

November 25, 2014

Labour Board (Nova Scotia)
PO Box 697
5151 Terminal Road, 7th Floor
Halifax, Nova Scotia
B3J 2T8

Dear Sir/Madam:

Re: DFR Complaint – Shannon Nickerson v. CUPE Local 3912

Please be advised that we represent Ms. Shannon Nickerson in connection with her duty of fair representation complaint against her Union, CUPE Local 3912. Please accept the enclosed as Ms. Nickerson's submissions pursuant to Paragraph D of Complaint Form DFR 22.

(1) Background:

Shannon Nickerson is a 43 year old woman (DOB – June 11, 1971) with a Master of Science Degree in Psychology. Ms. Nickerson was employed as a part-time Professor in the Psychology Department at St. Mary's University. She commenced her employment in the Fall of 2000.

Ms. Nickerson continued as a part-time Professor until her employment was terminated in September 2011. Ms. Nickerson was never disciplined prior to her dispute with St. Mary's University in 2011. By all accounts, Ms. Nickerson was excelling in her career and her future was bright.

An example of Ms. Nickerson's positive impact on St. Mary's University is reflected in the address by student Seyara Shwetz in the Spring of 2011. Ms. Shwetz commented:

"... With the building of our character also came the shaping of our intelligence. Saint Mary's asked us to hone our critical thinking skills. . . and like anything else, practice makes perfect. This new level of critical thinking expertise led us to challenge our pre-existing beliefs and basic understandings of society, science and sex. For example, Shannon Nickerson's, Human Sexual Behavior" covered topics such as STIs and the biological development of human reproductive organs. Nickerson also asked us to re-evaluate the ways we perceive others. Her lectures on human sexuality and the transient nature of gender questioned the strict ways we categorize, separate and segregate the world – she showed us that perhaps the kindest way to treat another human being was with nonchalant acceptance. My understanding of humanity and equality were redefined, and those changes remain the most prominent and

influential lessons of my entire education. While being formally educated, SMU students came to recognize and celebrate the uniqueness of human identity and the interconnectedness of human experience."

In 2009, Ms. Nickerson began experiencing difficulties with inner ear functioning (semi-circular canal dehiscence) which resulted in debilitating dizziness, falling spells, and autophony. Ms. Nickerson was required to undergo five skull base surgeries, three of which involving brain-retraction (the first occurring on November 27, 2009, the last in March 2012 - a craniotomy in Toronto). Ms. Nickerson always attempted to schedule her surgeries so as to minimize the impact on her work, but she did begin to miss time from work in 2009. While Ms. Nickerson missed some time from work as a result of surgeries, she continued to receive excellent reviews from her students (Tab A - Book of Evidence).

From 2010 to the eventual termination of her employment in September 2011, Ms. Nickerson was subjected to persistent harassment, bullying and differential treatment by management at St. Mary's University. During this time, Ms. Nickerson began to experience increased depression and (eventually) suicidal ideation. As a member of CUPE Local 3912 (hereinafter referred to as "CUPE"), Ms. Nickerson turned to her Union for assistance.

CUPE was reluctant to assist Ms. Nickerson and ultimately chose not to move forward with Ms. Nickerson's initial harassment and non-accommodation complaints in 2010 when she (understandably) did not want to attend a meeting with her harassers in person. Ms. Nickerson's direct supervisor and main harasser (whose main field of study includes union relations) is well-known to CUPE's union representatives. CUPE representatives initially refused Ms. Nickerson's assistance requests. Eventually, through her persistence and further harassment and non-accommodation incidents, CUPE filed two grievances (2011-01, filed on March 23, 2011, and 2011-06, filed on October 6, 2011 - found at Tab B - Book of Evidence). Grievance 2011-01 reads as follows:

"The Employer has violated Articles 4 and 14 and the collective agreement by undertaking a pattern of harassment pertaining to communications and the issuance of a disciplinary letter dated March 21, 2011 without just cause."

Grievance 2011-06 reads:

"The Employer has violated Articles 4, 14, 15, 16, 21 and any other relevant articles of the collective agreement, by denying re-appointment to teaching at St. Mary's University which constitutes dismissal under the Collective Agreement."

Since Ms. Nickerson's dismissal in September 2011, CUPE has not prosecuted Ms. Nickerson's grievances to Arbitration. Ms. Nickerson remains unemployed with her only financial support coming from Department of Community Services in the form of social assistance. Ms. Nickerson has cashed in all of her savings and has lost her financial independence. Ms. Nickerson now suffers from major depressive disorder which has been medically linked to the bullying she experienced at the hands of St. Mary's University and by the actions of CUPE.

CUPE has failed to prosecute Ms. Nickerson's grievances in a timely fashion, causing Ms. Nickerson to suffer increased financial loss and depression. CUPE has failed to protect Ms. Nickerson's Human Rights, contrary to the Nova Scotia Human Rights Act, RSNs 1989, c. 214, as amended. Further, CUPE has failed to act in Professor Nickerson's best interests, has acted arbitrarily, and in bad faith. Ms. Nickerson has pleaded with CUPE to correct their approach, but CUPE has refused to do so.

CUPE's failings need to be addressed urgently. CUPE has recently unilaterally scheduled a mediation with St. Mary's to attempt to settle Ms. Nickerson's grievances for December 9, 2014. Given CUPE's written statements to Ms. Nickerson, it is apparent that CUPE is likely to settle her grievances in a manner that is inconsistent with the protection of her Human Rights. If CUPE takes such action, Ms. Nickerson (according to the medical evidence on file) is likely to suffer irreparable harm.

