

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

PATRICIA JAMES

("James")

FRASER HEALTH AUTHORITY (EAGLE RIDGE HOSPITAL  
AND HEALTH CARE CENTRE)

(the "Employer")

-and-

HOSPITAL EMPLOYEES' UNION

(the "Union")

PANEL: Philip Topalian, Vice-Chair

APPEARANCES: Sarah Hentschel, for Patricia James  
Kirsten Hume and Bruce Grant, for the  
Employer  
James Baugh, for the Union

CASE NO.: 53684

DATES OF HEARING: October 31, November 1 and November  
29, 2006

DATE OF DECISION: January 12, 2007

**DECISION OF THE BOARD**

I. NATURE OF APPLICATION

1 James complains under Section 12 of the *Labour Relations Code* (the "Code"). She says that the Union failed in its duty to properly represent her, in dealing with her application for disability benefits under the applicable collective agreement. She also says that the failure of the Union to file an appeal to the Labour Relations Board of the determination of the Claims Review Committee that she was not totally disabled during the qualifying period was a further breach of its duties under Section 12. Finally, James says that the failure of the Union to negotiate a claims adjudication process which would afford her effective redress, through the grievance and arbitration process, for the denial of her claim to benefits constitutes a violation of Section 12.

II. BACKGROUND

2 James is employed as a pharmacy technician at Eagle Ridge Hospital and has worked there since 1984. On March 23, 2003, she injured her back while helping a friend move. As a result of this injury, she was off work for a significant time. She returned to work on a gradual basis in July 2005 and full-time in October 2005.

3 HEABC and the Health Services and Support - Facilities Subsector Association of Unions (the "FBA") are party to a collective agreement that includes a provision referred to as the Long-term Disability Insurance Plans Addendum (the "LTD Addendum"). The Union is a constituent member of the FBA.

4 Healthcare Benefit Trust ("HBT") pays long-term disability benefits ("LTD Benefits"), to qualified employees under the LTD Addendum provided that the employee is totally disabled during the "own occupation" period (i.e. for the first 2 years of disability, plus a five-month waiting period). HBT may continue to pay LTD Benefits if the employee is totally disabled during the "any occupation" period, which runs after the expiry of the own occupation period.

5 Total disability is defined in Section 3(B) of the LTD Addendum as:

Total Disability, as used in this Plan, means the complete inability because of an accident or sickness, of a covered employee to perform the duties of his/her own occupation for the first two (2) years of disability. Thereafter, an employee who is able by reason of education, training, or experience to perform the duties of any gainful occupation for which the rate of pay equals or exceeds seventy per cent (70%) of the current rate of pay for his/her regular occupation at the date of disability shall no longer be considered totally disabled under the Plan. However, the employee may be eligible for a Residual Monthly Disability Benefit.

6 In accordance with the provisions of the LTD Addendum a Claims Paying Agent ("GWL") adjudicates and pays long term disability claims. If an employee disputes a decision of GWL, the LTD Addendum provides that an employee may have their claim reviewed by a CRC composed of three medical doctors. One doctor is designated by the Union on behalf of the claimant, one by the employer, and a third agreed to by the first two doctors. Set terms of reference are provided to the CRC. The CRC is also provided with documentation regarding the claim, which is comprised of medical, vocational and other related documentation from GWL and the Claimant.

7 Carmela Allevato testified for the Union. She was in-house counsel for the Union beginning in 1985. From 1989 to 1996 she was the Secretary/Business Manager for the Union and acted as chief negotiator.

8 Allevato testified that the LTD addendum was in the Master Agreement when she came to the Union. Her belief is that the LTD plan is a superior benefit (compared to employer purchased plans) and she worked to ensure that all members of the Union would be covered by the plan.

9 The Union considers the CRC appeal process set out in the LTD plan to be safer for members than alternative processes because it involves doctors rather than lawyers. It is less adversarial and is faster. It is also less expensive and generally provides good results for members.

10 Every two years there is a wage policy conference of 300 to 400 members. In preparation for bargaining, bargaining demands are sent up from the locals to the wage policy conference and from there to the Association of health care unions. The Association votes on each proposal to see whether it will be put forward. No proposal has been put forward at any level to eliminate the LTD plan in favour of some other disability plan or process.

