

**Labour Relations Board  
Saskatchewan**

**ART SABO, Applicant v. REGINA POLICE ASSOCIATION, INC., Respondent**

LRB File No. 015-03; July 8, 2004

Chairperson, James Seibel; Members: Don Bell and Gloria Cymbalisky

For the Applicant: David Barth

For the Union: Merrilee Rasmussen, Q.C.

**Duty of fair representation – Scope of duty – Applicant bears onus to demonstrate that justice can be done despite delay in filing application - Where applicant did not file duty of fair representation application until approximately seven years after resignation and failed to provide reasonable explanation for delay, Board dismisses application.**

***The Trade Union Act, s. 25.1.***

**REASONS FOR DECISION**

**Background:**

[1] Regina Police Association, Inc. (the “Union”) is the certified bargaining agent for a group of employees of the Regina Board of Police Commissioners (the “Employer”). Art Sabo (the “Applicant”), was formerly a member of the bargaining unit; he left his employment with the Regina Police Service on December 31, 1995. Mr. Sabo filed an application with the Board on January 23, 2003, alleging that the Union violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the “Act”), by failing to represent him in grievance or rights arbitration proceedings in a manner that was not arbitrary, discriminatory or in bad faith.

[2] In its reply to the application, the Union denied the allegations and raised a preliminary issue that the application ought to be dismissed on account of unreasonable delay.

**Evidence:**

[3] For the purposes of the argument of the issue of delay before the Board, counsel for each of the Applicant and the Union agreed to certain facts and the admission of certain documents into evidence. The agreed facts are as follows:

1. Arthur Sabo (Sabo) joined the Regina Police Service on February 1, 1971, at 22 years of age, as a sworn officer. He was also a member of the Regina Police Association Inc. (the Association), which is the certified trade union representing employees of the Regina Police Service, during the entire period of his employment.
2. Terms and conditions of employment of members of the Regina Police Service are governed by a collective agreement with the Association, and have been since 1946. In particular, members of the Regina Police Service have access to benefits provided under the collective agreement in the form of pension, sick leave, disability and in respect of work-related injuries. As a sworn officer, Sabo was entitled to the benefits provided under Schedule A to the collective agreement. It is the practice of the Association to provide copies of the collective agreement to every member each time a new collective agreement is negotiated. A copy of the collective agreement in force on December 31, 1995 is attached as Exhibit 1.
3. The police pension plan is a defined benefit plan that provides a pension calculated at 2% per year of service to a maximum of 35 years on the average of the highest three years salary. A police officer with 25 years' service may retire with an immediate unreduced pension at any age.
4. Until January 1, 1996, police officers received unlimited sick leave. That is, a member of the police service who was off work as a result of sickness was paid full salary during the entire absence regardless of its length, unless he or she received compensation from the Workers' Compensation Board. The applicable provision in the collective agreement at December 31, 1995 was article 17 of Schedule A on pages 32 and 33 of Exhibit 1.
5. The Chief of Police announced his intention to put a cap on sick leave as early as 1994. The Chief of Police sent a letter to all members of the police service dated October 31, 1995. The letter set out the Chief's view of how sick leave would be handled effective January 1, 1996 and refers to the employee's options of accessing other benefits, including disability benefits. A copy of the letter is attached as Exhibit 2.

