



## Reasons for decision

Teresa Heitzmann,

*complainant,*

*and*

Canadian Union of Postal Workers,

*respondent,*

*and*

Canada Post Corporation,

*employer.*

Board File: 30317-C

Neutral Citation: 2014 CIRB 737

July 25, 2014

---

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members.

### **Parties' Representatives of Record**

Ms. Teresa Heitzmann, on her own behalf;

Mr. Ken Mooney, for the Canadian Union of Postal Workers;

Ms. Muriel Henry, for Canada Post Corporation.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

Section 16.1 of the *Canada Labour Code (Part I—Industrial Relations) (Code)* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this matter without an oral hearing.

---

## **I. Nature of the Complaint**

[1] On April 2, 2014, the Board received from Ms. Teresa Heitzmann a duty of fair representation complaint alleging that her bargaining agent, the Canadian Union of Postal Workers (CUPW), had violated section 37 of the *Code*:

37. A trade union or representative of a trade union that is the bargaining agent for 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 with respect to their rights under the collective agreement that is applicable to them.

[2] Ms. Heitzmann, who worked for Canada Post Corporation (CPC) until her termination on April 19, 2013, alleged CUPW acted in an arbitrary and discriminatory way in numerous ways, including by failing to advise her of her arbitration date, deciding unilaterally to settle her grievance, and requesting that she provide them with medical evidence.

[3] CUPW, through its representative Mr. Ken Mooney, who was actively involved in representing Ms. Heitzmann, provided a detailed response to Ms. Heitzmann's allegations.

[4] That response included a thorough chronology of events and attached documentation which had been exchanged between Mr. Mooney and Ms. Heitzmann. CUPW argued that this extensive record not only showed Ms. Heitzmann's allegations had no merit, but further demonstrated the significant lengths to which it had gone to assist her following the termination of her employment.

[5] Ms. Heitzmann filed a reply consisting of several emails containing assorted comments and a large number of appended documents.

[6] The Board has concluded that CUPW made significant and continuous efforts to assist Ms. Heitzmann. However, her continued unwillingness to respond to its legitimate requests for information, among other things, ultimately gave CUPW few options but to withdraw her termination grievance.

[7] These reasons explain the Board's decision.

---

## **II. Facts**

[8] Ms. Heitzmann's complaint referred to what the Board will describe as three categories of grievances.

### **A. Automatically settled grievances**

[9] Ms. Heitzmann filed numerous grievances under the collective agreement between CUPW and CPC. On the cover page of her complaint, she alleged that there were 13 of these grievances.

[10] CUPW argued that these 13 disciplinary grievances were resolved under a provision of the collective agreement which placed into abeyance any unresolved academic grievances. Those grievances, while involving discipline, had no financial impact on the employee.

[11] Article 9.106 of the CPC-CUPW collective agreement dealt with these situations:

In an effort to keep the regular arbitration procedure free from issues that may eventually become academic only, the parties agree to hold in abeyance any unresolved grievance where discipline was imposed with no financial impact on the employee such as reprimands or waived suspensions.

These grievances shall be kept in abeyance until either party wishes to rely on the presence or absence of such discipline in relation to another relevant issue or, at latest twelve months from the date of the alleged infraction. At the expiration of the twelve (12) months, the grievance shall be deemed to be settled...

[12] Ms. Heitzmann's reply included an April 15, 2014 email she sent to herself which partially addressed this issue:

I also am of the opinion that I was fired for what was in my personal file. I have no reason to believe the union withdrew my grievances from personal file before I was fired. The union did not state a date they were removed and I never received notification they were removed prior to March 2013.

[sic]

[13] This was the extent of Ms. Heitzmann's comments on the 13 grievances. CPC agreed with CUPW on the status of these grievances.

### **B. Overpayment grievance**

[14] The Board understands from the complaint that Ms. Heitzmann allegedly owed CPC certain sums arising from an overpayment of sick leave benefits.

---

[15] Ms. Heitzmann's complaint alleged that CUPW had settled her grievance contesting this alleged overpayment. She stated at page 4 of her complaint:

Union did not Investigate reasons for overpayment. Union Arbitrarily settled grievance so collections would harass me.

[sic]

[16] Ms. Heitzmann commented further on this issue at page 9 of her complaint:

its complicated but I filed grievances, contacted HR managers etc about the sick day issue. Upon termination Cpost sent bill for collections who have been contacting me. I told collections the Union + Cpost needed to resolve grievance cause I do NOT owe this. I received resolved grievance Dec 30. It was 100% reached arbitrarily in an effort to allow collections to harass me. Incidentally I filed a Human Rights Complaint which letters went to both Cpost + union.

[sic]

[17] In her reply, Ms. Heitzmann added the following comment about this repayment grievance:

The beginning of the money Canadapost is saying I owe then begins when in Dec 09 they back clawed my check. I have included the web information to the board. Despite unions claims the overpayment occurred as I was released from CPost I have been putting in enquiries since 2010 on this issue. It has not been resolved and I am not of the opinion it will be resolved.

[sic]

[18] CUPW contested Ms. Heitzmann's allegations, at page 3 of its response:

At the time of this writing, there is only [sic] outstanding grievance on the Grievor's behalf. The grievance is referenced in the Complainant's submission and pertains to an overpayment that Canada Post sought to recover following her discharge. The grievance was submitted to Canada Post on September 13, 2013, following the Complainant's termination. The grievance was referred to arbitration and will be scheduled for arbitration in accordance with the normal practice. Contrary to the Complainant's allegations, the grievance has not been settled nor does the Union ever arbitrarily settle grievances in order to allow collection agencies to harass its members.

(emphasis in original)

[19] CPC agreed with CUPW that this repayment grievance remained outstanding.

---

## C. Termination grievance

[20] The main thrust of Ms. Heitzmann's complaint concerned CUPW's ultimate decision to withdraw her termination grievance. Both parties filed extensive documentation in support of their positions. Ms. Heitzmann's termination arose from an alleged refusal on her part to provide medical information to support her request for an accommodated position. After repeated demands from CPC to provide this medical information to its third party disability manager, CPC terminated her employment.