11 Eagle Ridge Hospital became a party to the Union collective agreement in August 1993.

12 In September 2003, James made an application for LTD Benefits. She submitted her claim directly to GWL. The Union was not involved. She included a letter from a neurosurgeon she had seen in connection with her injury with her claim. In his letter, addressed to James' regular physician and dated August 7, 2003, the neurosurgeon stated:

She has done very well indeed....The local back pain markedly decreased already several weeks ago and most of the days she is without any pain. The radicular component of pain completely resolved. On examination, she has regained full range of movements of lumbar spine....

The neurosurgeon also noted in his letter that in cases like James' there was a possibility of relapse.

13 Based on the letter of the neurosurgeon as well as a CT scan report and an x-ray report, GWL advised James that the information on file did not support a claim that her condition was of such severity that she was precluded from performing the duties of her own occupation. GWL denied her application for LTD benefits.

14 James returned to her neurosurgeon in early October and obtained a letter from him indicating that he was initiating a new course of treatment, stating:

She responded quite well and the local pain markedly improved, radicular pain completely resolved. Several weeks ago however, develop pain again.

This letter was considered by GWL, together with the earlier documentation on file and James' claim was again denied. GWL specifically referred to the August report from the neurosurgeon and his statement that she had regained full range of movement at that time.

15 James returned to her neurosurgeon and obtained a letter from him in which he took issue with the way GWL had interpreted his first letter. He stated:

I find it objectionable for you to extricate from a medical letter that part which may support your intent and deliberately omit the other part which may point to other direction. Further, you disregarded the second letter confirming that the patient is again unwell. (emphasis added)

Following submission of this letter to GWL, James claim was again denied, by letter from GWL dated December 9, 2003. James testified that it was on this date that she contacted the Union for assistance with her claim. In fact, it is evident that she did so earlier, as there is a letter on file dated November 13, 2003 confirming that the Union would be assisting her with her LTD appeal.

16 On November 20, the representative assigned by the Union to assist James with her claim wrote to GWL requesting disclosure of the claim file. The file was provided to him in mid-December. In January, the representative wrote to the neurosurgeon asking him to complete an attending physician's statement of disability to assist in James' appeal and stating that the Union would pay for the information requested. The form asked a number of questions such as whether the patient is capable of working in her own occupation; if not, can she work at all; can she work full time; and generally, what are the patient's capabilities. To all of these questions the response was that the neurosurgeon could not provide an answer due to lack of information or lack of expertise.

17 Between the date the Union representative wrote to the neurosurgeon and the date the reply was received, the Union assigned a new representative to deal with LTD files, Knox. Knox received the neurosurgeon's reply on January 30. On February 3 she telephoned James to discuss his responses. She told James that the information provided would not assist her case. As a result, James again spoke with her

neurosurgeon. He provided another letter, dated February 24, 2004. He reviewed her case from the first time he had seen her and provided an assessment of her current condition. He stated that a functional capacity assessment had been done by CBI in February 2004 and that the capacity assessment had identified a number of barriers to her ability to return to work. The letter also included a confirmation of the statement in his letter submitted with the original claim:

On August 8, 2003 we temporarily stopped the treatment because she responded positively to treatment with excellent results, the radicular pain to legs resolved completely, back pain reduced markedly and she had only mild local pain around the right SI joint.

Knox submitted this letter to GWL with a request for reconsideration of her application, on March 8. She did not receive an immediate response. On April 1, Knox telephoned GWL to find the status of the file and was told that a response would be sent the following week. She telephoned James and left her a message to that effect.

18 Knox was informed by telephone that the claim had again been declined. This was confirmed by letter a week later. In the interim, she spoke with James, told her that her claim had again been denied and discussed the possibility of James returning to work.

19 In the denial letter, GWL noted that the neurosurgeon had referred to the CBI assessment but had not described its findings or provided a copy of the assessment. James provided a copy of the assessment to Knox to forward to GWL. Knox testified that the report contained statements damaging to James claim but she had to submit it to GWL because it had been referenced in the neurosurgeon's report and specifically referred to in the GWL denial letter following its review of the claim. As indicated in the neurosurgeon's letter, CBI identified 8 barriers to James returning to work. However, the assessment indicated sub-maximal effort on functional testing and identified the possibility of symptom magnification. Because of this, GWL again denied her claim.