6. The sick leave issue was a matter of grave concern for a number of individual members of the police service and was hotly contested by the Association, which filed an unfair labour practice application with the Labour Relations Board and a policy grievance under the collective agreement. On the eve of the scheduled arbitration of the grievance before Professor Gene Anne Smith (as she then was) an agreement was reached about the handling of sick leave. A copy of the agreement as it was recorded at that time is attached as Exhibit 3. The provisions as relating to sick leave were included in the next collective agreement as article 17 of Schedule A. A copy of that text is attached as Exhibit 4.
7. Long-term disability was separated out from pension effective January 1, 1992, as a result of changes to the federal *Income Tax Act* that made this necessary. Long-term disability is now provided through insurance coverage purchased with matching contributions from the employer and the employees.
8. Article 12 of the collective agreement provides for salary continuation in the case of a work-related injury that is so severe that the person is unable to perform the duties of any position, minus lawful deductions, benefits paid by the Canada Pension Plan, Workers Compensation Board, Criminal Injuries Compensation Board or resulting from any claim made in tort, and half of any earnings from employment. The text of Article 12 can be found at pages 7 to 10 of Exhibit 1
9. On October 24, 1984, Art Sabo (Sabo) was injured in a motor vehicle accident while on duty. His injuries were serious and he was off work from the date of the accident until December, 1984 when he returned to work performing light duties. The difference between any WCB benefits he received and his regular salary was paid by the Regina Police Service as sick leave pay.
10. Sabo was injured in a second motor vehicle accident on December 1, 1992. He was not on duty when the second accident occurred. He was off work from December 1, 1992 until March 18, 1993 when he returned to work on light duties. During any period that he was off work he received full pay as unlimited sick leave benefits.
11. Members of the Regina Police Association, Inc. executive were generally aware that Sabo had been involved in two motor vehicle accidents, which resulted in personal injury to him and which resulted in his using a great deal of sick time. A print-out of the sick time that he used dated May 10, 1995 is attached as Exhibit 5.

12. In March 1995 Sabo had surgery to fuse the C5-C6 vertebrae in his neck.
13. On December 11, 1995, Sabo submitted his resignation to be effective on December 31, 1995. A copy of the Employee Resignation Form that he completed and provided to the employer is attached as Exhibit 6. It states, "I have found my job very difficult to do since my car accident in December 1992. My doctor has advised me that my job is making my health condition worse".
14. On December 11, 1995, an inter-departmental memorandum stating that Sabo's resignation had been accepted effective December 31, 1995 was distributed to a number of recipients including the Association. A copy of the memorandum is attached as Exhibit 7. It states, "Sergeant Sabo's resignation, dated December 11, 1995, is accepted; his last working day being Sunday, December 31, 1995".
15. On December 14, 1995, Garry Tramer, Director of Pension and Benefits for the City of Regina and responsible for administration of the Police Pension Plan, wrote to Sabo to advise him that the commuted value of his pension if he resigned as at December 31, 1995 was about \$200,000, while the commuted value of his pension if he retired on February 1, 1996 would be about \$400,000. Trainer stated in the letter, "The purpose of my letter is to ensure that you fully understood the implications of the option you have elected". A copy of the letter is attached as Exhibit 8.
16. On February 13, 1996, Sabo wrote to a pension officer in the Pension and Benefits Department of the City of Regina saying, "Please be advised that I am not interested in the disability benefit at this time. I am requesting a pay out". A copy of the letter is attached as Exhibit 9.
17. Prior to December 31, 1995, Sabo met with Wes Britton, a member of the Association Executive. Britton asked Sabo why he wasn't waiting for approximately a month in order to retire with a full pension. Sabo replied that he wanted to resign rather than retire in order to get access to his pension funds. Sabo did not say that he was resigning for reasons of disability.
18. Under the police pension plan, if Sabo retired after 25 years' service he would have received an immediate pension on a monthly basis. Because he resigned prior to attaining 25 years' service, he was able to transfer the commuted value of his pension into a self-directed RRSP.