Reluctantly, Ms. Nickerson lodges this complaint that CUPE has breached its duty of fair representation. Please accept the enclosed as Ms. Nickerson's written submissions outlining CUPE's breach of its duty of fair representation.

(2) The Law

(A) Overview

Ms. Nickerson's complaint is lodged pursuant to section 54A(3) of the Trade Union Act, SNS 2013 c. 475, as amended. Section 54A(3) reads:

"... (3) No trade union and no person acting on behalf of a trade union shall act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employee in a bargaining unit for which that trade union is the bargaining agent with respect to the employee's rights under a collective agreement. 2005, c. 61, s. 7."

The Supreme Court of Canada, in Canadian Merchant Service Guild v. Gagnon, 1984 CanLII 18 (SCC), [1984] 1 S.C.R. 509, set out the basic requirements for the duty of fair representation. Although most of the test set out by the Court related to the refusal of a bargaining agent to take a grievance to adjudication the Court did set out in general terms the criteria for fair representation:

"... The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(B) Enhanced Duty – Seriousness of Grievance

It has been consistently held that Unions have an enhanced duty to their member when the issues facing the member are serious. In Canadian Merchant Guild v. Gagnon et al., [1984] 1 SCR 509, the

Court stated that the Union's discretion to move forward with a grievance must be balanced with the seriousness of the complaint. The Court held:

"...3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other." (emphasis added)

Ms. Nickerson's employment has been terminated. She remains unemployed and is now suffering from a major depressive disorder surrounding the unjust termination of her employment and conduct of her Union. It is difficult to imagine a more serious type of grievance than the grievances in this case. It is respectfully submitted that CUPE owes Ms. Nickerson an enhanced duty of fair representation in these circumstances.

(c) Enhanced Duty – Human Rights

The Nova Scotia Human Rights Act, mandates that CUPE must accommodate Ms. Nickerson's disability.

Section 5(1)(o) of the Act prohibits discrimination based on physical disability. Courts have consistently held that the failure of a Union to accommodate a members disability is a discriminatory act. The duty to accommodate continues to the point of undue hardship (Trask v. Nova Scotia (Justice), 2010 NSHRBOI).

Ms. Nickerson suffered from a physical and mental disability and now suffers from major depressive disorder. Ms. Nickerson required accommodation of her physical disability and subsequent mental disability and now requires accommodation for her mental disability.

In Central Okanagan School District v. Renaud (1993), 95 DLR (4th) 577, the Supreme Court of Canada made it clear that, in a unionized workplace, the trade union representing employees is bound by the duty to accommodate. The Court at page 591 made the following comment:

"...While the general definition of the duty to accommodate is the same irrespective of which two ways it arises, the application of the duty will vary. A union which is liable as co-discriminator with the employer shares a joint responsibility with the employer to seek to accommodate the employee. If nothing is done both are equally liable."

Courts and Tribunals have consistently held that Unions owe an enhanced duty in cases involving a potential violation of a members Human Rights. In Bingley v. Teamsters, Local 91, [2004] C.I.R.B. 291, the Board held as follows:

"... In Renaud v. Central Okanagan School District No. 23, [1992] 2 S.C.R. 970 (S.C.C.), the Court affirmed that in certain circumstances, unions have a similar duty when they participate in the discriminatory act. The Court held that the union's responsibility is engaged when it causes or takes part in the work policy that is the source of the discriminatory act against the employee, such as a provision contained in the collective agreement. The union's responsibility may also be engaged when it does not address the discrimination even though it did not cause or take part in the discriminatory work policy." (emphasis added)

The Board held that a Union may be held liable for the discriminatory effects of an employment policy decision by not seeking to put an end to the discrimination. Further the Board stated:

"... Due to the sensitive and important issues associated with the accommodation of disabled workers in the workplace, labour boards also look to see whether unions have given disabled employees' grievances greater scrutiny. The cases generally concur that the usual procedure applied to other members of the bargaining unit may be insufficient in representing a grievor with a disability, mainly because the member's situation will require a different approach." (emphasis added)

Similarly, in Buckboro v. Winnipeg Police Association (March 15, 2000)(Doc. 70/99/LRA (Man.L.B.)) the Manitoba Labour Board acknowledged a different standard for Unions when dealing with members in a fragile emotional state. The Board held:

"... Counsel for Mr. Buckboro submitted that the standard of care should be higher when dealing with a person with stress related problems. The Board agrees that a union dealing with an individual in his fragile emotional state must do so with more sensitivity than would normally be necessary. ..." (emphasis added)

The Board concluded in Bingley as follows:

"... Overall, these cases suggest that when a member has some kind of disability, the union must not only handle the grievance in an "ordinary" manner, but has to put some extra effort into the case. Thus, the union cannot handle the case like any other grievance; it must be proactive and more attentive in its approach." (emphasis added)

In these circumstances it is trite law that the Union and St. Mary's both have an obligation to accommodate Professor Nickerson's disability up to the point of undue hardship. To this point CUPE has failed miserably to accommodate Professor Nickerson's disability.