### 1. Ms. Heitzmann's allegations

[21] Ms. Heitzmann put forward several allegations to contest CUPW's representation of her interests. The main allegation concerned CUPW's request for medical information. CUPW considered that information essential to her case; Ms. Heitzmann was of the view that it was both confidential and not relevant.

[22] Ms. Heitzmann alleged that CUPW acted in an arbitrary fashion *inter alia* by not communicating with her, "baiting" her with a fake arbitration date and stealing her medical files:

Union has twisted facts. Asked for termination information they shouldnt. Not communicated with me satisfactoring arb date. Stolen my medical files after they were received by baiting me with a fake arb date.

[sic]

[23] Ms. Heitzmann's complaint also commented on her continued refusal to release the confidential medical information which CUPW kept requesting:

I cant release conf info from Sunlife. Union should know this and not ask me to. It doesnt even have any merit on the case.

[sic]

[24] Ms. Heitzmann's complaint provided further information about her allegations regarding two arbitration dates:

An arbitration date was set for my termination. **I wasnt aware of the arbitration date as no meeting was held with Ken to discuss details and no telephone call was made to me to discuss details. An apparent email was sent but I wasnt checking emails as I was out of town. I found out Ken had appeared at Arb without me.** Note, Kens voicemail had message he was on holiday for 7 weeks. I was unable to reach him by phone until after Arb date. Anothe Arb date was set with a list of Instructions. One instruction was I was to answer

---

questions about my confidential Sunlife Claim. I stated my claim was confidential as I had to sign an agreement. I stated this a couple of times and he persisted it was crucial to my new Arbitration date of Nov 12, 2013. Kens second request was that I allow him to contact my doctor.

[sic]

(emphasis added)

[25] Ms. Heitzmann also alleged that her absence on vacation had played a part in her failure to meet CUPW's deadlines:

Arbitration was Nov 26, 2013. I arrived back to Vanc Nov 12, 2013. He cancelled Arb date of the 14th of Nov 2013. **I never got the chance to talk to my Dr about consent because Ken cancelled Arb date before I had chance.** Ken demanded G.W.L. confidential medical files two copies. I complied and had them at his office Nov 12, 2013. Arb was cancelled due to my non-compliance. I then went to retrieve my personal medical records + was told by Ken he would not call Canada Post in my presense so I could retrieve said medical and Ken stated to me "Good Luck getting your medical records back, they are with Canada Post".

[sic]

(emphasis added)

[26] For her reply, Ms. Heitzmann attached a large number of documents, many of which seemingly went to the merits of her past disability issues. Ms. Heitzmann also commented further on the medical information she alleged was confidential:

This is in bad faith. I informed the union my mediation was confidential as sunlife wants it confidential that was the agreement I would appreciate the union moving past my sunlife and not using it against me.

[sic]

[27] Ms. Heitzmann commented further in her reply about CUPW's request for medical information:

Also the union knew I was not comfortable the union knew of all my greivances and issues and only pressed the matter of my medical over and over again without reviewing my file for alternative remedies...

**I am not of the opinion that supplying additional medical information would help me get back to work. I think, the problem is, in face, I have supplied far too much personal information about myself.** I am not of the opinion either than anything GWL gets is confidential if canadapost post can manipulte the system and get employees fired only to later threaten job reinstatement only after viewing the GWL file. In my case. CanadaPost

---

stole my medical information with the assistance of the Union when it was stated by the arbitrator the medical was to be destroyed and used for arbitration purposes only.

(emphasis added)

[28] Ms. Heitzmann's reply also suggested a lack of knowledge of her arbitration date:

Pertaining to the unions response that I was given plenty of time. On October 4th I receive an email from Ken that is not accurate he sais I did not report to work. When I was trying to report for work but wasn't allowed to report for work casue I had to get gwl clearance. **Then Ken in on holiday until October 23rd. I am also on holiday, out side of BC. I have no indication there is an upcoming arbitration date. If I had known, I would have arranged to be there without a doubt. Ken emails me on the 25th of October that I have Abrisraion on the 29th of October. I open my email on the 29th of October after being sick and I am shocked he went ahead with arbitration without me.** I get further requests for sunlife information I tell him its confidential and nothing to do with the case even in my opinion. Then I get conflicting requests. I read the arbitrators new orders and I comply with them. The arbitrator states that IF I was sick to bring in a note to ARB. She states IF several times. Yet ken tryes to bully me into getting the notes. I was going to tell the arb I had no idea of the arb date. As the union knew I was away from calling my phone after the arb date I left a message I was away until Nove 1st. Yet they went ahead and booked the arb without me.

[sic]

(emphasis added)

## 2. CUPW's position

[29] CUPW's response alleged that Ms. Heitzmann had originally repeatedly refused to cooperate with CPC's efforts to accommodate her. This led to her termination. CUPW noted that Ms. Heitzmann had similarly refused to cooperate with it as it attempted to process her grievance. It was this continuing lack of cooperation which ultimately led to CUPW's decision to withdraw the grievance.

[30] The Board will summarize CUPW's chronology of events which it supported by producing numerous exhibits in a bound Brief entitled "Union Documents".

### a. CUPW chronology of events

#### Late 2010

[31] Sun Life accepted Ms. Heitzmann's disability claim.

---

**February, 2012**

[32] Sun Life discontinued disability benefits due to Ms. Heitzmann's alleged non-compliance with a rehab program. This later led to a lawsuit, the precise details of which CUPW did not have.

**November, 2012**

[33] Ms. Heitzmann asked CPC to allow her to return to work in an accommodated position and provided a medical note.

**December, 2012**

[34] CPC, through its disability management provider Great-West Life (GWL), asked Ms. Heitzmann to have her doctor complete a medical questionnaire. While the questionnaire was completed, Ms. Heitzmann did not provide certain requested clinical notes and specialist reports. Her return to work would not be considered until this information was provided.

**January, 2013**

[35] Ms. Heitzmann's physician completed a further questionnaire about her restrictions, but Ms. Heitzmann would not agree to release the medical information which GWL had requested.

