The Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v. UNIVERSITY OF SASKATCHEWAN and UNIVERSITY OF REGINA, Respondents

LRB File Nos. 246-03 & 247-03; April 19, 2004
Vice-Chairperson, Wally Matkowski; Members: Clare Gitzel and Bruce McDonald

For the Applicant:	Peter Barnacle
For the Respondent University of Saskatchewan:	Neil Gabrielson, Q.C. and Laura Seibel
For the Respondent University of Regina:	Bonnie Dobni

Arbitration – Deferral to – Board reviews factors for consideration where one party asks Board to defer to grievance and arbitration procedure – Where same dispute gives rise to grievance and to application before Board, collective agreement makes grievance resolution possible by means of arbitration procedure and remedy sought under collective agreement is suitable alternative to remedy sought from Board, Board defers to grievance and arbitration procedure.

REASONS FOR DECISION

Background:

[1] On November 26, 2003, Canadian Union of Public Employees (the "Union"), brought an unfair labour practice application against University of Saskatchewan ("U of S") and University of Regina ("U of R" and collectively the "Employers"), alleging that the Employers violated ss. 11(1)(a) and (c) of *The Trade Union Act*, R.S.S.1978, c. T-17 (the "*Act*") by refusing to come back to the table and bargain with regard to the Job Evaluation Steering Committee ("JESC") (LRB File No. 246-03) and with regard to the job evaluation negotiation process (LRB File No. 247-03). U of R is prepared to meet with the Union and remains committed to continuing with and resolving the issues in the job evaluation process. As such, no relief is now being sought by the Union against U of R.

[2] The Union initially filed a policy grievance against the Employers, dated October 9, 2003, which provided:

> *We the undersigned claim that the employers have violated the Terms of Reference dated September 28, 1998 and the Memorandum of Agreement entitled Job Evaluation/Pay Equity by refusing to participate in the Job Evaluation Steering Committee meetings, failing to complete the rating process and by failing to abide by the dispute resolution process outlined in 7(f) of the Terms of Reference.*

[3] The Union requested the following relief in its grievance:

1. *That the employer be ordered to return to the Job Evaluation Steering Committee meetings to complete the rating process and abide by the dispute resolution process outlined in 7(f) of the Terms of Reference.*

2. *That the Job Evaluation Steering Committee be confirmed as having the authority to recommend changes to the ratings to the Job Evaluation Committees.*

3. *That the Union be awarded compensation and damages and otherwise be made whole, with interest, in that the Employer acted in an unfair and unreasonable manner by violating the Collective Agreement and the Terms of Reference.*

[4] Prior to the Board's hearing of these matters, counsel for U of S proposed that the parties agree to have the Board defer hearing LRB File Nos. 246-03 and 247-03 pending the result of the Union's policy grievance, in that some or all of the issues giving rise to the Board applications involved the interpretation of the applicable collective agreement. U of S conditionally agreed to withdraw its objection to the arbitrability of the grievance having regard to the timeliness of filing the grievance. The Union refused to agree to defer the matter to arbitration.

[5] At the hearing, which took place in Saskatoon on March 29, 2004, U of S asked the Board to defer the unfair labour practice applications to the grievance and arbitration process. Both U of S and the Union agreed to enter as evidence a number of exhibits to assist the Board in its determination of U of S's preliminary objection. These exhibits, together with the pleadings, were sufficient to allow the Board to determine the deferral issue.

Facts:

[6] The exhibits filed by the parties indicate that the basic facts are not in dispute. On September 28, 1998, the parties entered into a Memorandum of Agreement entitled Equal Pay For Work of Equal Value and Pay Equity Policy Framework and Terms of Reference (the "Terms

of Reference"), which dealt with job evaluation and pay equity principles and was incorporated into the parties' collective agreement. All parties confirmed their commitment to achieving equal pay for work of equal value. The parties spent a great deal of time and money attempting to achieve this worthwhile goal.

[7] Each of the initial Job Evaluation Committees ("JEC") at each University completed its mandate in April, 2003. The separate JECs evaluated all positions in the Union's bargaining unit in each workplace and, in effect, ranked them. Following this ranking process there were 29 positions which had different ratings given to them by the separate JECs at each University (the "problem"). These 29 positions relate to a significant number of employees at each respective workplace.