The Bingley principles have been reviewed and consistently applied by Boards and Courts (see Re Oliver and Nape [2012] L.R.B.D. No. 10 and Pepper v. Teamsters, Local 879, (2009), CIRB 453). In Pepper I would note, in particular, the Board's concluding remarks at parag. 34 and 37 of the decision:

"...Since the complainant focused her submissions at the hearing solely on the allegation that the union acted in an arbitrary manner in its handling of the grievance, the Board will address only that aspect of section 37. Virginia McRae-Jackson, supra, sets out the meaning of arbitrary conduct as follows:

[29] A union must not act arbitrarily. Arbitrariness refers to actions of the union that have no objective or reasonable explanation, that put blind trust in the employer's arguments or that fail to determine whether the issues raised by its members have a factual or legal basis (see John Presseault, supra, but see Orna Monica Sheobaran, [1999] CIRB no. 10, that upheld a complaint where the union referred an employee to the employer rather than assist the employee; and Clive Winston Henderson, supra, where the union's decision jeopardized an employee's seniority.

[30] It is arbitrary to only superficially consider the facts or merits of a case. It is arbitrary to decide without concern for the employee's legitimate interests. It is arbitrary not to investigate and discover the circumstances surrounding the grievance. Failure to make a reasonable assessment of the case may amount to arbitrary conduct by the union (see Nicholas Mikedis (1995), 98 di 72 (CLRB no. 1126), appeal to F.C.A. dismissed in Seafarers' International Union of Canada v. Nicholas Mikedis et al., judgment rendered from the bench, no. A-461-95, January 11, 1996 (F.C.A.)). A non-caring attitude towards the employee's interests may be considered arbitrary conduct (see Vergel Buquay et al., supra) as may be gross negligence and reckless disregard for the employee's interests (see William Campbell, [1999] CIRB no. 8). (emphasis added)

The Board, in Pepper, concluded that the Union acted in an arbitrary manner and therefore breached its' duty of fair representation. The Board stated, at paragraph 37 :

...Based on the Board's review of the evidence in this case, there are two aspects of the union's conduct that are of concern to the Board: the union's failure to make any effort to obtain any actual medical evidence, other than a verbal summary from the employer representative, despite the fact that this was an accommodation case where medical evidence was admittedly crucial; and the union's failure to make any effort to discuss the case with the grievor prior to making its decision to withdraw the grievance." (emphasis added)

In Ms. Nickerson's case (as will become evident), not only has CUPE failed to "put in the extra effort" and not met the higher standard of care when representing a member suffering from depression, they consistently engaged in arbitrary, discriminatory, and bad faith acts toward Ms. Nickerson. Worse, CUPE not only failed to make any effort to "obtain any actual medical evidence" in Ms. Nickerson's case, they have flatly ignored the overwhelming medical evidence that is already before them.

(3) Evidence – Bad Faith, Discrimination, Arbitrary Actions:

CUPE has engaged in a pattern of discriminatory, bad faith, and arbitrary actions that clearly support a finding that it has breached its duty of fair representation to Ms. Nickerson. The following are a few examples:

(A) Failure to take steps to insure Ms. Nickerson's Disability is Accommodated:

CUPE was provided with a copy of Ms. Nickerson's family doctor's (Dr. Fiona McGrath) file on May 31, 2013 and was aware of Ms. Nickerson's depression as early as 2011. Dr. McGrath notes throughout her file that Ms. Nickerson suffers from depression and that her depression has been exacerbated since 2011. We advised the Union of its obligation to obtain medical documentation to determine the best approach to accommodate Ms. Nickerson's disability (May 12th, 2014 correspondence – Tab C – Book of Evidence).

CUPE refused to write to Ms. Nickerson's physicians. CUPE continued to assert that it could "settle" Ms. Nickerson's grievances with or without her consent. CUPE continued to assert that it would not be pursuing Ms. Nickerson's grievance as it related to the personal harassment/bullying that she experienced at St. Mary's University (and in fact, until just recently, they were persistent in their attempts to convince Ms. Nickerson that she herself was the cause of the bullying). Indeed, CUPE

continued to advise Ms. Nickerson that it would not be seeking an apology from the University with respect to their actions. CUPE continued in their refusal to give assurance that it would review the settlement with Ms. Nickerson's physicians before concluding the settlement. It was clear from CUPE's actions that not only did it have no intention of putting in any "extra effort" to insure the process and remedies sought would adequately accommodate Ms. Nickerson's disability, CUPE had no intention of representing her fairly, period.

Accordingly, Ms. Nickerson was forced to retain Dr. E. Rosenberg, psychiatrist, to obtain his opinion concerning accommodation. CUPE agreed to reimburse Ms. Nickerson for the cost of this report.

Dr. Rosenberg delivered his report on June 30, 2014. His report (Tab D – Book of Evidence) was provided to CUPE on July 2, 2014 (July 2, 2014 correspondence – Tab E – Book of Evidence).

Dr. Rosenberg's report provided a thorough review of Ms. Nickerson's medical history. He reported that Ms. Nickerson suffered from Major Depressive Disorder. According to Dr. Rosenberg, Ms. Nickerson should recover from her depression, provided the stressors with her Union and Employer were resolved.