19. On January 4, 1996, Sabo applied for CPP disability benefits. He was awarded these benefits after winning an appeal in February 1999. A copy of the appeal decision is attached as Exhibit 10.
20. In October 1996 Sabo had surgery on the S1-L5 vertebrae.
21. In the fall of 1999, Sabo sought legal advice from Karolee Zawislak, a lawyer practicing law in Regina.
22. On June 4, 2001, Sabo sought legal advice from his current counsel, who wrote to the Chief of Police, with a copy to the Regina Police Association Inc., stating that the letter should be considered as Sabo's "formal application for disability benefits pursuant to section 12 of the Collective Bargaining Agreement". A copy of the letter is attached as Exhibit 11.
23. An acknowledgment of receipt of the June 4, 2001 letter was provided by the City Solicitor's Office to Sabo's counsel dated July 13, 2001, and a further letter, dated July 20, 2001, requested that he provide medical evidence to support his claim. The July 20 letter also stated, "There may be other reasons why your client is not entitled to Article 12 benefits, such as his voluntary retirement at 24 years, 11 months service and his present status as a non-employee, but a threshold issue is, in our opinion, whether there is a disability established by medical evidence which qualifies under Article 12". Copies of both letters are attached as Exhibit 12.
24. On August 9, 2001, counsel for Sabo forwarded to the City Solicitor's Office a copy of the Notice of Decision of the CPP Review Tribunal and the documents that were relied upon by that Tribunal in response to the July 20, 2001 request. A copy of his letter is attached as Exhibit 13.
25. On October 29, 2001, the City Solicitor's Office advised Sabo's counsel that it was their decision that Sabo's current disability "was not caused by his employment, which is required *inter alia*, for entitlement to Article 12 benefits". The letter also states, "We will not therefore be providing the requested benefit. Even if the current disability had been caused by his employment, there are other reasons, including his retirement, which would in our opinion, disentitle him from benefits". A copy of this letter is attached as Exhibit 14.
26. On December 21, 2001, Sabo issued a claim in the Court of Queen's Bench against the City of Regina. The claim was served on the City on March 26, 2002. A copy of the claim and the letter by which it was served are attached as Exhibit 15. On April 10, 2002 the City Solicitor pointed out that the proper plaintiff was the

Board of Police Commissioners and that this could be a matter for the Labour Relations Board, rather than the courts. A copy of this letter is attached as Exhibit 16.

27. On May 31, 2002, Sabo's counsel wrote a letter to the Regina Police Association Inc. to which a copy of the claim was attached, asking the Association about its role "in obtaining disability benefits for its members and also its policies with regard to advising the Plaintiff about resignation and any final interviews that management may have carried out with your members". A copy of this letter is attached as Exhibit 17
28. Counsel for the Association replied by letter dated June 12, 2002, stating, "the Association has and assumes no role in the administration of disability benefits". A copy of the letter is attached as Exhibit 18.
29. On August 7, 2002, Sabo's counsel wrote to counsel for the Association. The letter stated, "Please advise whether you would assist Mr. Sabo in obtaining his Article 12 benefits? Please advise as to whether Article 12 disability benefits apply when the disability is caused by an accident, which is not work related". A copy of the letter is attached as Exhibit 19.
30. On December 3, 2002, Sabo's counsel wrote to counsel for the Association requesting the Association's consent to being added as a defendant to the claim, which had now also been amended to change the City of Regina to the Board of Police Commissioners. A copy of this letter and the proposed amended claim is attached as Exhibit 20.
31. On December 11, 2002, counsel for the Association wrote to Sabo's counsel to advise that the Association would not consent to being added as a defendant. A copy of this letter is attached as Exhibit 21.
32. Sabo's counsel served a Notice of Motion to add the Association as a defendant to Sabo's claim on December 30, 2002. A copy of the Motion is attached as Exhibit 22. The application was heard on January 21, 2003, and the Court of Queen's Bench ordered that Sabo's application be dismissed with costs on the basis that the Court of Queen's Bench had no jurisdiction over the substance of the claim. A copy of the Order is attached as Exhibit 23.
33. Only one police officer has ever received Article 12 benefits from the Board of Police Commissioners. Don Coulthard received Article 12 benefits as a result of being shot while on duty. The

shooting occurred in the 1970s and he received Article 12 benefits until he retired at age 60 in September 1996.

34. Another police officer, John Reid, received long term disability benefits after having been injured in an off duty parachute accident. The accident occurred in 1986 and he will be in receipt of long-term disability benefits until the normal date of retirement at age 60.
35. The following are additional related documents:

Exhibit 24: List of Officers and Executive of Regina Police Association Inc., from 1979 to present.

Exhibit 25: Various records relating to Art Sabo's employment and work performance with the Regina Board of Police Commissioners.