[8] The parties were able to reduce the number of job positions in dispute to 20, but were unable to agree on how to proceed further pursuant to the Terms of Reference. The JESC attempted to deal with the problem to no avail. By letter dated June 11, 2003, U of S advised Jim Sharman, the Union's co-chair of the JESC, as follows:

> *Re: Implementation of Job Evaluation*
>
> *As you know, since my arrival at the University of Saskatchewan in August 2002, I have had significant concerns as to the status of the CUPE 1975 Job Evaluation project. My concerns are with respect to the timeliness of completing and implementing the project, the project costs, the divergent rating results of the two Job Evaluation Committees (JECs) at the University of Saskatchewan and the University of Regina, the continuing consequences of the agreement to freeze reclassification reviews, and the consequences to labour peace of this work continuing to be incomplete.*
>
> *In the 10 months since my arrival, the University of Saskatchewan has made significant attempts to move the project to closure. Following the Job Evaluation Steering Committee (JESC) meetings of May 26 & 27 2003, frustration with CUPE 1975's positional stance has led us to evaluate the likelihood of reaching successful conclusion of the project through that forum. Over a period of at least the last 8 months, and with more vigour over the last 3 months, our efforts to break the impasse through problem-solving by exploring alternative solutions has been met with resistance. At this juncture, I have no alternative but to formally advise you of the University of Saskatchewan's intent to withdraw from the JESC meetings and refer the matter to the negotiation process in an effort to implement the results of the project to date.*

Specifically, the JESC is in a deadlock over the question of whether the recent exercise undertaken by the JESC, as an approach to reconciling the different ratings arrived at by the individual JECs, jeopardizes the integrity, applicability and sustainability of the job evaluation system. Particular concerns put forth included the methodology used for reconciliation, the failure of the JESC to communicate with the JECs, and the JESC exceeding its jurisdiction under the negotiated Job Evaluation Policy Framework and Terms of Reference by engaging in such an exercise.

As agreed by the JESC committee at the May 13th meeting, the University of Saskatchewan committed to forwarding Employer options for discussion purposes in regards to possible alternatives to the impasse. When the JESC met on May 26 & 27, CUPE 1975 indicated that the options were not open for discussion, nor would CUPE, following repeated requests by the University team, put forth any options other than the exercise already undertaken as the means to resolving the impasse.

It was suggested by the University of Regina and agreed to by CUPE 1975 and the University of Saskatchewan, that the parties seek the assistance of an independent expert in job evaluation to assist them in problem solving the divergent rating results of the two Universities. It was stated that all parties would like to have agreement on a single expert however, it was also agreed that if this were not possible both CUPE and the Universities would appoint representative advisors.

The Universities put forth their desire and need to have an independent and nationally recognized expert in job evaluation/compensation to undertake an objective review and analysis of the reconciliation exercise. Specifically, the validity of the methodology used by the JESC in merging the divergences and its subsequent effect on the development of a system that would have both immediate and long-range integrity. The CUPE 1975 team responded negatively to this suggestion. They declared that they were unilaterally invoking Clause 7(f) of the Policy Framework and Terms of Reference. This clause mandates appointment of advisors to meet with the committee and attempt to assist them to reach a decision. If no decision can be mutually agreed upon, then the dispute is referred to arbitration.

It is the University of Saskatchewan's position the substance of the current dispute is not subject to Clause 7(f) nor is it arbitrable. Clause 7(f) outlines the dispute mechanism process relating to disagreements on matters of the development and implementation of the plan, excluding classification-level decisions. Accordingly, the University of Saskatchewan will not participate in meeting with or appointing an advisor under this Clause.

In summary, please be advised that the University of Saskatchewan has responded to the CUPE 1975 request – in accordance with the Collective Agreement and Terms of Reference – for the parties to name their representatives and begin negotiations of the implementation of Job

> *Evaluation. Given the current situation, we wish to inform you that the University of Saskatchewan will not be participating in JESC meetings until the completion of the negotiation process.*

[9] The Terms of Reference provide that the JESC is responsible for overseeing the development and implementation of the job evaluation program. One of the roles of the JESC is to "develop a plan to ensure that both JECs apply the evaluation tool in a consistent manner." Clause 7(f) of the Terms of Reference provides for an arbitration process if the JESC is unable to reach unanimous agreement on any policy or overall matter relating to the development and implementation of the plan.