Dr. Rosenberg provided a clear analysis on how the Union could accommodate Ms. Nickerson's disability. According to Dr. Rosenberg, Ms. Nickerson should have "considerable input" into any resolution of her dispute with her employer. Dr. Rosenberg was emphatic that Ms. Nickerson must be given the opportunity to be "vindicated" in order for her to achieve improvement in her mental health. At page 8 of his report, Dr. Rosenberg opined:

"...It seems reasonable that Ms. Nickerson should have considerable input to any dealings that her union has with her employer.....Vindication will be of prime importance in the relief of any present depressive symptomatology, and in maintaining a sense of personal integrity and dignity. The actions of Ms. Nickerson's employer – described by her as 'bullying and harassment, and the inaction of her union in not actively pursuing her grievance for three years has, in my opinion, contributed to the sustaining of Ms. Nickerson's depressive symptomatology.'" (emphasis added)

Dr. Rosenberg, at page 9-10, further stated:

"....3. Relief of the continuing stressor in her life at the present time will, in my opinion, prove to be far more valuable than specific psychotherapeutic intervention in the management of Ms. Nickerson's depressive symptomatology. It is my expectation that Ms. Nickerson will be able to return to full employment status with resolution of the matters involving her union and employer, and with vindication of her status. Ms. Nickerson will have to be an active participant in any procedure leading to a resolution of the matters involving her employer and her union. Should the union proceed to grievance without Ms. Nickerson's consent and participation, and without Ms. Nickerson's vindication regarding her claims of harassment

and bullying, it is predictable that her depressive symptomatology will be augmented and sustained." (emphasis added)

Dr. Rosenberg provided a clear road map for the Union to follow to ensure that Ms. Nickerson's disability was accommodated. Ms. Nickerson would have to be actively involved in any negotiated resolution of her grievance. The bullying and harassment complaint advanced by Ms. Nickerson must be pursued. Ms. Nickerson must be given the opportunity to be vindicated through this process.

It is clear from Dr. Rosenberg's report that, if CUPE failed to pursue vindication, Ms. Nickerson's depression would be augmented and sustained and she would not be able to return to gainful employment. The importance of this issue can not be understated.

Dr. Rosenberg's opinion is uncontradicted. CUPE has not secured any contrary medical opinion, but continues to ignore Dr. Rosenberg's opinion on the process that must be followed to accommodate Ms. Nickerson's disability. CUPE continues to assert that it will be proceeding to mediation (without Ms. Nickerson's consent – she wishes to proceed to Arbitration where she can seek vindication), may settle her grievance at mediation (with or without her consent) and on terms that are solely acceptable to the Union (and may not vindicate Ms. Nickerson). CUPE has only recently (November 14, 2014) stated that it will advance the personal harassment complaint, however that commitment is half-hearted at best. In their letter dated November 14, 2014, CUPE states:

"...The Union will raise personal harassment at mediation; *however that does not mean that it will be pursued to the end of mediation. Moreover, this does not mean it will be pursued at arbitration at all, if we go there*" (Book of Evidence – Tab F). Emphasis Added

CUPE continues to refuse to assure Ms. Nickerson that it will pursue vindication at an Arbitration. It is clear that CUPE's position smacks of bad faith and constitutes a discriminatory practice.

The grievance process formulated by the Union must accommodate the member's disability. Failing to follow a process that accommodates a member's disability constitutes a violation of the Human Rights Act and a breach of the Union's duty of fair representation.

In Schwartzman v. MGEU (2010), Carswell Man 824 (Man.L.B.), the Manitoba Labour Board commented that a process undertaken by a union which may be sufficient in the case of an employee without a disability may be insufficient in the case of someone with a disability. The Manitoba Labour Board cautioned that Unions must be particularly alert and sensitive to an employee's disability and the employment interests at stake in cases involving human rights principles, including the duty to accommodate. The Board concluded that Unions should 1) ensure that an employee with a disability understands his/her rights and responsibilities in the context of their complaint against the employer; 2) follow a process that recognizes the employee's disability; 3) assist the employee with obtaining necessary medical report etc.

In H.(K.) v. C.E.P., Local 1-S (1997), 98 CLLC 220-020 (Sask. L.R.B.R.) the complainant was suffering from a mental disorder that required accommodation. The worker filed a complaint against his Union that the Union failed to accommodate his disability when the Union did not adapt its policies, procedures and representation to take into account his disability. The Saskatchewan Labour Board found that the Saskatchewan Human Rights Code placed an obligation on trade unions to make such adaptations: The Board stated:

"...If this is the case, then the duty to accommodate may be relevant in determining whether there is an expectation that a trade union will make adjustments in procedures or policies normally followed in order to prevent the discriminatory impact which their typical operation would have on members of classes enumerated in the Code. The question in connection is not whether there is something the Union could or should have done to prevent discriminatory action on the part of the Employer - though this might be a relevant question in a different context - but whether the Union is required to adopt a differential approach to some employees in order to avoid discriminating against others."

The Board concluded that the Union, by failing to adapt its policies, procedures and representation to adequately accommodate the complainant's disability, breached its duty of fair representation. The Board concluded:

"...The Union may have handled the grievances diligently from the point of view of the normal operation of the grievance procedure. An ordinary employee might have little to complain of. Nonetheless, by limiting the scope of the grievance process to the normal sequence of investigation and discussion, by accepting the framework of progressive discipline, by, in effect, allowing the opinion of Dr. Barootes to govern what happened to K.H., the Union used the grievance procedure in a way which had a discriminatory effect on K.H. because of his mental disability."

CUPE has not assisted Ms. Nickerson in obtaining medical information that would help in formulating a process that would accommodate her disability. In fact, CUPE has ignored the medical evidence outlining the process to be followed to accommodate her disability. CUPE refuses to provide basic assurances to Ms. Nickerson (i.e. that it will pursue vindication for Ms. Nickerson at an Arbitration and that it will not settle her grievance without her consent) contrary to its obligation to accommodate Ms. Nickerson's disability under the Human Rights Act.

