Labour Relations Board
Saskatchewan

BEVERLY SOLES, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4777, Respondent

LRB File No. 085-06; November 14, 2006
Vice-Chairperson, Angela Zborosky; Members: Leo Lancaster and Donna Ottenson

The Applicant: Beverly Soles
For the Respondent: Peter Barnacle and Sharleen Haarstad

Practice and procedure – Summary dismissal – Applicant alleged violation of s. 74 of *The Labour Standards Act* – Board has no jurisdiction to administer *The Labour Standards Act* or rule upon alleged violations – Board refuses to hear portion of application relating to *The Labour Standards Act* pursuant to s. 18(o) of *The Trade Union Act*.

Practice and procedure – Summary dismissal – Lack of evidence ground not considered because infers requirement to produce evidence at pleadings stage of proceedings – At pleadings stage, party not specifically required to outline all evidence it intends to adduce or all documents it intends to introduce in evidence at hearing – Lack of evidence ground more appropriately used for dismissing application following introduction of evidence, whether or not oral hearing held.

Practice and procedure – Summary dismissal – Board considers whether applicant has established arguable case that union violated s. 25.1 of *The Trade Union Act* – Board does not assess strength or weakness of applicant's case, but simply determines whether application and/or written submission discloses facts that would form basis of unfair labour practice or violation of *The Trade Union Act* falling within Board's jurisdiction to determine – Board finds no allegation put forward by applicant that union failed in duty to represent applicant fairly – Board finds no arguable case.

Practice and procedure – Summary dismissal – Where application and written submission of applicant do not disclose arguable case, holding oral hearing concerning application would be ineffective use of Board's resources and would be unfair to require union to spend time and resources defending highly speculative claim basis of which unknown to Board or union – Board summarily dismisses application without oral hearing because application does not disclose arguable case.

***The Trade Union Act*, ss. 18(o), 18(p), 18(q) and 25.1.**

REASONS FOR DECISION

[1] Canadian Union of Public Employees, Local 4777 (the "Union") is designated as the bargaining agent for a unit of employees of Prince Albert and Parkland Health Region (the "Employer") which operates Pineview Terrace Lodge, a special care home in Prince Albert, Saskatchewan. Beverly Soles, the Applicant, was a member of the Union and employed by the Employer from February 21, 2005 to April 1, 2005 as a special care aide. The Applicant filed an application with the Board on June 13, 2006 alleging that the Union violated s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") and s. 74 of *The Labour Standards Act*, R.S.S. 1978, c. L-1. The Union filed a reply to the application on June 20, 2006 and, on September 28, 2006, made application to the Board to summarily dismiss the application without an oral hearing pursuant to ss. 18(p) and (q) of the *Act*. These Reasons for Decision deal with the application for summary dismissal.

Background:

[2] In her application, the Applicant references Pineview Terrace Lodge but specifically pleads that she alleges that the Union has engaged in an unfair labour practice (or violation of the *Act*) by reason that "They terminated me for reporting elder abuse." There is no other information included in her application.

[3] In the Union's reply to the application, it denies that it terminated the Applicant's employment, noting that there were no other facts set out in the application to respond to at the time. The Union also indicates in its reply that the Applicant was a special care aide employed by the Employer from February 21, 2005 to the date of her termination by the Employer on April 1, 2005 for "reasons of general unsuitability during the probationary period." The Union attaches copies of two letters sent by the Employer to the Applicant, one outlining the Employer's expectations of the Applicant during the probationary period and providing further orientation shifts and the other being the letter of termination.

[4] Along with its reply, the Union also delivered a letter to the Board indicating that its reply was a provisional one and requesting that the Board contact the Applicant to obtain further particulars of her application, noting its wish to reserve the right to make a full reply following receipt of those particulars and/or to make an

application for dismissal of the application without an oral hearing. On June 22, 2006, the Board Registrar wrote to the Union advising that, if the Union required further particulars in order to respond to the application, it must seek those particulars by way of written request to the Applicant's legal counsel and that, if particulars were not provided in a reasonable time period, the Union could request a conference call hearing with the Board's Executive Officer to address the issue. A copy of this correspondence was sent to the Applicant's legal counsel at that time and to the Employer.

[5] On September 28, 2006, the Union corresponded with the Board seeking summary dismissal of the Applicant's application without an oral hearing. Accompanying this correspondence was the Union's written submission outlining its grounds for this request. In accordance with Board practice, on September 29, 2006, the Applicant was notified that the Union's request would be placed before a panel of the Board to determine whether summary dismissal of the application was an option and was advised that, if that panel decided that summary dismissal was an option, the Applicant would be invited to file a written submission in response to the Union's request.

[6] On October 3, 2006, a panel of the Board considered the Union's request and determined that summary dismissal of the application was an option. By correspondence dated October 6, 2006, the Applicant was advised of the Board's decision and was asked to file a written submission in response to the Union's request, after which a panel of the Board would make a decision whether to summarily dismiss her application or to hold an oral hearing on some or all of the allegations she had made in her application. On October 19, 2006, the Applicant filed a written submission with the Board.

[7] In the Union's written submission of September 20, 2006, the Union provided information and copies of letters and documents, primarily concerning its attempts to obtain particulars from the Applicant. These facts do not appear to be in dispute between the parties. The Union stated that, on June 28, 2006, it corresponded with the Applicant's legal counsel requesting further particulars in order to properly respond to the application and indicating that if the same were not forthcoming by July 12, 2006, the Union would be asking the Board to summarily dismiss the application. On June 29, 2006, counsel for the Applicant corresponded with the Union asking for an

explanation as to the kind of particulars required while expressing his belief that "Ms. Soles will be happy to oblige." The Union responded on the same day indicating that it wished to be advised of the basis upon which the Applicant felt that the Union had violated s. 25.1, including any alleged facts she intended to prove and copies of any documents she intended to rely upon in support of her application. The Union indicated in its submission to the Board that it received no substantive response to these requests of the Applicant's legal counsel and, on July 24, 2006, the Union received a copy of a letter sent from the Applicant's legal counsel to the Board indicating that in the future the Board should deal with the Applicant directly and that counsel would not be conducting a hearing on the Applicant's behalf.

[8] The Union further indicated that, on July 27, 2006, it corresponded directly with the Applicant requesting particulars of her application. On July 30, 2006, the Applicant replied to the Union indicating, in part, as follows:

> *. . .*
> *Any particulars you need answered will be answered at the Hearing with my lawyer present.*
> *. . .*
> *I am suing the Union for d.f.r. (duty of fair representation) because when I reported "Elder Abuse" no one listened to me or helped the elderly who are still being abused.*
> *. . .*

[9] In the Union's written submission, the Union stated that it had only one other document on file in relation to the Applicant. It was an undated handwritten document setting out the Applicant's hiring and firing dates, a note that more orientations were required, that an investigation had been held into the elder abuse claim but that the resident affected denied any abuse and that the Union had attempted to contact the Applicant but was unsuccessful as the telephone number provided by the Employer was out of service.

[10] On November 1, 2006, an *in camera* panel of the Board considered the Union's request for summary dismissal of the application without an oral hearing.

Statutory Provisions:

[11] Relevant provisions of the *Act* include the following:

> *18. The board has, for any matter before it, the power:*
>
> *(o) to summarily refuse to hear a matter that is not within the jurisdiction of the board;*
>
> *(p) to summarily dismiss a matter if there is a lack of evidence or no arguable case;*
>
> *(q) to decide any matter before it without holding an oral hearing;*
>
> 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.*

Arguments:

[12] The Union brought this application to summarily dismiss the Applicant's application without an oral hearing, pursuant to s. 18 (p) and (q) of the *Act,* on the basis that the application contains a "lack of evidence or no arguable case." The Union argued that s. 18 (p) serves as a statutory rationale or a ground for the exercise of the Board's power to dismiss an application without an oral hearing pursuant to s. 18 (q). Counsel for the Union pointed out that the amendments to the *Act* in 2005 resulted in the Board's powers being specifically enumerated in s. 18, utilizing essentially the same wording as that contained in the Canada Labour Code (hereinafter the "*Code*"). As such, the Union urged the Board to accept the reasoning applied by the Canada Industrial Relations Board (hereinafter "Canada Board") in relation to the companion provisions, particularly in this case where the Board has not previously considered ss. 18 (p) and (q).

