour, considered the possibility of judicial review, or considered in any way the impact of the comment on the arbitration process. The arbitrator's actions should have been considered by the Union before agreeing to a settlement of the dismissal grievance. Because of its failure to consider the arbitrator's conduct, I conclude that the Union failed to represent the Complainant fairly.

Remedy

Having found a violation of the duty of fair representation, I turn now to the issue of remedy.

The Complainant sought only damages. What did the Complainant lose as a result of this Union breach of the duty of fair representation?

Clearly, the Union breach of the duty of fair representation did not cost the Complainant his job. Had the Union considered the arbitrator's conduct, the Union may still have settled the grievance, or had the Union continued to pursue the dismissal grievance it is quite likely that the Union would have ultimately been unsuccessful. It follows that the Union breach cost the Complainant only a small chance that he might somehow get his job back.

Nevertheless, I have decided that the Union did not represent the Complainant fairly and a remedy is appropriate for that breach. In all the circumstances, especially the small likelihood of ultimate Union success in the grievance, I assess damages in the amount of ten thousand dollars ($10,000.00). The Union is ordered to pay that amount to the Complainant.

Summary

I find that the Union did not meet its obligation to fairly represent the Complainant as it failed to consider the arbitrator's inappropriate conduct before settling the grievance. In terms of the fair representation standard set out in *Gagnon*, quoted above, I find that the Union has not exercised its discretion in the manner described in paragraphs 3, 4 and 5. I order the Union to pay the Complainant damages for that breach in the amount of $10,000.00.

I will remain seised to deal with any issues which may arise in the implementation of this award.

Dated at London, Ontario this 17th day of December, 2010.

Howard Snow, Arbitrator