CUPE is unilaterally proceeding to mediation on December 9, 2014. Ms. Nickerson has advised CUPE that unless vindication can be reasonably achieved in mediation, mediation would likely exacerbate her condition. It is unlikely vindication for Ms. Nickerson will be achieved in mediation. CUPE has refused to write to Ms. Nickerson's physicians to determine the impact a failed mediation would have on her condition. CUPE has turned a blind eye to Ms. Nickerson's medical condition and need for accommodation. The evidence is clear that CUPE has (and is) engaging in discriminatory conduct.

Interestingly, CUPE originally committed to proceeding to arbitration with respect to Ms. Nickerson's grievances. On March 3, 2014 (prior to receiving Dr. Rosenberg's report), CUPE wrote to Ms. Nickerson:

"We need to clarify for Shannon and Barry that the Union is not considering withdrawing grievance 2011-01 altogether, the question is whether or not to pursue the ground of harassment. Even if the Local does not pursue the ground of harassment, it is pursuing that grievance to arbitration." (emphasis added) (Tab G, Book of Evidence)

CUPE subsequently received Dr. Rosenberg's report. Notwithstanding the significant impact vindication will have on Ms. Nickerson's disability, CUPE now refuses to commit to pursue Ms. Nickerson's grievances to Arbitration. This isn't solely a case of the Union failing to inquire about the appropriate process to be followed to accommodate a member's disability. It isn't even a case solely where the Union has ignored medical evidence that is before it – as reprehensible as that may be. This is a case where CUPE has wantonly and deliberately changed its course of conduct to violate Ms. Nickerson's human rights. CUPE's conduct is discriminatory, outrageous and a clear breach of their duty of fair representation.

(B) Failure to follow through with Payment for Dr. Rosenberg's Report – CUPE has failed to secure medical documentation concerning Ms. Nickerson's disability. CUPE advised that it would be proceeding with Ms. Nickerson's grievance with the medical information it had (which was non-existent on the issue of accommodation). Accordingly we arranged for Ms. Nickerson to see Dr. Rosenberg, psychiatrist, for his opinion on accommodation.

Prior to the assessment, CUPE agreed to pay for Dr. Rosenberg's account (May 28, 2014 – Tab H – Book of Evidence). Dr. Rosenberg's report was provided to CUPE on July 2, 2014. Not only has CUPE ignored Dr. Rosenberg's uncontradicted findings and opinion, they have refused (contrary to their agreement) to reimburse Ms. Nickerson for the cost of his report. This has placed understandable distress (financial and emotional) on Ms. Nickerson and represents a clear act of bad faith on the part of CUPE;

(C) Attempt to interfere with Solicitor/Client Relationship – We have provided independent counsel to Ms. Nickerson in this matter. There has been correspondence exchanged between our Firm and CUPE since our retainer in February of this year. We have identified issues with respect to CUPE's handling of Ms. Nickerson's grievances.

In a deliberate attempt to undermine our professional relationship with Ms. Nickerson, CUPE wrote to Ms. Nickerson on October 23, 2014 (Book of Evidence – Tab I)

"... The Union disagrees with Mr. Mason's descriptions and allegations. The Union is concerned that Mr. Mason's ongoing inaccurate descriptions will taint your view."

CUPE's statement was clearly designed to attempt to place wedge between our client and our Firm. It was an attempt to interfere with Ms. Nickerson's right to independent counsel through this process. CUPE's actions in this regard constitute bad faith.

(D) Delay – Ms. Nickerson's initial grievance was filed in March 2011 – over 3.5 years (45 months) ago. CUPE still has no confirmed a date for Arbitration. Today, Ms. Nickerson remains out of work and has suffered both financially and emotionally. The delay has taken a considerable toll on Ms. Nickerson.

CUPE is responsible for moving Ms. Nickerson's complaint forward in a timely manner. It has failed miserably.

Once a Union has decided to move forward with a grievance, there is a duty on the Union not to be reckless and to proceed with due diligence (*Savoury v. Canadian Merchant Service Guild*, 2001 PSSRB 79; and *Shanks v. Transportation Communications International Union and CANPAR Transport Ltd.*, [1996] CLRBD No. 20)

CUPE's gross negligence in moving Ms. Nickerson's complaint forward in a timely manner is arbitrary and further constitutes an act of bad faith.

(E) Mishandling of Grievance – Aside from delay, CUPE has failed to keep Ms. Nickerson reasonably informed of her grievance, repeatedly has misstated the evidence in an effort to undermine Ms. Nickerson's position, fails to listen to Ms. Nickerson's wishes, has put forward offers to settle Ms. Nickerson's grievance (without reviewing the offer first with Ms. Nickerson) and, most recently, has taken steps to retaliate against Ms. Nickerson.

Again, CUPE's actions must be judged in light of the fact that Ms. Nickerson suffers from a mental disability. CUPE owes Ms. Nickerson an enhanced duty in these circumstances. It must go the extra mile. CUPE has failed to meet its duty.

A few specific examples of CUPE's gross mishandling of Ms. Nickerson's grievances include:

- (i) **Mediation** – CUPE continues to assert that Ms. Nickerson requested that the matter proceed to mediation. The documentary evidence (Tab J, Book of Evidence) clearly confirms the opposite. This is significant as CUPE is attempting to suggest that it is proceeding to mediation (contrary to Ms. Nickerson's need for vindication through an open, transparent arbitration) as a result of a request by Ms. Nickerson and not because it is in Ms. Nickerson's best interests. CUPE is deceptively trying to manipulate the record;

- (ii) Consent to Release Medical Information – CUPE continues to assert that Ms. Nickerson has refused to release to the Union her medical records. This astonishing statement continues to be made even though Ms. Nickerson's family doctor's file was provided to CUPE on May 31, 2013 and Dr. Rosenberg's report was forwarded to them on July 2, 2014.