[13] The Union relied on *Kelly v. Amalgamated Transit Union, Local 1415, and Greyhound Canada Transportation Corp.,* [2002] CIRB No. 202 and *Virginia McRae Jackson and Jacoline Shepard v. CAW-Canada and Air Canada Jazz* and *Edwin F. Snow v. Seafarers' International Union of Canada and Seabase* [2004] CIRB No. 290, both cases decided by the Canada Board where the Canada Board dismissed duty of fair representation cases without holding an oral hearing. The Union suggested that a duty of fair representation complaint should be dismissed without a hearing in any of the following circumstances: (i) where the complainant does not provide any particulars or documentation in support of the allegation or fails to do so when requested; (ii) where

the complainant seeks to use the Board to simply appeal a decision of the union respecting the handling of a grievance; (iii) where the Board and other parties would be faced with an expenditure of time and resources dealing with a claim that is, at best, speculative; or (iv) based on the particulars and documents provided, the complaint does not establish an arguable case or, alternatively, a *prima facie* case of a violation of s. 25.1.

[14] The Union pointed out that, in this case, the Applicant, while failing to provide any information with respect to the reasons for her termination by the Employer, simply makes the bald statement that the Union terminated her employment for reporting elder abuse. The Union was not the Applicant's employer and the Union did not terminate the Applicant's employment. The Union also pointed out that the Applicant made no contact with the Union between the time of her termination and the filing of this application and now the Applicant refuses to provide any particulars of her position in advance of the hearing. The Union argued that, in these circumstances, it is inconsistent with the principles of natural justice to hold an oral hearing where the Union has no idea of the case it is expected to answer.

[15] The Union argued that, because the Applicant has refused to provide details or particulars of her claim, it is appropriate for the Board to simply consider the record before it in determining whether to summarily dismiss the application.

[16] The Union argued that there is simply nothing in the application that would demonstrate a possible violation of s. 25.1, that is, there is nothing to support a claim that the Union acted arbitrarily, discriminatorily, or in bad faith, as s. 25.1 has been interpreted by the Board. There is therefore no need to adjudicate any difference on the facts as between the Applicant and the Union. There is simply no arguable or *prima facie* case for the Union to meet and to hold an oral hearing in these circumstances would not be an effective use of the Board's resources, nor would it be fair to put the Union to the time and expense of an oral hearing.

[17] The Applicant filed a brief written submission in response to the Union's submission. It stated:

> *The further particulars that the C. U. P. E. was inquiring about are not clear to me as they were no questions there that they had asked me to answer. There was never any meeting. They have my address.*
>
> *I reported elder abuse. My witness is_____[1] and she is willing to sign an affidavit about the elder abuse she is in knowledge of at Pineview Terrace Lodge. She is an employee there and has been for 6 years.*
>
> *If there is no hearing set up then my lawyer and I will Appeal it.*

Analysis and Decision:

[18] Firstly, at the outset of these Reasons for Decision, we made reference to the fact that the Applicant alleged a violation by the Union of s. 74 of *The Labour Standards Act*. Although we note that the Applicant has failed to state grounds concerning the alleged violation of that provision by the Union, the Board has no jurisdiction to administer *The Labour Standards Act* or rule upon alleged violations. As such, we refuse to hear that portion of the application pursuant to s. 18 (o) of *The Trade Union Act*.

[19] This is the first occasion on which the Board has been required to interpret and apply ss. 18 (p) and (q) since the amendment made to s. 18 in 2005. The Union is correct in its submission that it appears that the Legislature replicated many of the powers of the Canada Board as contained in s. 16.1 of the *Code* when it amended s. 18 of the *Act* to specifically enumerate the powers of the Board. The original Bill to amend the *Act* simply incorporated by reference the companion provisions contained in s. 16.1 of the *Code*, however, prior to third reading, the proposed amendments to s. 18 of the *Act* were amended to specifically enumerate the Board's powers within the section, utilizing almost identical language to that contained in s. 16 of the *Code*. While arguably, the Board had these powers prior to the 2005 amendment, the specific enumeration of the powers makes it abundantly clear.

[20] As stated, s. 18(q) makes it clear that the Board may summarily dismiss an application without a hearing. The *Code* contains a provision in its s. 16.1 which reads the same as s. 18(q) of the *Act*. As such, it is helpful to consider decisions of the

Canada Board regarding the origination and scope of that power, as interpreted by the Canada Board. The Canada Board stated in the *McRaeJackson* case, *supra* at 18:

> *[56] There is no requirement for the Board to give notice to the parties of its intention not to hold a hearing (see Nav Canada, April 5, 2000 (CIRB LD 213), affirmed in NAV Canada v. International Brotherhood of Electrical Workers, Local 2228 (2001), 267 N.R. 125 (F.C.A.); and Raymond et al. v. Syndicat des travailleurs des postes (2004), 318 N.R. 319 (F.C.A.)).* ***The audi alteram partem rule, that is the requirement to hear both sides of a matter, does not require that an oral hearing be held in every case. The reviewing courts have clearly stated that the Board is only required to grant to the parties an opportunity to present their case, whether by written submissions, documents produced and its own inquiries*** *(see Commission des Relations de Travail du Quebec v. Canadian Ingersoll-Rand Company Limited et al., [1968] S.C.R. 695; Anne Marie St. Jean, supra; Boulos v. Canada (Labour Relations Board), [1994] F.C.J. No. 1854 (QL); and Nav Canada, supra, with respect to the discretion of this Board).*
>
> **[*emphasis added*]**

[21] While the Canada Board's decisions regarding the application of s. 16.1 of the *Code* provide guidance for the interpretation of s. 18 of the *Act*, it is also necessary that we interpret and apply the provisions of s. 18 of the *Act* in a manner appropriate to the procedures we have adopted and consistent with past decisions of the Board.

[22] The Union submitted that s. 18(p) may provide a statutory rationale or ground for the application of s. 18(q). We agree with that proposition except to say that there may be other rationale or grounds for the application of s. 18(q). In other words, the Board may "decide any matter before it without holding an oral hearing" on some basis other than "lack of evidence" or "no arguable case." As it is possible to dispose of this application through our consideration of whether the application should be summarily dismissed without an oral hearing because there is a lack of evidence or no arguable case (as urged upon us by the Union), we will not speculate on any other

[1] The full name and telephone number of the witness contained in the Applicant's original submission has been removed for reasons of privacy.

possible grounds that might form the basis of a respondent's application to summarily dismiss without an oral hearing.

[23] It is therefore incumbent upon us to consider whether in this case, the application should be summarily dismissed without a hearing because there is a lack of evidence or no arguable case. In our view, it is not appropriate to consider the specific ground of a "lack of evidence" because, by its very words, it infers a requirement to produce evidence at this stage of the proceedings. While we will examine below the requirements for the filing of an application, we note that, at the pleadings stage, a party is not specifically required to outline all the evidence it intends to adduce or all the documents it intends to introduce in evidence at a hearing. While it is possible that the Board may in the future utilize a process where the parties must file their evidence in written form rather than have an oral hearing (i.e. a "paper hearing"), a practice currently generally limited to the determination of interim applications, it would seem that the ground of a "lack of evidence" would more appropriately be used for dismissing an application following the introduction of evidence, whether or not an oral hearing is held.

[24] We are therefore left to determine the Union's motion to summarily dismiss the application on the basis of "no arguable case." In its argument, the Union suggested that the Board adopt the test utilized by the Canada Board in its interpretation of the companion provisions of s. 16.1 of the *Code*, that is, whether the applicant has made out a "*prima facie*" case. Without deciding whether the "*prima facie*" test used by the Canada Board to dismiss an application without an oral hearing is the equivalent of an "arguable case*"* as stated in s. 18(p), for the purposes for this case we will determine the requirements of an *"*arguable case*"* in the application of s. 18(q) of the *Act*.

[25] In the circumstances of this case, the Board must answer the following questions:

(1) Has the Applicant established an arguable case that the Union acted arbitrarily, with discrimination or bad faith in relation to the Union's representation of the Applicant in grievance or rights arbitration proceedings under a collective bargaining agreement?

(2) If not, is this an appropriate case to summarily dismiss without an oral hearing?

Has the Applicant established an arguable case that the Union acted arbitrarily, with discrimination or bad faith in relation to the Union's representation of the Applicant in grievance or rights arbitration proceedings under a collective bargaining agreement?