**February 18, 2013**

[36] GWL determined there was insufficient medical information to support Ms. Heitzmann's return to work request.

**February 27, 2013**

[37] As a result of Ms. Heitzmann's refusal to release medical information, CPC warned her it might be obliged to proceed with disciplinary action, up to and including her release.

**March 1, 2013**

[38] Ms. Heitzmann informed GWL that she would not provide the requested medical information.

---

**March 19, 2013**

[39] CPC wrote to Ms. Heitzmann asking her again to provide GWL with the requested medical information.

**April 4, 2013**

[40] CPC provided Ms. Heitzmann with one final opportunity to provide GWL with the medical information, failing which it would release her from its employment. Ms. Heitzmann never picked up this registered letter, which was later returned to CPC.

**April 5, 2013**

[41] Ms. Heitzmann wrote an email to CPC about the registered letters it had been sending to her:

HARB, Please stop sending Registered mail to my address... Tell him to stop threatening with firing me there is only so much negative a person wants to hear in a lifetime.

**April 12, 2013**

[42] CPC sent a letter by registered mail to Ms. Heitzmann. The letter indicated a recommendation had been made to terminate her employment. It was later returned after Ms. Heitzmann failed to pick it up.

**April 19, 2013**

[43] CPC sent Ms. Heitzmann a termination of employment letter. Ms. Heitzmann did not pick up the letter until several weeks later, after CUPW instructed her to do so.

**April 25, 2013**

[44] Ms. Heitzmann settled her lawsuit against Sun Life. These reasons do not need to disclose the amount of that settlement.

**May 1, 2013**

[45] Ms. Heitzmann met Mr. Mooney for the first time to inquire about her employment status. Ms. Heitzmann told Mr. Mooney that she had been aware of CPC's registered letters, but had not picked them up, in part due to her case with Sun Life. CUPW, in preparation for its

---

investigation, asked Ms. Heitzmann to complete a form so that it could obtain her medical information.

[46] CUPW also instructed Ms. Heitzmann to retrieve CPC's registered letter. That letter indicated that Ms. Heitzmann had been terminated for refusing to provide certain medical information to GWL, despite multiple requests.

**May 8, 2013**

[47] CUPW filed a grievance contesting Ms. Heitzmann's termination.

**May 31, 2013**

[48] CUPW disputed Ms. Heitzmann's allegation that it never asked for her medical file from GWL. It maintained that it had submitted a request to GWL by fax on May 31, 2013.

**July, 2013**

[49] Ms. Heitzmann, who received the medical file from GWL, provided it to CUPW.

**August 14, 2013**

[50] Mr. Mooney spoke to CPC. CPC was open to negotiate a possible resolution of the grievance if Ms. Heitzmann provided the medical information that CPC had originally requested.

**August 15, 2013**

[51] Mr. Mooney provided Ms. Heitzmann with a detailed email analysis of her case setting out the issues arising from the grievance. In part, he indicated that CUPW would need her authorization to obtain further medical information from her physician. That information would also have to be provided to GWL.

[52] Mr. Mooney also expressed his concerns about how an arbitrator might view Ms. Heitzmann's failure to open or accept CPC's letters. Such conduct might help CPC's case against her:

Employees have a right to privacy which must be balanced with an Employer's right to satisfy its concerns with an employee's fitness to work. Having reviewed the GWL file, I believe that it is likely that an arbitrator would accept that GWL had legitimate concerns regarding your ability to safely return to work. **Given that you have been absent from work since 2009, I think an arbitrator would be troubled by the fact that you refused to provide the requested clinical records/notes and specialist reports, thereby hindering**

---

**GWL from reaching an informed decision regarding your ability to return to work in a safe manner.**

**As we discussed over the phone, I believe that an arbitrator would also be disturbed by your refusal to either open and/or accept Canada Post's letters.** Those letters reiterated the request for the medical information initially identified in the February 14, 2013 GWL questionnaire and in the subsequent voicemail message of March 1, 2013. Objectively speaking, I think the evidence would confirm that you were aware of the medical information that was being requested yet chose not to provide it. Put another way, I believe that Canada Post is in a position show cause.

(emphasis added)

[53] Mr. Mooney further explained the parameters of a possible settlement which he had discussed with CPC the day before.

[54] Ms. Heitzmann responded with two emails that day. The first indicated she would not release any further medical information. The second indicated her "people" would review the situation:

The GWL forms did not ever contain anything in referece to 5 ton work. DOes this mean I wil finally get trained for that after 4 years of discrimination and bypassing due to non health related reasons from CPOST? What about the money they are saying i owe them that I dont? What about all my other workplace issues and all the lies and such put forth by them? I do want to go back to work but how with all the bullshit issues? **I am not in releasing any more drs chart notes due to my past experience with cpost Manulife sunlife and wcb. Noone listens to drs and it been a complete abuse of the medical system by these companies.** IF the arbitrator knew the issues all of them that preceded this them i am sure he would be in my favour. I want to go back to work. But do not want my right to bid taken away my right to medical care as i see fit taken away my right to medical privacy in a reasonable manner taken away. And no i cant do regular msc work like i was doing before and I can not work inside either. But let me know when they can let me bid and do 5 ton because i already brought in a note last xmas for that.

...

I need some of this resolved. I am not a puppet on a string. **Ill have my people review EVERYTHING and write up a detailed letter of issues they see.** There are many. That i did not ask for. It's a circus going to the doctor so many times filling out forms there has to be an end. I am not performing surgery. I am driving a truck.

[sic]

(emphasis added)

---

### August 16, 2013

[55] In an email, Ms. Heitzmann reiterated her refusal to provide more medical information. Later that month, Ms. Heitzmann requested the return of her GWL file. She later picked it up.