[10] Following further meetings, the Union advised the Employers, by letter dated October 9, 2003, that it would be filing a grievance with regard to the Employers' conduct. The October 9, 2003 letter provided as follows:

> *<u>Re: Job Evaluation/Pay Equity</u>*
>
> *Further to the letters of June 11, 2003 and July 8, 2003 from Barb Daigle and our meeting of October 9, 2003, it is our understanding that the University of Saskatchewan and University of Regina does not intend to return to the Job Evaluation Steering Committee to complete the rating process.*
>
> *It is the Union's position that the latest procedure undertaken has not been completed and the committee needs to meet to complete this process in order to effectively conclude Job Evaluation as determined by the Terms of Reference and the Memorandum of Agreement.*
>
> *This letter is to inform you that although we intend to proceed with negotiating the implementation of job evaluation, Local 1975 is filing a grievance and is intending to proceed to arbitration under Article 14 of the collective Agreement and the Terms of Reference alleging that the University of Saskatchewan has refused to comply with the dispute resolution process under paragraph 7(f).*
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> *As the Terms of Reference are specifically incorporated in the Collective Agreement, the refusal of the University of Saskatchewan to abide by the terms of the dispute resolution process in paragraph 7(f) constitutes a violation of the Collective Agreement.*
>
> *Please accept this letter as our formal notice to proceed to arbitration under the Terms of Reference and we are also enclosing a grievance setting out the additional remedy requested which includes damages and that the Union be made whole, with interest.*

[11] The Union provided a further letter to the Employers dated October 27, 2003, relating to the policy grievance, which provided:

> *Further to our letter dated October 9, 2003 and grievance form (attached), the local has yet to hear a response.*
>
> *The union's summation is that the Terms of Reference and in particular 7(f) has not been adhered to: therefore, this violation triggers the arbitration process of the Terms of Reference. In the alternative, the union believes if the employer feels the dispute resolution procedure in the Terms of Reference do not apply, then the procedure laid out in the collective agreement do apply.*
>
> *The union requests at this time, that failing the return of the employer to the JESC table and invoking the Terms of Reference in a timely manner, that the parties agree to settle the matters of violations of the Terms of Reference directly related to the collective agreement, be settled under one (1) arbitration board following the guidelines laid out in the collective agreement.*
>
> *Please respond in writing, as time is of the essence in resolving the disputes and the local looks forward to a prompt reply.*

[12] By letter dated November 4, 2003, U of S responded to the Union's letters as follows:

> *This will acknowledge receipt of your letters dated October 9th and October 27th regarding Job Evaluation.*
>
> *I think it is important to summarize some of the events and resulting correspondence of the last few months. On April 28, 2003, we were pleased that CUPE served the University of Saskatchewan with notice to begin negotiation on the implementation of Job Evaluation. We took this notice to mean that CUPE was willing to enter negotiations to fully discuss the interests of both parties and to move this project to conclusion. However, at the JESC meetings subsequent to that notice (May 12, 13, 26 and 27, 2003), CUPE continued to insist on "cobbling" the results from the two Universities, prior to going to the bargaining table, despite the University of Saskatchewan's objections.*
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> *In my letter of June 11, 2003 to Jim Sharman (to express our concerns about discussions at JESC), and July 8, 2003 (in response to a letter from Don Moran dated June 20) we advised CUPE that the University of Saskatchewan would no longer participate in JESC meetings. We believed that CUPE's insistence on "cobbling" the JEC ratings from the University of Regina and University of Saskatchewan violated the Terms of Reference. In a letter to Don Moran on June 11, 2003, we requested*

that the JE negotiations be combined with collective bargaining of the CUPE 1975 Collective Agreement (which expires December 31, 2003). On June 19, 2003 the local denied this request.

When we met at JE negotiations on October 9, 2003 it became clear that CUPE's agenda to change the ratings of the JECs at each University had not changed. After a short discussion, in which the University of Saskatchewan attempted to introduce a creative approach to implement JE results (which did not involve "cobbling"), CUPE presented the management team with a "grievance" document (dated October 9, 2003). We believe CUPE brought bargaining to an impasse at our first JE negotiation meeting. This has an appearance of not bargaining in good faith.

It is our position that the "grievance" dated October 9, 2003 is inarbitrable for a number of reasons, and we are putting CUPE on notice of our intent to raise preliminary matters in the event of an arbitration hearing, including but not limited to the following:

First, the grievance is out of time. If there was a basis for a grievance (and we do not think there is) the time period to file the grievance commenced at either June 11, 2003 or July 8, 2003 when we indicated our intentions with respect to the JESC. The thirty calendar day time period prescribed by Article 14.7 of the Collective Agreement has elapsed.

Second, as indicated in the summary of the correspondence above, the union served notice to proceed to negotiations for implementation. By having done so we believe that CUPE is now estopped from relying upon the Terms of Reference. In the event that Article 7.f. is applicable, which we expressly deny, CUPE has failed to follow the requisite procedures, including the time limits, to initiate arbitration.