Exhibit 26: Art Sabo's personal income tax returns for 1992 – 2001.

Exhibit 27: Letter from Dr. Montbriand dated May 9, 2003.

#### **Arguments:**

**[4]** Ms. Rasmussen, counsel for the Union, filed a written argument which we have read and considered. Counsel submitted that the application ought to be dismissed on account of extreme and unreasonable delay – in excess of seven years had passed from when Mr. Sabo resigned his employment to the filing of his application to the Board. Indeed, a period of some six years had passed before he filed his abortive lawsuit against the Union and the Employer.

**[5]** Ms. Rasmussen argued that, while the Board generally is not inclined to take an excessively rigid or technical approach to the issue of delay, it has recognized that there are cases where delay may seriously undermine the Board's ability to fairly consider the matters in issue. In support of the argument, counsel referred to the decision of the Ontario Labour Relations Board in *McKenly Daley v. Amalgamated Transit Union and Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420, and the decisions of the Board in *Saskatchewan Union of Nurses v. South Central District Health Board*, [1995] 2nd Quarter Sask. Rep. 281, LRB File No. 016-95, *Neskar*

*v. Canadian Union of Public Employees, Local 21 and City of Regina*, [1995] 4th Quarter Sask. Labour Rep. 70, LRB File No. 122-95 and *Kinaschuk v. Saskatchewan Insurance Office and Professional Employees' Union, Local 397 and Saskatchewan Government Insurance*, [1998] Sask. L.R.B.R. 528, LRB File No. 366-97.

[6] Mr. Barth, counsel on behalf of Mr. Sabo, argued that the Union has a duty of be “proactive” in the representation of its members, even though Mr. Sabo’s former counsel took no action on his behalf. Counsel submitted that Mr. Sabo was not aware of the potential benefits available under article 12 of the collective agreement (that is, apart from long-term disability benefits) until 1999 and knew from the time he filed his lawsuit in December, 2001 that he wanted to obtain those benefits.

[7] In reply, Ms. Rasmussen pointed out that the agreed facts do not support the contention of counsel for the Applicant that Mr. Sabo was not aware of article 12 of the collective agreement until 1999. Counsel submitted that it is not up to the Union “to go shopping for grievances” to file on behalf of members.

**Relevant Statutory Provisions:**

*25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*

**Analysis and Decision:**

[8] In several decisions issued in the course of the past year, the Board has had occasion to consider the issue of the effect of substantial delay in the context of duty of fair representation cases.

[9] In *Leedahl v. United Food and Commercial Workers International Union, Local 248-P and Mitchell's Gourmet Foods Inc.*, [2003] Sask. L.R.B.R. 424, LRB File Nos. 030-03 & 031-03, the Board commented that the fundamental question to be answered with respect to the issue of delay is whether justice can still be done.



[10] In *Bobowski v. United Food and Commercial Workers International Union, Local 248-P and Mitchell's Gourmet Foods Inc.*, [2003] Sask. L.R.B.R. 507, LRB File Nos. 028-03 & 057-03, between July, 1999 and November, 2001, the applicant employee complained to the union about certain actions taken by the employer between 1994 and 2000, some of which involved small amounts of money. The union advised the applicant within a few days that it would not take the matters to arbitration. The Board dismissed the application finding that there had been excessive delay without reasonable explanation, both with respect to the applicant's initially raising his concerns with the union and in making his application pursuant to s. 25.1 of the *Act* once the union advised that it would not take any action on his behalf.

[11] In *Kimmie v. Communications, Energy and Paperworkers Union of Canada, Local 609 and Azko Nobel Chemicals Ltd.*, [2003] Sask. L.R.B.R. 533, LRB File No. 247-02, the Board dismissed an application brought under s. 25.1 of the *Act* where the applicant's complaint against the union concerned alleged grievances over a period of some fifteen years and the application was filed some two years after settlement of the grievance of his termination by the employer. The Board stated as follows, at 536:

*The effluxion of time may, in and of itself, make it probable that justice cannot be appropriately done in respect of the reliability of the evidence of the situation at the time. The onus is on the Applicant to explain his delay in bringing the application.*

[12] The Board expressed similar sentiments in *Kinaschuk, supra*.