20 Knox testified that she believed that it would be necessary to challenge the damaging aspects of the CBI assessment. She believes she advised James of this. Knox wrote to James' neurosurgeon providing him with copies of several GWL decision letters. In the letter to the neurosurgeon, the Union advised him of the definition of "total disability" and identified the need to establish total disability during the qualifying period, March 23, through August 23, 2003. The Union stated that it required further information to assist James' claim for benefits and that it would be prepared to pay for further documentation. Although the neurosurgeon provided another letter as requested, GWL continued to deny the claim. The absence of clinical findings to support James' reported symptoms, together with the statements in the neurosurgeon's earlier letters regarding her physical state in August 2003 and the statements in the CBI assessment were repeatedly cited by GWL as the reasons for denial of her claim.

21 The Union forwarded medical evidence to GWL on James' behalf on a number of subsequent occasions. On July 21, the Union wrote to GWL noting that in its July 14

decision GWL appeared to have failed to consider medical evidence forwarded on July 12. The Union stated that if GWL did not alter its decision on considering that evidence it would refer the matter to a CRC.

22 James continued to obtain medical documentation which she hoped would support her claim to LTD benefits and to ask the Union to forward the documentation to GWL on her behalf. Each time she submitted further documentation her file had to be returned to GWL for adjudication. As a result, the CRC did not actually convene until January, 2005.

23 Although the Union was aware that each time further documentation was submitted to GWL the CRC would be further delayed, given that there would be no appeal beyond the CRC it considered it worthwhile to continue to pursue its efforts to have GWL change its decision.

24 Some time prior to the scheduled CRC date, the HBT forwarded to James a binder of materials. The binder included the terms of reference for the CRC; an overview of the LTD appeal process; the question to be answered by the CRC; a history of the claim, including copies of medical and vocational information on which GWL based its decision; and administrative information regarding the CRC.

25 The package included the question to be answered by the CRC, which was:

During the qualification period of March 24, 2003 to August 23, 2003 was Ms. James totally disabled and unable to perform the duties of her own occupation as a regular full-time Pharmacy Technician at FHA/Eagle Ridge Hospital?

James raised no objection to this question.

26 The package contained information that the CRC would be composed of three doctors: one designated by the employee; one designated by the employer and a Chairperson to be mutually agreed by the first two.

27 The package also contained information indicating that the CRC is considered the "court of last resort" on all medical matters but that claimants have a right of appeal to the Labour Relations Board if they are denied a fair hearing or meet the other criteria for an appeal under Section 99 of the Code.

28 James was informed that there might be a physical examination by the CRC and she should wear suitable (loose) clothing. In the terms of reference portion of the package was a statement that if the claimant wished to have a nurse present during the examination a written request should be made to the HBT and that arrangement would be made. James made no request to have a nurse present.

29 James had a discussion with Knox about her designate. Knox advised using Dr. Kornder, a physician regularly appointed as the claimant nominee to CRC panels. James initially resisted, wanting to have one of her attending physicians appointed.

However, Knox persuaded her that Kornder would have more credibility than an attending physician, who would be seen as an advocate by the other two members of the CRC. Given that CRC decisions are not required to be unanimous but may be majority decisions it would be more useful to have a disinterested physician speaking for her. As well, Knox informed James that the Union had appointed Kornder to numerous CRC panels, with a good rate of success. In the end, James agreed to the appointment of Kornder as her designate. Although the letter from the HBT informing James that a CRC would be constituted to deal with her appeal specifically stated that if she disagreed with her nominee she should advise HBT within 14 days of the date of the letter she did not do so.

30 The CRC convened on January 12, 2005. James took medical documentation which had not been submitted to GWL and to the CRC. The documentation was accepted by the panel.

31 James testified that she took a friend to the CRC but was told that the friend was not permitted to stay. There was a physical examination but no nurse was present. James testified that she felt humiliated and intimidated. She did not know why the Union did not attend the CRC (although she did not discuss this possibility with Knox prior to the CRC).

32 To this point, there are minor discrepancies between Knox' recollection of events and that of James. Those discrepancies are not material to the issue, relating primarily to matters such as who telephoned who (rather than whether there were telephone conversations), the exact date upon which events or conversations took place, and precisely what was the content of a particular conversation. However, there is a significant conflict between the testimony of Knox and that of James as to what occurred following the publication of the CRC decision.

33 James testified that she got the CRC decision in the mail after about three weeks after the panel convened. The decision was that she was not totally disabled during the qualifying period. James says that she telephoned Knox and told her she was very disappointed by the decision and did not understand how the CRC could make a decision based on their assessment of her condition during the qualifying period as they had not seen her during that time.

34 James testified that she "didn't realize about Section 99" and that the Union did not advise her of the possibility of an appeal under Section 99 or of the 15 day time limit to pursue such an appeal. However, James did acknowledge in cross examination that shortly after her February 3 conversation with Knox she read the section of the HBT package provided to her which stated that the CRC is the "court of last resort" on all medical matters and which sets out the limits on the right of appeal to the Board from CRC decisions. James testified that she was aware that there was a time limit on appeals to the Board but that she did not contact the Board or the Union to find out what the limitation period is. She believes that she was informed that there was a time limit by the Union steward in the workplace when she telephoned him shortly after her February 3 telephone conversation with Knox.

35 Knox testified that she received a copy of the CRC decision on February 1. She reviewed the decision and, having done so, compiled the file on the case and forwarded it to the Union's in-house counsel to see if there was any basis for an appeal. Knox recalls that she received a message to call James and that she called James back on February 3<sup>rd</sup>. Knox testified that it is her practice to get an opinion from legal counsel before discussing the case with an unsuccessful claimant. Before calling James on February 3, Knox discussed the file with the Union counsel and was informed that the counsel, having reviewed the file, did not believe there was any basis for an appeal to the Labour Relations Board.

36 The in-house legal counsel for the Union testified at the proceeding. She confirmed that Knox had brought her the CRC decision and requested an opinion as to whether there was any basis for an appeal. She further testified that several days later, having reviewed the decision, she advised Knox that she did not consider that there was any error in the CRC decision that could be the basis for a successful appeal.

37 Knox testified that, when she spoke with James, James was very upset. She informed James that the Union did not see any basis for an appeal but that James was welcome to obtain another opinion and that she could pursue an appeal under Section 99 herself, if she chose to do so.

38 On March 6, James wrote to Knox. In her letter, she stated that Knox had advised her she had no right to appeal and that she could appeal to the Labour Relations Board. She listed 5 reasons that she believed justified an appeal and requested a written response. Knox responded by letter dated March 15, 2005. Knox detailed the Union's view regarding each of the 5 grounds set out in James' letter and explained why those reasons would not support a successful appeal. Knox referred James to the portion of the CRC binder dealing with appeals from CRC decisions and also confirmed that the matter had been reviewed by legal counsel.

39 Sometime in March, James contacted legal counsel to obtain advice about the possibility of pursuing a Section 99 appeal of the CRC decision. The appeal was filed with the Board on August 8, 2005. James also filed a complaint against the Union pursuant to Section 12 of the Code. The Section 99 application included an application for extension of the 15 day time limit within which to file an appeal of the CRC decision. The Board found no basis to grant the application for an extension and refused to process the appeal.

### III. POSITIONS OF THE PARTIES

40 James argues that the Union acted arbitrarily by failing to properly represent her throughout the LTD claim process, including failing to represent her at the CRC. James also argues that the Union acted in an arbitrary manner by failing to negotiate an appeals process for disability claims which would provide effective redress to unsuccessful claimants. James says the conduct of the Union throughout was perfunctory, indifferent or reckless. She cites the failure of the Union to provide her with

written reasons for its decision not to appeal the CRC decision and says that the decision was not reasoned.

41 James says that the Union based some of its decisions on uninformed opinion because it was not aware of James' fibromyalgia; of the role of rheumatologists in dealing with fibromyalgia and that a medical diagnosis can be made long after symptoms appear; and that it was unaware of the legal issues surrounding disability claims.

42 Finally, James says that the Union violated its obligations by failing to advise her of the 15 day limitation period in which to file a Section 99 application to the Board if she wished to appeal the CRC decision.

43 The Union says that James was, in large part the author of her own misfortune. GWL found that James was not totally disabled throughout the qualifying period because the neurosurgeon who had been treating her wrote in his letter of August 7, 2003 that she had no pain on most days and that she had regained full range of motion. That assessment was supported by a CT scan report and by an x-ray report. James submitted the letter of the neurosurgeon to GWL long before she approached the Union for assistance with her claim. Although the letter did say that there was a possibility of relapse, the neurosurgeon stated that as at the date of his letter James was effectively recovered from her injury. Although the letter did not specifically state that James was fit to return to work, that was a reasonable inference for GWL to draw, given the information it contained. From the time it became involved until the conclusion of the CRC every effort by the Union was directed to overcoming the damage to James' claim done by the letter.

44 James case was further damaged by statements contained in the CBI assessment. The Union made significant efforts to undo this damage, including paying for a new medical report.

45 The fact that the Union was unsuccessful in convincing GWL to reverse its decision was not a result of any deficiency in representation. Knox had extensive experience in dealing with LTD claims advocacy and not only met but exceeded the standard required of the Union in representing the interests of a member.

46 The Union says it did everything it could reasonably be expected to do. It first sent a questionnaire to the neurosurgeon attempting to have him clarify James' functional capabilities during the qualifying period. The neurosurgeon completed the questionnaire, but indicated that he was unqualified or unable to answer the key questions.

47 The Union did not simply give up. It contacted James and advised her of the problems with her Doctor's responses and that better evidence of her disabled status would be necessary to overcome the initial GWL decision. The letter obtained by James following this conversation did identify barriers then existing to James' ability to return to work. It also reviewed the history of her treatment and included a statement

very similar in terms to that in the August 7 letter; that her condition had resolved at that time.

48 When GWL continued to deny James' claim, the HEU again wrote to the neurosurgeon. It provided to him copies of several GWL decision letters denying James' claim and identified the reasons that GWL had done so. The Union also set out the definition of disability that had to be met in order for James' claim to succeed and asked the neurosurgeon for any information he could provide which would assist in showing that James was disabled during the qualifying period. As well as doing this, the Union notes that it forwarded numerous other documents to GWL at James request, all for the purpose of persuading GWL to reverse its initial decision. The Union says that it did everything it possibly could to assist James in pursuing her claim to LTD benefits with GWL. Finally, the Union requested that the matter be submitted to a CRC; the only avenue remaining under the terms of the collective agreement.

49 The Union says that James' complaint that it negotiated the CRC process rather than some other process is out of time. The LTD addendum has been in the collective agreement between Eagle Ridge Hospital and the Union, substantially unchanged in form, since 1993. James has been a member of the Union for the entire period. If James considered the Union had violated its obligations by failing to negotiate some other process, she should have done so when she became a member of the Union, not 12 years later.

#### IV. ANALYSIS AND DECISION

50 James does not allege that the Union was guilty of discriminatory representation or of bad faith representation. She says the Union's representation of her interests was arbitrary. She asserts that the Union dealt with her interests in a perfunctory manner throughout and thereby failed to properly represent her.

51 The evidence simply does not support James' complaints regarding the quality of representation provided by the Union. The Union from its first involvement in James' case believed that the only way James could succeed in her claim for LTD benefits was to provide evidence to GWL which would overcome the statement in writing from her attending neurosurgeon stating, in effect, that she was fully recovered from her back injury on August 7, 2003. The neurosurgeon's statement was supported by a CT scan and an x-ray report which supported his opinion that James was substantially recovered. Although the neurosurgeon did not say that James was fit to return to work, GWL concluded, based on his letter together with the other medical evidence submitted, that she was not totally disabled as defined by the plan throughout the qualifying period.

52 James did not dispute that she was feeling better or that the neurosurgeon had ceased treating her in August 2003. She testified that regardless of these facts she was by no means able to work.

53 The Union concentrated its efforts on obtaining evidence which would displace the existing evidence that James was fully recovered and thus able to work at the time

the neurologist wrote his letter. James, on the other hand, concentrated her efforts on proving that she continued to be totally disabled; a matter which was irrelevant given the initial determination of GWL that she was not totally disabled through the entire qualifying period. Contrary to the assertions of the complainant, the Union actively pursued the evidence which would be required to overcome the August 7, 2003 assessment. For example, in June 2004 the Union wrote to the neurosurgeon stating that James' claim had again been declined and seeking further assistance. The Union set out the definition of disability that had to be met and stated:

I have attached copies of the decision letters for your consideration. In both letters GWL specifically identified the need to provide medical evidence with respect to the period of March 24, 2003 to August 23, 2003 and following that period. *New evidence about her condition currently has less relevance than redefining her disabilities during that period.*

Further, they suggest that Ms. James suffers from symptom magnification. This, I believe, needs to be addressed specifically.

GWL has reviewed this information in conjunction with her job description. Although there is infrequent lifting, there are issues with over the shoulder reaching and the job requires bending in combination of reaching. Her ability to do this during that period and following it must be addressed as well. (emphasis added)

This letter was one variation on a theme pursued by the Union from the time it first became involved in James case.

54 In its decision in *James W.D. Judd*, BCLRB No. B63/2003, 91 CLRBR (2d) 33 ("*Judd*") the Board stated:

For example, although the Board has explained that it has no jurisdiction to overturn a union's decision simply because an employee thinks it was wrong, the Board receives a large number of Section 12 complaints which essentially ask the Board to do just that. While these complaints may use the phrases "arbitrary, discriminatory and bad faith", the essence of the complaint is often that the union was wrong. However, it is not the Board's role to decide if a union was right or wrong as long as the union has not acted in an arbitrary, discriminatory, or bad faith manner. (para. 30)

The essence of James' complaints regarding her representation by the Union between the time it became involved in her case until the CRC decision was issued is that the Union was wrong in its judgment of how best to proceed. It was wrong in not dealing with GWL in a more aggressive manner; it was wrong in its assessment of who would best serve her interests on the CRC panel; and it did not provide her with effective representation throughout the process. The evidence simply does not support James' view of the matter.

55 In a number of instances, such as the designation of her nominee on the CRC panel, she initially disagreed with the Union's proposed course of action. In the case of the CRC nominee, when the Union explained to her the reasons for its choice, she accepted the Union's advice. From that, the inference can be drawn that she considered the advice to be reasonable at the time. She cannot now attack the Union for nominating Dr. Kornder to the CRC.

56 The standard required of a Union in representing its members is set out in *Judd*:

As well, unions are not law firms. Unions are not expected to meet the standards required of a lawyer in respect to either procedural or substantive matters. It is only when the alleged carelessness of a union reaches the level of blatant or reckless disregard for the employee's interests that the union can be said to be misusing its exclusive bargaining agency and acting arbitrarily within the meaning of Section 12. (para. 70)

The Union devoted considerable time and resources to pursuing James' claim for disability benefits. It paid for several medical opinions to support her claim and actively pursued evidence that it considered would assist her case. The Union pursued her claim in the manner prescribed under the applicable collective agreement when it dealt first with GWL and then submitted her claim to the CRC. I find that the evidence does not disclose that the Union acted carelessly at any stage of the process nor does it disclose any act or omission on the part of the Union which could be described as blatant or reckless disregard for James' interests. To the contrary, I find that the Union took every step it reasonably could to pursue James' claim to a successful conclusion.

57 James says that the conduct of the Union in failing to negotiate an appeals process for disability claims which provides effective redress to members in accordance with the principles of administrative law and fundamental justice was arbitrary; that its failure to incorporate the grievance and arbitration process into the disability claims process was arbitrary; and that its failure to file a grievance of the CRC decision was arbitrary.

58 The first two grounds relate to terms which have been in the collective agreement for many years. The Union has argued that these complaints are out of time, and I agree. Even if that were not the case, the following comments of the Board, from the panel in *Judd*, are apposite:

Also, the union is not guilty of discriminatory representation merely because it may reach an agreement with the employer which leaves some employees in a better position and others in a worse position than they were before. This is generally recognized as part of the give-and-take of collective bargaining and the union-employer relationship in the union's representation of the employees. The Board does not substitute its judgment for the union's and the employer's as to what adjustments should be made at their workplace. (para. 57)

The Union called its head negotiator to testify about the considerations which led it to negotiate the LTD process and the benefits of that process for claimants when compared to either the grievance and arbitration process or the pursuit of disability claims through the Courts. The negotiator testified that it is her view that the process is superior to the alternatives and that it produces good results for the majority of claimants. This is the sort of judgment that a Union is required to make in the negotiation of agreements and, as noted in *Judd*, the Board will not substitute its judgment.

59 The complaint that the Union did not file a grievance of the CRC decision is without merit. That avenue is not open to an unsuccessful complainant under the terms of the collective agreement.

60 I do not propose to deal further with the various deficiencies in representation alleged against the Union. I find that the Union did not act in an arbitrary, discriminatory or bad faith manner in any aspect of its representation of James through the claims adjudication and CRC process.

61 This leaves the matter of the Union's decision not to appeal the CRC decision to the Board. There are two elements to this complaint: the first is the decision of the Union not to appeal the decision of the CRC; and the second is the alleged failure of the Union to inform James of her right to appeal the decision of the CRC and of the fact that there is a time limit within which such appeals must be filed.

62 As noted above, this is the issue upon which the testimony of Knox and that of James conflicts. Knox testified that on receiving the decision of the CRC she reviewed it and, as was her usual practice in the case of unsuccessful CRC appeals, forwarded the decision to in-house counsel for an opinion on whether there was any basis for appeal. She did this before contacting James. After receiving a message to telephone James, Knox went to the Union counsel and discussed the decision. The counsel told Knox that, having reviewed the decision, she did not believe there was any basis for a successful appeal. Knox says that she then telephoned James and advised her that the Union did not consider that there was any basis for an appeal and that the Union would not file one. She says that James was very upset and that she told her that she was welcome to obtain a second opinion and that it was open to her to file an appeal without the involvement of the Union.

63 In making a decision whether to pursue a matter the union must "put its mind to the case and come to a reasoned decision whether to proceed." In other words, the union's decision must be based on reason: *Judd*, para.65.

64 In the present case, Knox requested an opinion from legal counsel about the possibility of appeal. The Union counsel testified that she considered the limited grounds of appeal under Section 99. She looked at the question submitted to the CRC and reviewed the decision to ensure that was the question that the CRC answered. She looked at the medical evidence submitted to the CRC as well as the other materials before the CRC. She concluded that there was no error disclosed which could form the

basis of a successful appeal and advised Knox of her opinion. I find that the Union did not violate Section 12 when it decided not to pursue an appeal of the CRC decision.

65 In cross examination Knox stated that it is her standard practice to review Section 99 appeal rights, including the limitation period, with unsuccessful claimants.

66 James denies that Knox made any mention of the possibility of an appeal of the CRC decision. Her recollection of the February 3 telephone conversation is that she told Knox that she was very disappointed by the decision and that she did not understand how the CRC could make a decision based on the qualifying period. She says that she asked Knox what she could do and Knox told her that there was nothing she could do. James testified that she did not realize there was a possible avenue of appeal pursuant to Section 99 and the Union absolutely did not advise her of appeal rights or the limitation period. However, James did acknowledge in cross examination that the information package she received prior to the CRC did set out her appeal rights from the CRC and that she had read that. She also testified in cross examination that she had asked Knox "What about the Labour Relations Act?".

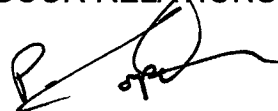
67 On the issue of what was said in the February 3 conversation, I prefer the evidence of Knox. She obtained a legal opinion on the possibility of an appeal before contacting James and it is unlikely that she would not have told James about this. That she would not have told James about the legal opinion becomes completely improbable in light of James evidence that she specifically asked Knox about the "Labour Relations Act". I find that Knox did advise James of her Section 99 appeal rights. That being the case, it is not necessary for me to decide whether the failure to provide such advice to James would constitute a breach of the Union's obligations under Section 12 of the Code.

68 Counsel for James referred me to a number of authorities dealing with the duty of an insurer to its insured. I find those authorities have no bearing on the duty of fair representation set out in Section 12 of the Code. Accordingly, I have not referred to those authorities in this decision.

## V. CONCLUSION

69 The Union did not breach Section 12 of the Code in its representation of James through the claims adjudication process, the CRC process, or in regard to its negotiation of those processes. Furthermore, the Union did not breach Section 12 of the Code regarding the question of whether the decision of the CRC should be appealed to the Board. James' complaint is dismissed.

LABOUR RELATIONS BOARD



PHILIP TOPALIAN  
VICE-CHAIR