### August 27, 2013

[56] Ms. Heitzmann repeated her objection to producing medical information and suggested that other unnamed people at CPC had not been obliged to provide such documentation prior to being returned to work:

So...people that want accommodations will they have to prove thru endless doctors notes, critiques, face possible disagreement over them really needing accommodation. Or do they get shuttled through the system without the hassles of GWL....Gee thought we were all suppose to be treated equally? I am no different than these people that want accommodation....deny them accommodation and training like was done to me..Not by your persay. Are they going to submit their doctors chart notes and face dismissal as well? I think its only fair they have to prove their disability thru chart notes....am I right or am I right? AND if they don't have to do that then I don't. **I don't like the way I have been misdirected. I want to get back to work and back to my job and keep my medical issues private...do bypass the whole system** .. I was in exactly the same situation....do u understand where I am coming from? Hope so...

[sic]

(emphasis added)

### September 26, 2013

[57] Arbitrator Joan Gordon scheduled Ms. Heitzmann's arbitration for October 29, 2013. Shortly thereafter, CPC requested the production of the GWL file, as well as any other medical information which would be relied on at the hearing. CUPW was unable to comply with these requests due to Ms. Heitzmann's continuing refusal to provide her consent.

### October 2, 2013

[58] Given Ms. Heitzmann's position regarding her medical information, CUPW decided to put all of its communications to her in writing. CUPW advised Ms. Heitzmann of the unlikely chance of success at arbitration without disclosing her medical information:

For the reasons that I outlined in my earlier email, **I believe that Canada Post is in a position to show cause**. The question that follows from that is whether discharge was justified in all the circumstances of the case. **At this point, I am concerned that there is an**

---

**absence of mitigating circumstances. You did not report for work, or open the letters that were sent to you, or respond to the letters, or provide the additional medical information that was requested on a number of occasions. You further refused to consent to the release of the medical information that was requested by GWL when it was in the process of assessing your potential return to work. In light of these factors, the prospect of success at arbitration seems unlikely.**

(emphasis added)

### **October 3, 2013**

[59] Ms. Heitzmann emailed Mr. Mooney to indicate she disagreed with his views and reiterated that she still declined to produce the medical information.

### **October 4, 2013**

[60] CUPW again advised Ms. Heitzmann that it required her cooperation for the arbitration or the negotiation of a settlement. This cooperation involved providing CPC with the requested medical information:

**I don't wish to repeat myself, but we will require your cooperation and full participation if we are to proceed. In order to proceed or engage in settlement discussions, we will need to provide Canada Post with a copy of the GWL file. This type of disclosure is mandatory. It will also be necessary to provide Canada Post with a copy of the clinical records/chart notes relevant to both your absence and limitations. There is no way around this. Like it or not, Canada Post has the right to use a third party for the purpose of disability management.**

At your request, you retrieved the GWL file from our office. And **you have indicated that you are unwilling to disclose your physician's chart notes. This leaves us in a difficult situation.**

(emphasis added)

### **October 5, 2013**

[61] Ms. Heitzmann again refused to provide her medical information and contested CUPW's strategy and advice:

I read the cupw website on accommodations. Accomodated people being treated equally and bidding like the regular workers. Then management and union deciding what the limitations are.. and not gwl. I am interested in that program... not the one you are suggesting. **I do not know why you guys are doing this but it is wrong. You are now suggesting my medical information goes to canadapost u have got to be kidding ken. I dont agree i have to do that. I think you need to focus more on the issues at hand isntead of making more problems..** the issues are in my greivances and i have stated to the uion. **I am not in agreement with your message or advice. I did not sign for registred letters and not open them... i never signed for them therefore i never received them.**

---

**They were only signed for on your advice to ascertain where the DLC cards were and then pick them up for you to review.** I was dealing with my sunlife claim. I did not sign for the registered letters or read them or have them in my possession prior to my discharge. In fact i never knew i was discharged until 2 weeks later and the way i found out was an email from the department i put in a work transfer with. Please do not assume things or situations. I feel like you are attacking me. My grievances need to be resolved. As Harb put it.... i reviewed her personal file and decided to fire her "" what was in my personal file were problems and accusations from the corp that were not resolved by my union. In solidarity Ken. **Try to think of something better please Ken. You are offending me with the games.**

[sic]

(emphasis added)

### **October 23, 2013**

[62] CUPW sent two emails to Ms. Heitzmann about the arbitration scheduled for October 29, 2013. It is unclear from the written record whether CUPW had earlier advised Ms. Heitzmann of the actual arbitration date, which the arbitrator had confirmed almost a month earlier on September 26, 2013, *supra*.

[63] In its emails, CUPW advised Ms. Heitzmann it required her consent for the medical information and her cooperation. If she would not comply by October 25, 2013, then CUPW would withdraw her grievance:

Without your active participation and cooperation, I won't be able to help you.

Please confirm your willingness to (i) disclose the GWL file for the purposes of arbitration and (ii) provide the requested authorizations no later than Friday, October 25, 2013. Otherwise, we will have no alternative but to withdraw the grievance.

[64] Ms. Heitzmann in her October 23, 2013 email reply advised Mr. Mooney she could not attend the October 29, 2013 arbitration:

Subject: RE: Discharge – Arbitration, October 29, 2013

I am not in a position to be at arbitration October 29th. November 29th I could consider. I'm in disagreement with the unions advice due to what I have experienced. And I'm very sorry for this.

---

**October 25, 2013**

[65] Faced with Ms. Heitzmann's position that she could not attend the arbitration, CUPW asked the arbitrator for an adjournment. The arbitrator refused and further issued a summons for Ms. Heitzmann's attendance and a production order for the medical information.

**October 29, 2013**

[66] Despite CUPW forwarding to Ms. Heitzmann the arbitrator's production order and summons, Ms. Heitzmann failed to attend the arbitration. CUPW and CPC made oral submissions about an adjournment.

[67] On his return to his office, Mr. Mooney had a voicemail message from Ms. Heitzmann indicating that she was not in British Columbia and had been ill the previous week. Mr. Mooney emailed Ms. Heitzmann to advise her of what had occurred before the arbitrator.

[68] Mr. Mooney also received a phone call from a Ms. Gileno who suggested she would be "taking over the case". Mr. Mooney advised her she had no authorization from CUPW to involve herself in any way. He further advised her to encourage Ms. Heitzmann to cooperate with CUPW.

**October 31, 2013**

[69] Arbitrator Gordon issued an award granting CUPW its requested adjournment, but on the condition that Ms. Heitzmann disclose her GWL file and substantiate her absence from the first day of the arbitration with a medical certificate.

**November 4, 2013**

[70] Mr. Mooney advised Ms. Heitzmann by email of Arbitrator Gordon's conditions and that the next arbitration date would be November 26, 2013. CUPW reiterated its need for her authorization to obtain the required medical information.

**November 6, 2013**

[71] CUPW sent another email to Ms. Heitzmann about its need for her authorization and the fact that arbitral case law supported CPC's imposition of discipline.

---

[72] Ms. Heitzmann responded that day by email, contested CUPW's strategy and again refused to provide her authorization for the medical information:

**I feel all this requested info is both unjust and unnecessary.** my concern is that wrong information has been given to the arbitrator in relation to my firing. my other concern is that i am being set up to loose in order that my previous greivances dont have to be addressed by my union. i feel so far this is gone off track and a train wreck waiting to happen. i dif nothing wrong. **your not getting permisdion to contact my doctor when i can answer myself what u need to know.** If i dont get my job back it will not be fare. your not helping me ken. i think u know this already. i met a lady that is a corp lawyer she has never herself seen chart notes when people get fired or reinstated. she goes by doc notes or what the dov sais one can do. i provided my limitations. im reconsidering sending in my gwl. and instead filing human rights and union complaints. **i totally disagree with your stance on this.**

(emphasis added)

### **November 12, 2013**

[73] In following up on Arbitrator Gordon's order, Ms. Heitzmann left certain extracts of the GWL file at the CUPW office. Ms. Heitzmann did not provide CUPW with her authorization to contact her physician for the further medical information the arbitrator had ordered disclosed. CUPW sent to CPC what Ms. Heitzmann had disclosed.

[74] CUPW again contacted Ms. Heitzmann to ask for her authorization, but did not hear back.

### **November 13, 2013**

[75] CUPW's legal counsel provided an opinion that Ms. Heitzmann's lack of cooperation made any prospect of success unrealistic.

### **November 14, 2013**

[76] CUPW informed Ms. Heitzmann that it had withdrawn her grievance.

### **February 4, 2014**

[77] Ms. Heitzmann filed her DFR complaint with the Board.

## **III. Duty of Fair Representation (DFR)**

### **A. Section 37 of the Code**

[78] Section 37 of the *Code* establishes the duty a trade union owes to members of its bargaining unit:

---

37. A trade union or representative of a trade union that is the bargaining agent for 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 with respect to their rights under the collective agreement that is applicable to them.

[79] The text of section 37 indicates Parliament's intent. For example, the trade union's duty is linked with an employee's rights under the collective agreement. As noted in *Mallet*, 2014 CIRB 730 (*Mallet* 730), the duty does not extend to matters arising outside the collective agreement, such as those involving a trade union's constitution:

[66] Except in very specific situations found in section 95 of the *Code*, the Board is not the forum in which to contest allegations that a trade union may not have followed its internal policies: see, for example, *Thibeault*, 2014 CIRB 711. A trade union's constitution is evidently distinct from any collective agreement it might negotiate with an employer.

[80] Similarly, Parliament did not intend for the Board to sit in appeal and pass judgment on the quality or reasonableness of a trade union's representation. Instead, section 37 is quite clear that a *Code* violation only occurs if a trade union's conduct meets the high threshold of being "arbitrary, discriminatory or in bad faith".

[81] As noted in *Singh*, 2012 CIRB 639, the Board examines what a trade union's representatives actually did at the material times when representing a complainant:

[81] Since the Board focusses on the trade union's process, rather than on the correctness of its decision, a section 37 inquiry is limited to the actual steps the trade union took in reaching its decision not to take a matter to arbitration. The Board commented on the scope of its analysis in *Cheema*, 2008 CIRB 414 (*Cheema* 414):

[12] The Board's role in the context of a duty of fair representation complaint is to examine the union's conduct in handling the employee's grievance (see *Vergel Bugay*, 1999 CIRB 45). A section 37 complaint cannot serve to appeal a union's decision not to refer a grievance to arbitration, or to assess the merits of the grievance, but it is used to assess how the union handled the grievance (see *John Presseault*, 2001 CIRB 138).

[82] The Board's hearing is not the forum for a trade union to demonstrate that, if it had examined the matter more thoroughly, its original conclusion would still be correct.

[82] A complainant has the burden of proof in a DFR complaint: *Scott*, 2014 CIRB 710, at paragraphs 97–102. While section 98(4) reverses the burden of proof for some unfair labour practice complaints filed against an employer pursuant to section 94(3) of the *Code*, no reversal occurs in DFR matters:

---

98(4) Where a complaint is made in writing pursuant to section 97 **in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3)**, the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.

(emphasis added)

[83] The Board is not required to hold an oral hearing in every case:

16.1 The Board may decide any matter before it without holding an oral hearing.

[84] The Board receives numerous DFR complaints. The Board has prepared both an optional complaint Form and an Information Circular to help explain to complainants what the duty under section 37 entails.

[85] Despite those materials, a fair number of DFR complaints contest matters which generally fall outside the role Parliament gave to the Board under section 37 of the *Code*.

[86] For example, an employee may disagree with his/her trade union's interpretation of the collective agreement. In most cases, such as in *Mallette*, 2012 CIRB 645, this type of difference of opinion does not meet the threshold contained in section 37:

[24] In his complaint, Mr. Mallette challenges the interpretation of the collective agreement. However, there is no evidence that the CAW arrived at its position based on arbitrary or discriminatory factors or bad faith. The facts set out indicate that the CAW had to rule on a question of seniority that involved several members of the unit.

[25] Settling the dispute by means of a detailed explanation concerning the application of the collective agreement to Mr. Mallette's case was a normal part of the bargaining agent's day-to-day work. The Board will not rule on an issue involving the "proper" interpretation of a collective agreement, including any differences of opinion regarding which collective agreement should apply to a given situation.

[26] Rather, in the case of a DFR complaint, the Board will determine whether the complaint establishes a *prima facie* case that the bargaining agent acted in an arbitrary or discriminatory manner or in bad faith in arriving at a particular decision. Mr. Mallette's complaint does not do so.