[26] The phrase "arguable case" appears in the Board's jurisprudence on interim applications. On that type of application the Board considers as part one of a two-part test, whether the pleadings and affidavits filed in support of the application establish an arguable case. In *Grain Services Union (ILWU – Canada) v. See StarTek Canada Services Ltd.*, [2004] Sask. L.R.B.R. 128, LRB File Nos. 115-04, 116-04 & 117-04 the Board stated at 136:

> *[32] As explained above, the test is adapted from that set out by the Ontario Labour Relations Board in Loeb Highland, [1993] OLRB Rep. March 197. With respect to the two parts of the test – that is, whether the main application raises an arguable case – the Ontario Board stated as follows, at 202:*
>
> > *Turning first to the idea of a threshold test with respect to the merits of the main application, we have some concern about applying a high level of scrutiny to that application at the time of a request for an interim order. To the extent that such scrutiny may imply a form of prejudgment of the final disposition of the main matter, it is not particularly compatible with the scheme for interim relief set out in the Act and the Board's Rules of Procedure. More specifically, the procedure for interim relief contemplated by the Board's Rules reflects the inherent necessity for expedition in these matters. To that end, evidence is filed by way of certified declarations which are not subject to cross-examination. Indeed, s. 104(14) of the Act and Rules 92 and 93 indicate the Board may not hold an oral hearing at all, but may receive the parties' arguments in writing as well.*
> >
> > *This means that the Board is not in a position to make determinations based on disputed facts. In these circumstances, it would normally be unfair for an interim order to be predicated to any significant*

> *extent on a decision with respect to the strength or weakness of the main case. That should await the hearing of the main application when the Board hears oral evidence and can make decisions with respect to credibility based on the usual indicia, in a context where the parties have a full right of cross-examination. This is particularly important in cases such as the section 91 complaint to which this application relates, where decisions are often based on inferences and the various nuances of credibility play a key role. In other words, the granting of interim relief in this context should usually be based on criteria which minimize prejudging the merits of the main application.*

[27] As stated, in the case before us, it is necessary to examine whether the application discloses an arguable case such that it should not be dismissed without an oral hearing. At this stage, we do not assess the strength or weakness of the Applicant's case but simply determine whether the application and/or written submission discloses facts that would form the basis of an unfair labour practice or violation of the *Act* that falls within the Board's jurisdiction to determine. In order to make such a determination, it is necessary to understand the elements required to establish that the Union is in violation of s. 25.1 of the *Act*. In *Laurence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, the Board reviewed the principles concerning a union's duty of fair representation at 71 and 72:

> *This Board has discussed on a number of occasions the obligation which rests on a trade union to represent fairly those employees for whom it enjoys exclusive status as a bargaining representative. As a general description of the elements of the duty, the Board has indicated that it can do no better than to quote the principles outlined by the Supreme Court of Canada in the case of Canadian Merchant Services Guild v. Gagnon, [1984] 84 CLLC 12,181:*
>
> > *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
> >
> > *1. The exclusive power conferred on a union to act as a spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*

2. *When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*

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.*

4. *The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

5. *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 employees.*

The terms "arbitrary," "discriminatory," and "in bad faith," which are used in the legislative description of the kind of conduct on the part of a trade union which is to be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:

> *... The union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*

This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:

> *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favouritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*

[28] It is also important to consider the limitations on the Board in hearing and determining a duty of fair representation complaint by an employee. Those limitations were discussed in the *McRaeJackson* case, *supra*, where the Canada Board dismissed duty of fair representation cases without an oral hearing. In that case, the Canada Board, quoting from *Stephen Jenkins et al.,* June 9, 2004 (CIRB LD 1102), stated at 19:

> *In a majority of the cases under section 37, complainants are not represented or assisted by legal counsel. This was true in this case. They often do not fully appreciate what the Board can and cannot do for them, if anything, under the law. Where the issue is a dispute between an individual and the union representing him over the union's decision to drop or not pursue a grievance, the complainant infrequently expects that the Board will be able to make a decision on the actual merits of the grievance-to decide whether the suspension, or whatever took place, is appropriate and, if not appropriate, to modify or nullify it.*
>
> *The Board is therefore careful at the beginning of a hearing in such circumstances to remind the parties that its mandate is only to judge the union's handling of the grievance - to determine whether such handling shows evidence of having been "arbitrary, discriminatory or in bad faith" - and not to decide the merits of the grievance. Thus it will focus primarily on the evidence showing how the union behaved.*

[29] There is a high onus on an applicant to prove that a union is in violation of s. 25.1 of the *Act*. In its written submission, the Union quoted from the Canada Board's

decision in *McRaeJackson*, *supra*, regarding the Canada Board's experience with duty of fair representation applications, which we find closely reflects the reality in Saskatchewan. At 3, the Canada Board stated:

> *[1] The Canada Industrial Relations Board (the Board) receives large numbers of complaints from employees alleging that their trade union has breached its duty of fair representation. Annually, these complaints represent close to fifty percent of unfair labour practice complaints received by the Board and monopolize a great deal of its resources without significantly advancing the objectives of Part I of the Code, which it is called upon to interpret and apply. In deed, most of these complaints are dismissed on the basis that the facts do not establish sufficient grounds for a successful complaint.*
>
> *[2] The demands placed on the resources of trade unions, the Board and the labour relations system as a whole prompted the Board to review how to address these complaints while satisfying the principles of natural justice that govern all administrative tribunals and at the same time giving complainants the opportunity to have a complaint reviewed.*
>
> *[3] A general observation that stems from a review of the numerous complaints is that most complainants do not fully understand the basis of the duty of fair representation imposed by the Code.*

[30] In order to determine whether the Applicant has established an arguable case under s. 25.1 of the *Act*, we must examine the facts and allegations contained in the application, reply and written submissions of the parties. In the application that was declared by the Applicant in the presence of legal counsel who represented the Applicant at the time the application was filed, the Applicant only alleges that the Union "terminated [her] for reporting elder abuse." The Applicant has essentially refused to provide particulars to the Union concerning her basis for claiming that the Union failed to represent her in the manner required by s. 25.1 of the *Act*, stating that such particulars would only be provided at a hearing with her lawyer present. In her response to the request for particulars she does note that she is "suing the Union for d.f.r. (duty of fair representation) because when I reported "elder abuse", no one assisted or helped the elderly who are still feeling abused."

[31] The Union explained in its reply that it did not terminate the Applicant as the Applicant was not an employee of the Union. The Union also indicated that the Employer terminated the Applicant on April 1, 2005 during her probationary period for general unsuitability. The Applicant did not deny these facts in her submission to the Board.

[32] In our view, there has simply been no allegation put forward by the Applicant that the Union somehow failed in its duty to represent her fairly within the meaning of s. 25.1 of the *Act*. The Applicant's allegation that the Union terminated her is simply wrong and does not give rise to even the possibility of an argument that the Union violated s. 25.1 of the *Act*. Clearly, it was the Employer who terminated the Applicant. The Board has no power under s. 25.1 to deal with an employee's termination *per se*. Section 25.1 of the *Act* deals solely with a Union's duty to represent an employee in relation to grievances or violations of the collective agreement by the Employer. Here the Applicant has not even asserted such a violation by the Employer nor is there a suggestion that she even contacted the Union to ask it to assist her or file a grievance on her behalf. Although the facts in this case suggest that the Union conducted a brief investigation into the Applicant's dismissal and attempted, without success, to contact the Applicant following her termination, a union does not run afoul of s. 25.1 by failing to take action on behalf of an employee without a request by the employee for the union's assistance.

[33] If we were to attempt to "read between the lines" of the application, it might appear that the Applicant feels that her termination had something to do with her reporting elder abuse, however, clearly the Union did not terminate her for that reason. As far as the Union was aware, the Employer terminated the Applicant for general unsuitability during her probationary period. The Applicant also indicated that no one listened to her when she reported "elder abuse" and that "no one helped the elderly who are still feeling abused." There was, however, neither a suggestion by the Applicant that she reported such abuse to the Union nor any facts to establish that the Union had any responsibilities for such matters, let alone that that somehow represents a violation of the collective agreement that requires representation of the Applicant by the Union. In her written submission, the Applicant did not elaborate on how the Union had any responsibilities with respect to the Applicant's concerns about elder abuse, only

providing the name of a witness the Applicant says has evidence of the abuse of residents.

[34] In short, there are simply no allegations that fall within the jurisdiction of the Board to determine nor for the Union to answer at a hearing. Specifically, there is no allegation of: (1) bad faith such as the Union demonstrating some personal animosity toward the Applicant; (2) discrimination, in the sense that the Union had somehow treated the Applicant differently than others in the bargaining unit to her disadvantage; or (3) arbitrariness by the Union, by treating the Applicant's workplace problems in a capricious or cursory manner or without reasonable care. The Applicant has not established an arguable case that the Union acted arbitrarily, with discrimination or bad faith in relation to the Union's representation of the Applicant in grievance or rights arbitration proceedings under a collective bargaining agreement.

If the Applicant has not established an arguable case, is this an appropriate case to summarily dismiss without an oral hearing?

[35] Although the Union has not sought an order for particulars to be provided by the Applicant, the issue bears some consideration. In our view, given that there is no allegation by the Applicant that falls within s. 25.1 of the Act, this is not an appropriate case in which to make an order requiring the Applicant to file particulars. Furthermore, the Applicant had the opportunity to do so when requested by the Union through her legal counsel and then directly of her when her legal counsel withdrew from acting on her behalf. As previously stated, the Applicant refused to provide such particulars, stating that she would provide them only at a hearing with her lawyer present. We note that, prior to the Applicant making this response to the Union, the Board had received notification that the Applicant's lawyer would no longer be acting on her behalf. The Applicant had a further opportunity to provide particulars when she filed her written submission in response to the Union's application to have this matter dismissed without an oral hearing. She did not do so, stating only that the particulars the Union was inquiring about were not clear to her. We agree with the submission of the Union that the Applicant, by refusing to provide particulars in her written submission, must accept that the Board may make a decision to dismiss without an oral hearing based on the information on record before it at the time the panel considers the Union's request.

[36] In answering the question whether this is an appropriate case to dismiss without an oral hearing, the Union having established that the Applicant has no arguable case, it is helpful to consider the decisions of the Canada Board relied upon by the Union in this case. In the *Kelly* decision, *supra*, the Canada Board reviewed the rationale for its powers under s. 16.1 of the *Code* "to decide any matter before it without holding an oral hearing," at 10:

> *. . . to provide a broader discretion to the Board and to allow it to reduce the time required and the expense of deciding any matter, where this is appropriate . . . .*
>
> *…*
>
> *[24] Under section 16.1 of the Code, the Board is required to carefully consider the facts and circumstances before it, and if the Board determines it is appropriate to decide a matter on the basis of the written submissions before it, it may do so (see Ghislaine Gagne, [1999] CIRB no. 18; Raynald Pinel, [1999] CIRB no. 19; Anne Marie St. Jean, [1999] CIRB no. 33; Greater Moncton Airport Authority Inc., [1999] CIRB no. 20; and Royal Aviation Inc., [2000] CIRB no. 69). In many cases, therefore, after considering the matters in issue, the available evidence and other relevant factors, the Board will decide the matters before it based on written submissions only.*

[37] We agree with the decision of the Canada Board in *McRaeJackson*, *supra*, where it is made clear that the onus is on the applicant to provide particulars and documents to support its allegations that a union has violated the duty of fair representation. In that case, while determining that certain applications should be dismissed without an oral hearing, the Board stated at 16 and 17:

> *[49] **The Board is an independent and adjudicative body** whose role is to determine whether there have been violations of the Code. Although the Code gives the Board broad powers in relation to any matters before it, **it is not an investigative body. Accordingly, it is not mandated to go on a fact-finding mission on behalf of the complainant**, to entertain complaints of poor service by the union, to investigate the union's leadership or to investigate complaints against the employer for alleged wrongs suffered in the workplace. **Employees who allege that their union has violated the Code and wish to obtain a remedy for***

> ***that violation must present cogent and persuasive grounds to sustain a complaint.***
>
> *[50] A complaint is not merely a perceived injustice; it must set out the facts upon which the employee relies in proving his or her case to the Board. A complaint goes beyond merely alleging that the union has acted "in a manner that is arbitrary, discriminatory or in bad faith."* ***The written complaint must allege serious facts, including a chronology of events, times, dates and any witnesses. Copies of any documents that are relevant, including letters from the union justifying its actions or decision, should be used to support the allegations.***
>
> [***emphasis added***]

[38] Although we do not require an applicant to outline all of its evidence in an application, an application filed with the Board must meet certain minimum requirements. Regulations and forms passed pursuant to the *Act* outline those requirements. Section 6 of the Saskatchewan Regulations 163/72 provides as follows:

> *6(1) Any trade union or any person directly affected may apply to the board for an order or orders determining whether or not any person has engaged in or is engaging in any unfair labour practice or any violation of the Act, in requiring such person to refrain from engaging in any such unfair labour practice or any violation of the Act.*
>
> *(2) The application shall be in Form 2 and shall be verified by statutory declaration.*

[39] The form referred to in s. 6(2) of the Regulations is also prescribed by Saskatchewan Regulations 163/72 and is the form used on unfair labour practice applications. Due to the requirement that the form be verified by statutory declaration, the information contained in the form carries the weight of evidence. In paragraph 1 of this statutory form, it states that the applicant requests an order for the determination of an unfair labour practice within the meaning of the *Act*, "particulars of which are set out below." Particulars of the applicant's claim must be set out in paragraph 4 of the statutory form, which states as follows:

> *4. The applicant alleges that an unfair labour practice (or a violation of the Act) has been and/or is being engaged in by the said _____ by reason of the following facts:*
>
> _____
>
> _____
>
> _____
>
> _____
>
> _____
>
> ***(Here state clearly and concisely all relevant facts indicating the exact nature of the practice or violation complained of. Additional material in the form of Exhibits properly verified by statutory declaration may be included.)***
>
> [***emphasis added***]

[40] Although we do not require the filing of affidavits on an application to summarily dismiss without an oral hearing, the pleadings are sufficient to allow the Board to determine the matter in issue. However, we note that the parties are also given an opportunity to provide any further facts they wish to rely upon through their written submissions. In accordance with the Board's jurisdiction to develop its own procedures,[2] the Board has adopted a two-stage process for the consideration of s. 18(q) motions to summarily dismiss. The process utilized by the Board ensures that the parties have an opportunity to fully set out their respective positions. This may involve the provision of additional facts as well as the grounds relied upon to dismiss the application or defend against summary dismissal. If a respondent wants the Board to consider summary dismissal of an application without the holding of an oral hearing, the respondent must make application to the Board and provide a written submission concerning the grounds for such a motion. An *in camera* panel of the Board then considers whether summary dismissal is an option. If a panel so determines, the applicant is invited to file a written submission in reply. Both the respondent's and applicant's submissions are then considered by another panel of the Board to determine whether all or part of the application should be dismissed without an oral hearing.

---

[2] See *Canadian Paperworkers Union, Local 1120 et al. v. Prince Albert Pulp Company Ltd.* (1986), 52 Sask. R. 178 (Sask. C.A.), where Sherstobitoff, J.A., observed at 187: *". . . [Q]uestions of admissibility and interpretation of evidence*

[41] In our view, the requirements in the Board's Regulations and Forms concerning the information which must be contained in an application and the procedure utilized by the Board on motions for summary dismissal allow the Board to appropriately determine whether the Applicant's application should be considered without an oral hearing and only on the basis of written submissions and material filed with the Board. These procedures satisfy the *audi alteram partem* rule and otherwise meet the requirements of natural justice.

[42] In our view, given that the application and written submission of the Applicant do not disclose an arguable case, holding an oral hearing concerning this application would be an ineffective use of the Board's resources. It would also be unfair to require the Union to spend time and resources defending a highly speculative claim, the basis of which is simply unknown to the Board or the Union. The Board is an adjudicative body, not charged with the responsibility of fact-finding on behalf of the Applicant. Therefore, after consideration of the available information, including the application, reply and written submissions of the parties, along with other relevant factors, including the scope and application of s. 25.1 of the *Act*, we determine that the application shall be summarily dismissed without an oral hearing because it does not disclose an arguable case.

DATED at Regina, Saskatchewan, this **14th** day of **November, 2006**.

LABOUR RELATIONS BOARD

_____
Angela Zborosky,
Vice-Chairperson

---

and procedure are all matters assigned exclusively to the Board as are all questions of fact, and sufficiency or insufficiency of evidence. These are not jurisdictional matters."