The only restriction Ms. Nickerson has placed on the release of medical information is that CUPE's contact with her physicians be in writing. This restriction was placed on CUPE as, early on in the process, CUPE officials attempted to pressure Ms. Nickerson's family doctor to revise a previous diagnosis pertaining to Ms. Nickerson's health. CUPE's actions were inappropriate and potentially medically harmful, and forced Ms. Nickerson to take this step.

Ms. Nickerson has repeatedly advised CUPE that it may write to her physicians for medical information. CUPE only recently notified Ms. Nickerson that it was not in possession of (the May, 2013 drafted) medical release form. This form, Ms. Nickerson signed on May 29, 2013 and presumed was it included in the medical file her doctor's office forwarded to CUPE on May 31, 2013. The fact that Ms. Nickerson's doctor's office has confirmed that they do have a copy of the signed consent form (dated May 29, 2013), casts doubt on CUPE's claims not to have received it.

Otherwise, Ms. Nickerson's concerns surrounding the medical consent forms has been limited to simply requesting minor revisions as some of the forms proposed permitting access to unqualified (and unnecessary) local executives.

CUPE continues to write to Ms. Nickerson blaming her for their failure to obtain medical information. CUPE's comments are put forward in an attempt to shield themselves from their own misdeeds. Their statements are false and represent a clear act of bad faith;

- (iii) Violation of Privacy - In October, 2013, Ms. Nickerson's privacy was violated by CUPE when Dr. MacGillivray's (Genest) psychological report was reviewed by both Mary Fougere (a temporary union representative) and Susan Coen (union lawyer), without Ms. Nickerson's consent. According to Ms. Fougere's letter to Ms. Nickerson: "Following receipt and review of the Independent Medical Evaluation from Genest, I (or Marianne) along with Susan Coen propose to meet with you to discuss...". At that time, only Marianne Welsh had been given consent to review the report. (Tab K - Book of Evidence)

(iv) Failure to Grieve 1st Disciplinary Letter - On February 17, 2011, Ms. Nickerson was issued (by mail) the first of two disciplinary letters by St. Mary's University. A copy was sent to a former address the University had on file for Ms. Nickerson, and a copy was sent to CUPE. CUPE failed to notify Ms. Nickerson that they had received this letter and ultimately, inexplicably, they failed to grieve the letter. When Ms. Nickerson finally received her copy in the forwarded mail and appealed to CUPE to file a grievance, they simply told her it was too late and that nothing could be done. (Tab L - Book of Evidence)

(v) Deliberate Obfuscation of Appeal Options - In late May, 2011, Ms. Nickerson requested information from CUPE National Representative, Robert Lanning, regarding the "...appeal process..." "...for members who feel they have not been adequately represented in the grievance process?". Mr. Lanning was willfully unforthcoming with respect to Ms. Nickerson's appeal options and engaged in a series of responses that Ms. Nickerson eventually discovered (through her own research) to be misrepresentative. When Ms. Nickerson insisted that Mr. Lanning be clear about his assertions, he simply chose to ignore her. (Tab M - Book of Evidence)

(vi) Apology - Ms. Nickerson has requested an apology from the University and damages for mental anguish. Notwithstanding that the grievances are broad enough to permit these remedies, the Union refuses to pursue it. CUPE has taken no steps to determine what impact their failure to pursue these remedies may have on Ms. Nickerson's disability. CUPE's actions are discriminatory;

(vii) Offers to settle - In CUPE's letter dated May 9, 2014 to St. Mary's University, CUPE offered to settle grievance 2011-01 for essentially an apology. Ms. Nickerson learned of the offer to settle after it had been communicated to and was rebuffed by the University. (Tab N - Book of Evidence)

CUPE was aware that Ms. Nickerson was suffering from a mental disability yet took no steps to determine whether the offer to settle was in her best interests from a mental health perspective. CUPE's actions were clearly discriminatory;

(viii) Unreasonable Demands - When CUPE does provide information to Ms. Nickerson it often provides an unreasonable time frame in which to respond.

*proof that they
did not afford
me my work
input. **

As an example, CUPE on Friday November 14, 2014 emailed to Ms. Nickerson two letters (one authored by Ms. Coen and another by Ms. Welsh of CUPE), a 15 page document/submission, 5 pages of disclosure, 10 cases (totaling 299 pages in length), various correspondence from our office and an expert's report dealing with academic freedom. This documentation was emailed to Ms. Nickerson on Friday evening at approximately 5:00 pm. Incredibly, CUPE imposed a deadline of Monday November 17, 2014 at 4:00 pm to respond. (Tab O - Book of Evidence)

Given Ms. Nickerson's medical condition, and the fact that she would need to review these matters with her counsel, it is clear that CUPE was not interested in a response from Ms. Nickerson. CUPE has not consulted with any physician on what impact imposing unreasonable deadlines upon Ms. Nickerson would have on her mental health (and whether, given her weakened state, she is capable of properly responding under such deadlines). This is just another example of CUPE's complete disregard for Ms. Nickerson's disability. CUPE has acted arbitrarily and is discriminating against Ms. Nickerson when imposing unreasonable deadlines;