[27] For these reasons, the Board dismisses Mr. Mallette's complaint on the basis that it fails to establish a *prima facie* case of a *Code* violation.

[87] Due to the high number of DFR complaints, the Board also adopted a *prima facie* case analysis. Under this analysis, a panel of the Board will examine a complaint in order to determine whether it raises a *prima facie* case for a *Code* violation: see *Browne*, 2012 CIRB 648.

---

[88] While a trade union initially does not need to respond to a DFR complaint before the Board completes its *prima facie* case analysis, it has a significant role to fulfill if the Board requests a response. That response may be its only opportunity to provide the Board with its observations on how it did not violate its *Code* duty. The Board commented on the importance of the trade union's response to a DFR complaint in *Mallet 730, supra*, at paragraphs 113 to 117.

[89] In this case, given Ms. Heitzmann's initial allegations, *supra*, the Board requested a response from CUPW. Mr. Mooney, on behalf of CUPW, provided a detailed review of the numerous steps he took to represent Ms. Heitzmann's interests, both in the time period leading up to her arbitration, as well as at her initial arbitration hearing.

[90] Mr. Mooney included with his response copies of his extensive written communications with Ms. Heitzmann during the material times when he represented her.

[91] The Board examines a trade union's process during its representation of a complainant. In *McRaeJackson*, 2004 CIRB 290, the Board summarized the various procedural steps it might examine:

[37] Accordingly, the Board will normally find that the union has fulfilled its duty of fair representation responsibility if: a) it investigated the grievance, obtained full details of the case, including the employee's side of the story; b) it put its mind to the merits of the claim; c) it made a reasoned judgment about the outcome of the grievance; and d) it advised the employee of the reasons for its decision not to pursue the grievance or refer it to arbitration.

[92] The Board commented in *Lamolinaire*, 2009 CIRB 463 on the trade union's obligations, as well as those of an employee in the bargaining unit who must assist his/her trade union with the representation being provided:

[36] Given that a member of a bargaining unit generally does not have an absolute right to have a grievance referred to arbitration, the Board must consider, among other things, the following questions in regard to an investigation conducted by a union:

1. Did the union conduct only a perfunctory or cursory inquiry, or a thorough one?
2. Did the union gather sufficient information to arrive at a sound decision?
3. Were there any personality conflicts or other bad relations that might have affected the soundness of the union's decision?

[37] Regarding the duty of fair representation, it is true that a union has certain obligations toward its members, but members also have obligations. Complainants must assist their union in the performance of its duties. If a union is investigating a matter, the complainant

---

has a duty to provide as much information as possible to ensure that the final decision is a sound one.

[93] It is with the above jurisprudence in mind that the Board will now analyze Ms. Heitzmann's complaint.

#### **IV. Analysis and Decision**

[94] The Board will break its analysis down in the same manner in which it described Ms. Heitzmann's different categories of grievances.

##### **A. Automatically settled grievances**

[95] Ms. Heitzmann had the burden of proof of demonstrating that CUPW's conduct met the threshold of being arbitrary, discriminatory or in bad faith.

[96] Ms. Heitzmann referred generally to 13 grievances she had filed. CUPW listed 13 grievances and indicated that they had been dealt with pursuant to a specific provision of the collective agreement. That provision treated certain discipline grievances, which involved no financial penalty, as academic once a period of time had passed.

[97] CPC agreed with CUPW's characterization for these grievances.

[98] Ms. Heitzmann's reply sought to get into the merits of various issues arising from her employment. She did not satisfy the Board that CUPW's reliance on a collective agreement provision specially designed for these types of grievances crossed the threshold created by section 37 of the *Code*.

[99] While Ms. Heitzmann suggested CPC somehow relied on these grievances, CPC's termination letter sets out its grounds for termination. Moreover, the article in the collective agreement would presumably have protected Ms. Heitzmann if CPC had attempted to rely on these grievances. The evidence demonstrated the termination occurred due to her refusal to provide medical information to GWL. CPC never raised a culminating incident in its termination letter as a ground for the termination.

##### **B. Overpayment grievance**

[100] The Board understands that an issue exists between CPC and Ms. Heitzmann regarding an overpayment relating to sick leave she took.

---

[101] Ms. Heitzmann alleged that CUPW had settled this grievance about the repayment demands, without any investigation. Ms. Heitzmann further alleged CUPW did so with the intent that a collection agency would then harass her.

[102] CUPW advised the Board that on September 13, 2013, several months after Ms. Heitzmann's termination, it had filed a grievance concerning the repayment issue. That grievance remained outstanding and would be referred to arbitration in the normal course.

[103] CUPW strenuously objected to the "outlandish allegation" that it would "*ever* arbitrarily settle grievances in order to allow collection agencies to harass its members" (*italics in original*).

[104] In her reply, Ms. Heitzmann suggested this repayment issue had commenced in or about 2009 rather than at the time of her termination.

[105] Ms. Heitzmann has not satisfied the Board that CUPW's alleged conduct met the threshold of being arbitrary, discriminatory or in bad faith. Ms. Heitzmann did not provide any evidence to substantiate her allegation that CUPW had in fact settled this grievance. Neither did she present any evidence that CUPW had done so for some nefarious intent.

[106] Given the lack of evidence from Ms. Heitzmann contesting the status of this overpayment grievance, the Board is satisfied that, as of the close of pleadings in this case, the grievance remained pending in the CPC—CUPW arbitration process.

[107] CPC, in its short response, had agreed with CUPW that this grievance remained outstanding.

### **C. Termination grievance**

[108] The main object of Ms. Heitzmann's complaint concerned CUPW's decision to withdraw her termination grievance. She had the burden of demonstrating that CUPW's actions met the threshold of being arbitrary, discriminatory or in bad faith.

[109] On the facts as set out above, the Board is satisfied that CUPW, through its representative Mr. Mooney, acted with extreme patience, provided sound counsel to Ms. Heitzmann and gave her every opportunity to help her situation.