[13] In *Taylor v. Regina Police Association Inc.*, [2003] Sask. L.R.B.R. 307, LRB File No. 016-03, the Board considered an argument similar to that made by counsel for the Union in the present case. In that case, the applicant did not seek the assistance of the Union until some three years after he resigned from his employment with the Regina Police Service. In dismissing the application on the grounds, *inter alia*, of excessive delay, the Board stated as follows, at 315 and 316:

*The Applicant's duty of fair representation case is premised on the fact that the Union did not file a grievance on his behalf in relation to the harassment he experienced under the supervision of Superintendent Forbes. The Union replied by indicating that the Applicant resigned his employment effective January 9, 1999 and*

*did not seek grievance assistance from the Union until March 15, 2002.*

*Under article 8 of the collective agreement, an employee has seven (7) consecutive working days to state a grievance in writing to the Union, at which time the Union is authorized to investigate the matter and act on the complaint. The Union President was present and assisted the Applicant during his meeting with the Chief of Police in January, 1999. He also advised the Applicant not to resign his position but the Applicant did not take his advice.*

*In these circumstances, the Applicant has not established a prima facie case under the duty of fair representation provision. He did not ask the Union to file a grievance in a timely manner pertaining to the matters that are the subject of his complaint. Under the duty of fair representation provision contained in s. 25.1 of the Act, the Applicant must demonstrate that he asked the Union to act on his behalf and that he made this request within the time limits set out in the collective agreement for filing a grievance (i.e. seven days from January 9, 1999) or, if the time limits are not met, when the delay could at least be excused by an arbitration board under s. 25(2)(f) of the Act. In this case, the Applicant delayed seeking assistance from the Union from January 9, 1999 to March 15, 2002, a period in excess of three (3) years.*

*This case is somewhat unique in the Board's experience, as generally the argument pertaining to delay relates to the filing of a duty of fair representation application with the Board. Such delay is a procedural issue for the Board and does not go to the merits of the duty of fair representation complaint. In the present case, however, the delay pertains to the Applicant's request for assistance from the Union. In these circumstances, it is inconceivable that the Union could successfully prosecute the Applicant's grievance, even if it found the grievance to be meritorious, based on the Applicant's extreme delay in requesting assistance from the Union.*

*As a result, the Board dismisses the duty of fair representation as a key and necessary element of the complaint (that is, a timely request for assistance) has not been made out.*

**[14]** The Board has also held that a certified bargaining representative need not encourage or convince members to ask the union to file a grievance, nor need it seek out grievances to file: See, *Lundgren v. United Food and Commercial Workers International Union, Local 248-P and Mitchell's Gourmet Foods Inc.*, [2004] Sask. L.R.B.R. ---, LRB File No. 141-03 (not yet reported) and *Hargrave, et al. v. Canadian*

*Union of Public Employees, Local 3833, and Prince Albert Health District*, [2003] Sask. L.R.B.R. 511, LRB File No. 223-02.

**[15]** In the present case, the Applicant resigned from his employment effective December 31, 1995. He did not file his application with the Board alleging a breach of the duty of fair representation regarding the benefits situation associated with his decision until January 23, 2003, a period of some seven years. It appears that the Applicant first requested the assistance of the Union with respect to potential benefits under article 12 of the collective agreement by his letter dated August 7, 2002 (see, Agreed Facts, paragraph 29, *supra*). We are of the opinion that the situation in the present case has much similarity to *Taylor, supra*, and, as in *Kimmie, supra*, the Applicant bears the onus to demonstrate that justice can nonetheless be done at this late date. While we are sympathetic to the position that Mr. Sabo now finds himself in, he has failed to provide a reasonable explanation for the delay. Therefore, the application is dismissed.

**DATED** at Saskatoon, Saskatchewan this **8<sup>th</sup>** day of **July, 2004**.

**LABOUR RELATIONS BOARD**

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James Seibel,  
Chairperson