- (ix) Ignoring Requests for Information - By the end of 2013 alone, CUPE had ignored at least 18 written requests by Ms. Nickerson for any evidence (not simply accusations issued by the University) related to her wrong-doing with respect the events leading up to her dismissal. Understandably, Ms. Nickerson was hoping to gain an understanding of the reasons behind CUPE's handling of her grievances. To date, none of the accusations issued by the University have been supported by the evidence, and CUPE continues to ignore all requests for evidence of her alleged misbehaviour. By ignoring Ms. Nickerson's simple requests for information, CUPE is complicit with the University in the harassment. (Tab P - Book of Evidence)

- (x) Retaliation - CUPE continued to inundate Ms. Nickerson with submissions, letters, reports and documents following their November 17, 2014 correspondence. Twelve separate letters were emailed to Ms. Nickerson between November 17, 2014 to November 20, 2014. Ms. Nickerson was given until November 20, 2014 to respond. Clearly, even those not afflicted with a mental disability, would be unable to properly respond within that time frame. These letters required a response and Ms. Nickerson (after reviewing these letters with counsel) intended to respond.

On November 21, 2014 we wrote to CUPE outlining serious errors in their correspondence. Specifically we advised (as we had on numerous occasions in

the past) that the Union was not authorized (and the Union had agreed) to put forward in mediation or arbitration the issue of mental disability as a "mitigating factor". Shockingly, the Union in their final submissions to the mediator, changed their submissions, to include an argument on mental disability as a "mitigating factor". CUPE advised (wrongfully) in their November 19th, 2014 correspondence that Ms. Nickerson had consented to this issue being raised. The evidence on file clearly demonstrates that the Union was not permitted to raise this issue and had agreed not to do so. CUPE raised this issue at the 11th hour, slipped it into a 15 page submission and failed to give Ms. Nickerson a reasonable opportunity to respond, knowing it was taking an action that was contrary to Ms. Nickerson's wishes and best interests. CUPE's actions were clearly an act of bad faith.

In our letter dated November 21, 2014 we complained to CUPE about this inappropriate behaviour and that their actions were affecting Ms. Nickerson's mental health. (Tab Q - Book of Evidence)


CUPE, rather than agreeing to a more reasonable timeline in providing information and allowing Ms. Nickerson to respond, unbelievably wrote stating that "we should stop involving Sister Nickerson as such an active participant". Incredibly CUPE retaliated against Ms. Nickerson by cutting her out of the grievance process because she asked for a reasonable period of time to review submissions and respond. This is a clear act of bad faith.

Circumscribing Ms. Nickerson's involvement in the grievance process is contra-indicated and a discriminatory act. Dr. Rosenberg opined that Ms. Nickerson needed to be involved in the grievance process. Dr. Rosenberg opined:

"It seems reasonable that Ms. Nickerson should have considerable input to any dealings that her union has with her employer."

CUPE unilaterally reduced Ms. Nickerson's role in the grievance procedure contrary to Dr. Rosenberg's clear medical opinion. The suggestion by CUPE that it is doing so to take pressure off of Ms. Nickerson is absurd. First, the medical evidence suggests that Ms. Nickerson needs to be highly involved, not the opposite. Ms. Nickerson needs to be heavily involved in the process so she can get better. There is no contradictory medical opinion on this point and the Union has not sought any other opinion. CUPE's actions are, at a minimum, discriminatory and show clear retaliation against Ms. Nickerson because she was looking for additional time to review documents. CUPE's actions are an act of bad faith and discrimination.

(F) High Conflict Personality Disorder – As discussed previously, Ms. Nickerson asked questions of CUPE concerning the release of her medical information. Clearly CUPE did not appreciate being questioned on their approach to securing medical information.

Shockingly, CUPE in response suggested that Ms. Nickerson may be suffering from a "high conflict personality disorder". CUPE arranged for Ms. Nickerson to be examined by Dr. R MacGillivray, psychologist. Dr. MacGillivray concluded that Ms. Nickerson did not suffer from such condition. 

CUPE refused to move forward with Ms. Nickerson's grievance until after her high conflict disorder assessment was completed and, in fact, even refused to respond to her repeated written requests (at least six) for clarification as to the relevance of the personality assessment to the grievances. Not only did this delay Ms. Nickerson's grievance, it understandably caused her considerable emotional anguish. CUPE referred Ms. Nickerson to have a personality assessment – not to advance her interests – but to undermine her credibility. It was an act of retaliation. CUPE's efforts failed, but clearly constitute an act of bad faith. (Tab R - Book of Evidence)

(4) Relief Sought:

The above represents just a few of the acts of bad faith and discriminatory practices by CUPE in Ms. Nickerson's case.

Ms. Nickerson's primary concern, at this point, is CUPE's clear intention of settling her grievance at mediation, without her consent. If CUPE takes this action, Ms. Nickerson will suffer irreparable harm.

In addition Ms. Nickerson is entitled to damages against CUPE for its serious acts of bad faith, discrimination and arbitrary conduct. CUPE's conduct has led to significant emotional turmoil for Ms. Nickerson. General damages, aggravated damages and punitive damages ought to be awarded against CUPE to ensure that Ms. Nickerson is adequately compensated for her losses and to deter CUPE from acting in this fashion in the future. We cite the Nova Scotia Supreme Court's recent decision in Brine v. Industrial Alliance (2014,SC) as the appropriate range for these types of damages.

Accordingly we are requesting that the Department of Labour intervene immediately. Understandably Ms. Nickerson has lost trust in CUPE and it is critical that she be provided with new independent counsel, to be funded by CUPE. As Ms. Nickerson's mediation is scheduled for December 9, 2014 we would ask that you review this matter urgently.

Yours very truly,
Presse Mason

A handwritten signature in black ink, appearing to be 'B. Mason' with a long horizontal stroke extending to the right.

Barry J. Mason

cc. client

RECEIVED

NOV 25 2014

LABOUR BOARD
FORM 22
DUTY OF FAIR REPRESENTATION
COMPLAINT UNDER S. 54A(3) OF THE TRADE UNION ACT

@ **LABOUR BOARD**
Please be advised that any information you provide to the Labour Board in the course of making a complaint under Section 54A(3) may be shared with other parties.

A. COMPLAINANT INFORMATION: (Person making the complaint)

Full Name Ms. Shannon Lee Nickerson			
Address 2658 Fuller Terrace		Town/City, Province Halifax, NS	Postal Code B3K 3V7
Home Telephone No. 902-448-0570	Work Telephone No. N/A	Fax No. N/A	E-mail shannon.nickerson@gmail.com
Preferred Method of Contact & Time:			

B. TRADE UNION INFORMATION:

Full Name CUPE Local: 3912		Contact person and position Ms. Marianne Welsh	
Address 271 Brownlow Avenue		Town/City, Province Dartmouth, NS	Postal Code B3B 1W6
Office Telephone No. 902-454-4180	Contact Telephone No.	Fax No.	E-mail

C. EMPLOYER INFORMATION:

Full Name (Person or legal business name) St. Mary's University		Contact person and position	
Address 923 Robie Street		Town/City, Province Halifax, NS	Postal Code
Business No.	Fax No.	Cell No.	E-mail

WHEN WERE YOU HIRED BY THE ABOVE EMPLOYER?**September 2000****WHAT IS OR WAS YOUR POSITION / JOB TITLE?****Part-Time Professor**

WHAT IS OR WAS YOUR EMPLOYMENT STATUS?

- FULL TIME
X PART TIME
CASUAL
PROBATIONARY
OTHER, PLEASE EXPLAIN _____

WHAT IS THE GENERAL NATURE OF THE EMPLOYER'S OR FORMER EMPLOYER'S BUSINESS?

Professor-Psychology Department

D. YOUR COMPLAINT:

The duty of fair representation prohibits trade unions, and persons acting on behalf of trade unions, from representing bargaining unit members in a manner that is (a) arbitrary; (b) discriminatory; or (c) in bad faith, with respect to their rights under collective agreements. You must identify which type(s) of unfair representation occurred in your case by checking the appropriate box, and describing the unfair representation below.

☒ arbitrary representation conduct which was ill-informed, reckless, or indifferent to your interests eg. A union automatically accepts the employer's version of a grievance without giving the employee a chance to respond to it.

☒ discriminatory representation different treatment due to a personal characteristics such as your race, or sex; or due to individual favouritism eg. A union refuses to arbitrate grievances of certain bargaining unit members because of their religious practices.

☒ bad faith representation conduct based on ill-will, hostility, or revenge toward an employee eg. A union refuses to arbitrate a grievance because the grievor had run against a union official in union elections.

Provide specific examples of the unfair conduct you have alleged. Tell us what happened, when it happened, who was involved, and what your union did or didn't do about the situation. Refer to the evidence that you believe proves your allegations: (You may attach additional pages, if necessary)

See Attached

Your complaint will be returned if you do not complete this area satisfactorily.

What is the date when you feel the Union violated its duty of fair representation?

Continuous Violations since 2010 - See Attached

What internal union appeals have taken place?

None

What remedy are you seeking from the Labour Board?

See Attached

E. UNFAIR REPRESENTATION:

Who do you feel unfairly represented you? Union ☒ Union Representative ☒ Both ☒

If you answered 'Union Representative or Both', please complete the following section:

Union Representative Name Ms. Marianne Welsh		Position National Representative	
Address 271 Brownlow Avenue		Town/City, Province Dartmouth, NS	Postal Code B3B 1W6
Home Telephone No.	Work Telephone No. 902-454-4180	Fax No.	E-mail

I acknowledge that any information I provide to the Labour Board in relation to this complaint may be shared with other parties.

I certify that all information provided on this form is true and correct to the best of my knowledge.


Signature

25/11/2014
Date (dd/mm/yr)

Important Note: Complaints may be filed with the Board by hand delivery, regular mail, facsimile transmission, Xpresspost or Courier.

Return to: Labour Board (Nova Scotia)
PO Box 697
5151 Terminal Road, 7th Floor
Halifax, Nova Scotia B3J 2T8
Fax: (902) 424-1744

For more information call:
Phone: 1 (902) 424-6730
Toll-free: 1 (877) 424-6730

**LABOUR BOARD
DUTY OF FAIR REPRESENTATION
COMPLAINT UNDER S.54A(3) OF *THE TRADE UNION ACT***

**BOOK OF EVIDENCE ON BEHALF OF COMPLAINANT,
SHANNON LEE NICKERSON**

**To: Labour Board (Nova Scotia
PO Box 697
5151 Terminal Road, 7th Floor
Halifax, NS B3J 2T8**

RECEIVED

NOV 25 2014

@
LABOUR BOARD