[110] For reasons known only to Ms. Heitzmann, which may have included acting on advice from other unknown persons, her continued refusal to assist Mr. Mooney virtually assured that CUPW would not be able to prevail at arbitration.

---

[111] What evidence satisfied the Board that CUPW satisfied its duty under the *Code*? There are numerous examples.

**1. Ms. Heitzmann's refusal to cooperate with CUPW's efforts to assist her**

[112] It is not surprising that medical evidence about Ms. Heitzmann's medical limitations was highly relevant to her arbitration case involving the duty to accommodate. Ms. Heitzmann herself had started the entire process by asking to return to work in an accommodated position.

[113] For some reason, Ms. Heitzmann objected to releasing certain medical information in support of her accommodation request. This ultimately led to CPC terminating her employment and CUPW filing a grievance on her behalf.

[114] During the period leading up to arbitration, Ms. Heitzmann maintained this objection to producing her full medical information, despite a multitude of requests from CUPW. Mr. Mooney did not just request this information in a vacuum without any explanation why he needed it. Indeed, in several written communications, he explained to Ms. Heitzmann why that information was critical to her case.

[115] For example, in his August 15, 2013 email, *supra*, Mr. Mooney clearly advised Ms. Heitzmann of his concern about an arbitrator's reaction to her refusal to provide supporting medical evidence. He warned that her original refusal to provide relevant medical information could provide CPC with cause for termination.

[116] Mr. Mooney provided similar advice to Ms. Heitzmann in his emails dated October 2 and 4, 2013.

[117] Ms. Heitzmann contested this sound counsel, and further insulted Mr. Mooney's ongoing attempts to assist her. Ms. Heitzmann's October 5, 2013, email illustrated the types of reactions with which Mr. Mooney had to contend throughout his representation efforts:

**I do not know why you guys are doing this but it is wrong.** You are now suggesting my medical information goes to canadapost u have got to be kidding ken. I dont agree i have to do that. I think you need to focus more on the issues at hand instead of making more problems... **I am not in agreement with your message or advice. I did not sign for registered letters and not open them... i never signed for them therefore i never received them. They were only signed for on your advice to ascertain where the DLC cards were and then pick them up for you to review... Try to think of something better please Ken. You are offending me with the games.**

[sic] (emphasis added)

---

[118] The above quote also highlights Ms. Heitzmann's apparent belief that her refusal to open registered letters provided her with an enhanced defence. This at least appears to be her reasoning when telling CUPW she only opened the registered letter(s) on its instructions.

[119] Ms. Heitzmann clearly knew of the registered letters, given her April 5, 2013 email to CPC:

HARB, Please stop sending Registered mail to my address... Tell him to stop threatening with firing me there is only so much negative a person wants to hear in a lifetime.

[120] Ms. Heitzmann also pleaded she did not know of the October 29, 2013 arbitration date, *infra*.

## 2. Communications between CUPW and Ms. Heitzmann

[121] Ms. Heitzmann suggested CUPW did not communicate with her adequately and further alleged that it had twisted facts, stolen medical files and "baited" her with a fake arbitration date.

[122] The extensive written record which Mr. Mooney included with CUPW's detailed response clearly demonstrated that these serious allegations hold no weight.

### a. Arbitration date

[123] Ms. Heitzmann suggested CUPW never informed her of the initial arbitration date. She also suggested she only opened emails from CUPW after the arbitration date:

An arbitration date was set for my termination. **I wasn't aware of the arbitration date as no meeting was held with Ken to discuss details** and no telephone call was made to me to discuss details. **An apparent email was sent but I wasn't checking emails as I was out of town.** I found out Ken had appeared at Arb without me.

...

Then Ken in on holiday until October 23rd. I am also on holiday, out side of BC. **I have no indication there is an upcoming arbitration date. If I had known, I would have arranged to be there without a doubt.** Ken emails me on the 25th of October that I have Arbitration on the 29th of October. I open my email on the 29th of October after being sick and I am shocked he went ahead with arbitration without me.

[sic]

(pages 5 and 7 of complaint; emphasis added)

---

[124] While the written record did not indicate whether CUPW had provided Ms. Heitzmann with the precise arbitration date prior to its October 23, 2013 email, she was clearly informed of it at that time.

[125] Ms. Heitzmann then advised Mr. Mooney in her October 25, 2013 email response that she could not attend the arbitration:

Subject: RE: Discharge – Arbitration, October 29, 2013

**I am not in a position to be at arbitration October 29th.** November 29th I could consider. Im in disagreement with the unions advice due to what I have experienced. And im very sorry for this.

[sic]

(emphasis added)

[126] Ms. Heitzmann's response led to Mr. Mooney asking for an adjournment. Even if one ignored Ms. Heitzmann's own October 25, 2013 email, if she had never known of the arbitration date until after it had occurred, why would CUPW have asked for an adjournment?

[127] Arbitrator Gordon denied the adjournment, issued a summons and further ordered Ms. Heitzmann to produce her medical information at the arbitration.

[128] In a scenario reminiscent of Ms. Heitzmann's refusal to open CPC's registered letters, Ms. Heitzmann pleaded that she did not know of the arbitration date because she had been absent from B.C. and ill. On the same day of the arbitration, a Ms. Gileno had contacted Mr. Mooney to indicate she would take over the matter on behalf of Ms. Heitzmann.

[129] The Board is able to assess credibility in DFR cases without holding an oral hearing: *Nadeau v. United Steelworkers of America (F.T.O.)*, 2009 FCA 100. The clear record CUPW filed with its response demonstrated to the Board's satisfaction that Ms. Heitzmann knew of the October 29, 2013 arbitration date.

#### **b. Ms. Heitzmann's claim CUPW arbitrarily cancelled her second arbitration date**

[130] Ms. Heitzmann suggested that Mr. Mooney cancelled her second arbitration date while she was trying to comply with arbitrator Gordon's order:

Arbitration was Nov 26, 2013. I arrived back to Vanc Nov 12, 2013. He cancelled Arb date of the 14th of Nov 2013. **I never got the chance to talk to my Dr about consent because**

---

**Ken cancelled Arb date before I had chance.** Ken demanded G.W.L. confidential medical files two copies.

[sic]

(emphasis added; page 7 of complaint)

[131] Again, the extensive written record does not support Ms. Heitzmann's recollection of events.

[132] After Mr. Mooney advised Ms. Heitzmann of arbitrator Gordon's conditions for continuing with the second arbitration date, Ms. Heitzmann again refused to provide her consent. She further confirmed her disagreement with Mr. Mooney's advice:

I feel all this requested info is both unjust and unnecessary... **your not getting permission to contact my doctor** when i can answer myself what u need to know... **i totally disagree with your stance on this.**

[sic]

(emphasis added)

[133] While Ms. Heitzmann did later provide CUPW with certain extracts of the GWL file, she failed to provide consent for the other medical material. Neither did she respond to CUPW's November 12, 2013 request for this consent.

[134] Despite arbitrator Gordon's order, Ms. Heitzmann clearly advised CUPW, as she had done numerous times before, that she would not provide her consent. While it appeared some GWL information was arriving at CUPW's office, Ms. Heitzmann never advised CUPW that she had made a fundamental change in her position on the issue of consent. CUPW was more than entitled to rely on Ms. Heitzmann's longstanding position as it evaluated whether to proceed with the arbitration.

[135] Ms. Heitzmann's suggestion in her complaint that CUPW withdrew her grievance just when she was on the verge of complying with arbitrator Gordon's order appears, at best, disingenuous.

---

**c. Clear expression of reasons for not proceeding to arbitration**

[136] In *Scott 710, supra*, the complainants had to file a complaint with the Board to learn the reasons for their termination grievances not proceeding to arbitration:

[137] While the IMAW may have characterized the reasons in its September 7, 2011 letters as “skinny”, the Board finds it failed to give the Complainants any explanation why they could not contest their terminations before an arbitrator. This lack of an explanation occurred against the backdrop of the reinstatement of the other three terminated employees just a few weeks earlier.

[138] The IMAW also decided not to respond to the Complainants’ legal counsel’s lengthy November, 2011 demand letter. This was a second missed opportunity to provide reasons.

[139] A refusal to provide reasons raises the troubling question of whether long service union members must file a complaint with the Board in order to learn, at even a basic level, the specific reasons why their grievances did not go to arbitration. The Board is not suggesting a trade union needs to provide written reasons in the way tribunals do. But there needs to be some concrete explanation, especially for the four Complainants who had, collectively, over 60 years of service at United.

[137] The instant case demonstrates the exact opposite situation. CUPW advised Ms. Heitzmann on numerous occasions that her case would not proceed to arbitration unless she cooperated with its efforts to assist her.

[138] For example, in his October 4, 2013 email, Mr. Mooney indicated that the arbitration would not proceed if Ms. Heitzmann would not cooperate:

I don’t wish to repeat myself, but we will require your cooperation and full participation if we are to proceed. In order to proceed or engage in settlement discussions, we will need to provide Canada Post with a copy of the GWL file. This type of disclosure is mandatory.

[139] CUPW summarized its reasons for not going to arbitration in its November 13, 2013 email to Ms. Heitzmann:

**In previous email correspondence, I informed you that the Union would require your active participation and cooperation in order to allow us to assess and prepare a case on your behalf.** On various occasions, I requested that you provide authorization that would allow me to contact your physician and obtain the medical information necessary to assess and prepare a case on your behalf. On various occasions, I advised you that we would not be able to assist you in the absence of your active participation and cooperation. On October 23, 2013, I specifically informed you that we would have no alternative but to withdraw the grievance in the continued absence of your willingness to provide the requested authorization. **As of today’s date, you have not provided the requested authorization in spite of my various requests.**

---

In consideration of a legal opinion that was obtained at our request, **it is our view that there is no reasonable prospect of success based on the information that has been provided.**

Further to my previous email of October 23, 2013, please be advised that the above grievance will now be withdrawn.

(emphasis added)

[140] CUPW warned Ms. Heitzmann on numerous occasions that her lack of cooperation would harm her case. In the face of Ms. Heitzmann's continued intransigence, CUPW did not act in an arbitrary, discriminatory or bad faith manner when it decided to withdraw her termination grievance.

## **V. Conclusion**

[141] As noted in the Board's case law, *supra*, the Board focuses on the trade union's process at the material times. In other words, what steps did the trade union take when representing a member's interests?

[142] In this case, Mr. Mooney continuously attempted to assist Ms. Heitzmann.

[143] CUPW's process demonstrated that it clearly understood the reasons why CPC had terminated Ms. Heitzmann. CUPW sought to obtain consent for Ms. Heitzmann's medical information in order to assist it in pleading a grievance which alleged a failure to accommodate her.

[144] CUPW's legal arguments were hampered by Ms. Heitzmann's intentional refusal to pick up CPC's registered letters or to provide CPC's disability manager with consent to examine certain medical information.

[145] CUPW repeatedly advised Ms. Heitzmann of the legal challenges with her case and the steps she could take to improve her situation. Ms. Heitzmann refused to follow this advice. This refusal, *inter alia*, also prevented CUPW from pursuing the settlement discussions about which CPC had expressed a possible openness.

[146] Ms. Heitzmann's failure to cooperate with CUPW's efforts included knowingly failing to show up at the first arbitration date. The written record between Mr. Mooney and Ms. Heitzmann demonstrated that she knew of that arbitration date.

---

[147] Even after the initial fiasco before an experienced labour arbitrator, CUPW continued to attempt to represent Ms. Heitzmann's interests. However, Ms. Heitzmann maintained her attitude of non-cooperation.

[148] Ultimately, after reviewing the situation with legal counsel, CUPW decided to withdraw Ms. Heitzmann's grievance. It further emailed Ms. Heitzmann the reasons for its decision.

[149] The Board finds nothing arbitrary, discriminatory or in bad faith with CUPW's process throughout this case.

[150] The DFR complaint is accordingly dismissed.

[151] This is a unanimous decision of the Board.

---

Graham J. Clarke  
Vice-Chairperson

---

André Lecavalier  
Member

---

Norman Rivard  
Member