Third, Article 8.f. of the Terms of Reference states "…Job Evaluation decisions [by the JECs] shall be unanimous and deemed final and binding upon the Parties, subject to appeal procedures. ***Job Evaluation decisions are not referred to the JESC****…" (emphasis added). This precludes the JESC from changing the ratings (through cobbling or any other means) and therefore the dispute resolution process in Article 7.f does not apply and the grievance is not valid. We do not believe there is a means for CUPE to refer this matter to arbitration and in doing so is attempting to force the Universities to change the JE ratings, which is a violation of the Terms of Reference.*

Finally, we will take the position that there has been no violation of the Collective Agreement.

In summary, it is clear that we fundamentally differ on what is to be implemented, believe that the process was flawed from its inception, and believe that the Terms of Reference have been violated in a number of ways including Article 5, the timeliness for implementation. In response

> *to CUPE's declared intention to continue negotiating implementation of JE, we believe that CUPE has brought this exercise to an impasse. As you know this joint process has been "ongoing for six and one half years" and the University of Saskatchewan has borne the majority of the costs. We believe that in 1998 the Universities and CUPE entered the Joint Job Evaluation project in good faith. However given our accountability to serve the interests of the Board of Governors and our obligations to our staff and the public we think it would be irresponsible for the organization to continue with this exercise. We believe that the project has failed.*
>
> *We will raise this matter at the bargaining table for the bargaining of the Collective Agreement which expires on December 31, 2003. In the interim the University of Saskatchewan will explore strategies to implement the results of the JEC ratings through our current agreement as per Articles 2.1 and 11.*

[13] The Union rejected the U of S request to include job evaluation/pay equity negotiations with collective bargaining negotiations. By letter dated November 14, 2003, the Union placed the Employers on notice that it would be proceeding before the Board with respect to the Employers' failure to return to the table for the JESC and job evaluation negotiations. The Union made it clear that it still intended to proceed with the policy grievance and the parties were prepared to conditionally agree to a chair for the arbitration of the policy grievance.

U of S's arguments:

[14] Counsel for U of S argued that it has been a longstanding policy of the Board to defer hearing matters that are or should be the subject of collective bargaining agreement arbitration. Counsel argued that the conditions necessary for the Board to defer to an arbitration board are present in this case. Finally, counsel argued that the Union's application centered on the allegation that U of S failed to bargain and that the validity of this claim depended entirely upon whether or not the terms of the collective agreement required the Employers to continue to bargain through the forum of the JESC.

Union's arguments:

[15] Counsel for the Union argued that U of S's preliminary objection should be dismissed or, in the alternative, be determined after all the evidence had been presented. Counsel advised the Board that the Union would be seeking a declaration that U of S violated ss. 11(1)(a) and (c) of the *Act* and requesting an order that U of S cease such violations and return

and negotiate with the Union within the framework of the committees provided for in the Terms of Reference.

U of R's arguments:

[16] U of R's primary interest was in receiving a determination as to whether or not U of S and U of R JEC results would, in effect, be averaged. U of R was prepared to problem solve to ensure that the pay equity process moved forward.

Analysis:

Should the Board defer its jurisdiction to a board of arbitration?

[17] In essence, the Union and U of S are in a dispute over whether or not the job evaluation process is worth salvaging. U of S takes the position that the process has failed and that it would be foolhardy and irresponsible to continue with a flawed process. U of S has, in effect, abandoned the project. It is prepared to enter into negotiations relating to job evaluation/pay equity at the collective bargaining table. The Union takes the position that it would be an equally foolhardy and irresponsible decision to walk away from six years of work invested in the job evaluation process and has filed a policy grievance hoping to obtain a decision from an arbitrator which could salvage the job evaluation process. An arbitrator's decision could result in a finding that the process is not flawed and thus require U of S to continue with the process.

[18] Counsel for U of S argued that the Board has a policy of deferring to grievance and arbitration provisions in a collective agreement, where the issue raised involves the interpretation or application of a collective agreement term and where complete relief can be obtained through the arbitration process, and pointed to two recent decisions of the Board which support this assertion (See: *International Brotherhood of Electrical Workers, Local 2067 v. Saskatchewan Power Corporation*, [2000] Sask. L.R.B.R. 17, LRB File No. 162-99 and *International Brotherhood of Electrical Workers, Local 2067 v. Saskatchewan Power Corporation*, [2002] Sask. L.R.B.R. 268, LRB File No. 010-02).

[19] In deciding to defer an application to the grievance and arbitration process, the Board in *International Brotherhood of Electrical Workers, Local 2067 v. Saskatchewan Power Corporation*, [2002] Sask. L.R.B.R. 268, LRB File No. 010-02 considered whether the three conditions described by the Saskatchewan Court of Appeal in *United Food and Commercial*

Workers v. Westfair Foods Ltd. et al. (1992), 95 D.L.R. (4th) 541 (Sask. C.A.) had been met. These conditions are:

> i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute;
>
> ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance-arbitration procedure; and
>
> iii) the remedy sought under the collective agreement must be a suitable alternative to the remedy sought in the application to the Board.

[20] In *International Brotherhood of Electrical Workers, Local 2067 v. Saskatchewan Power Corporation*, [2002] Sask. L.R.B.R. 268, LRB File No. 010-02, after reviewing the three conditions set out above, the Board concluded at 269 and 270:

> *At the hearing, the Board advised the parties that it would defer this application to the grievance and arbitration process. The reasons for the decision to defer can be summarized as follows:*
>
> *(1) The central issue in the unfair practice and the grievance relates to the employee's entitlement to union representation during the meeting in question. This right arises from the collective agreement, and may, on the Union's theory of the effect of s. 2(b) and s. 11(1)(c), also arise under the Act. If the Board were to embark on an inquiry, it is possible that it would come to a different conclusion with respect to the nature of the meeting than would an arbitrator. The essential nature of the dispute is the same before this Board and an arbitration board hearing the grievance.*
>
> *(2) The issue before the Board can be determined in whole under the collective agreement. Legislative policy supports the use of arbitration as the method of resolving all disputes between parties to a collective agreement: see. S. 25(1).*
>
> *(3) The Supreme Court of Canada in cases like Weber and O' Leary has significantly expanded both the nature of complaints that may be referred to the grievance and arbitration process and the remedies that may be*

> *granted. In the present case, the Union has contractual provisions(Article 1.02, Article 9) relating to its representational rights that could be placed before an arbitration board and remedies could be sought for any alleged representational interference. All of the issues raised by the Union on the application for an unfair labour practice could be raised through the grievance and arbitration provisions. In the present case, the Union argued that the grievance did not address the issue of representational harm to the Union. In our view, this issue is implicit in the grievance.*

[21] In this case, the three conditions set out by the Court of Appeal in *Westfair Foods Ltd., supra*, have been met. The Board therefore upholds U of S's preliminary objection and defers these matters to the grievance and arbitration process.

[22] The Union has filed a grievance relating to the failure of U of S to continue with the job evaluation process as set out in the Terms of Reference, which form part of the collective agreement between the parties. The grievance will require an arbitrator to interpret the Terms of Reference and advise the parties how to proceed.

[23] From a practical perspective, if the arbitrator determines that the process is flawed (i.e. the terms of reference do not provide for a mechanism to deal with the dual JEC results) the parties could then attempt to salvage almost six years of work by revising the process. If the process is not flawed, the parties will be advised by the arbitrator how to proceed to achieve their joint goal of achieving pay equity.

[24] The Board has no desire to interpret the Terms of Reference when it is possible that an arbitration board could come to a different conclusion on the meaning of the Terms of Reference than the Board arrives at.

[25] As set out by the Board in *International Brotherhood of Electrical Workers, Local 2067 v. Saskatchewan Power Corporation*, [2002] Sask. L.R.B.R. 268, LRB File No. 010-02, legislative policy supports the use of arbitration as the method of resolving disputes relating to the interpretation of the Terms of Reference, which form part of the collective agreement. Likewise, the Board also accepts the proposition that the nature of complaints that may be referred to the grievance and arbitration process and the remedies that may be granted by an arbitration board have been significantly expanded. An arbitration board will have the jurisdiction

to deal with the meaning of the Terms of Reference and will be able to provide the Union with the necessary remedies in the event the Union's policy grievance is successful.

Conclusion:

[26] The Board is satisfied that the provisions of the Terms of Reference, which form part of the collective agreement, are such that an arbitration board will have the authority to deal with the issues raised between the parties. Accordingly, deferral to arbitration, in these circumstances, is the appropriate decision in that an arbitration board will be able to provide full relief to the Union in the event that the Union's policy grievance is upheld.

[27] The Board issued an Order that the Union's applications would be adjourned *sine die* to be brought back to the Board at the conclusion of the grievance and arbitration process by either party on notice to the other party if there are any issues remaining that were not dealt with by the arbitration board which hears and decides the policy grievance.

DATED at Regina, Saskatchewan, this **19th** day of **April, 2004.**

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson