The Labour Relations Board
Saskatchewan

HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN, Applicant v. FIVE HILLS HEALTH REGION, Respondent

LRB File No. 021-08; April 1, 2008
Chairperson, Kenneth G. Love, Q.C.; Members: John McCormick and Leo Lancaster

For the Applicant: Peter J. Barnacle
For the Respondent: Kevin Zimmerman

Arbitration – Deferral to – Proper interpretation of collective agreement at heart of dispute – Board declines to become embroiled in dispute as matters of interpretation of collective agreement reserved to boards of arbitration under s. 25(1) of *The Trade Union Act* – Board defers deciding final application as Board considers matter could be resolved by arbitration.

Remedy – Interim order – Practice and procedure – Union asks Board to make interim order requiring employer to immediately discontinue early and safe return to work program - Board dismisses application for interim order where dispute relates to interpretation of collective agreement.

***The Trade Union Act*, ss. 5.3, 18(l) and 25(1)**

REASONS FOR DECISION

Background:

[1] The Applicant, Health Sciences Association of Saskatchewan (the "Union"), filed an application on February 21, 2008 alleging that the Respondent, Five Hills Health Region (the "Employer") engaged in an unfair labour practice as defined by ss. 11(1)(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") by virtue of the appointment by the Employer of Sibley & Associates Inc. (hereinafter "Sibley"), as its agent to administer the Employer's Attendance Management and Sick Leave Maintenance Administration Program (hereinafter the "Early and Safe Return to Work Program").

[2] Also on February 21, 2008, the Union filed an interim application which was heard by the Board on March 19, 2008 seeking interim relief including, *inter alia,* orders of the Board requiring the Respondent to:

1. *Immediately cease and desist in utilizing the services of Sibley & Associates Inc. pending the resolution of the unfair labour practice.*

2. *Immediately cease to interrogate, interfere with, restrain, intimidate, threaten or coerce any employees with a view to undermining and damaging the relationship between Health Sciences Association of Saskatchewan (the "Union") and its members.*

3. *Respect the rights and protections with respect to employees and the union as provided under The Trade Union Act.*

[3] At the hearing of this matter, the Union modified its requested order to make it clear that the order requested was that the Employer immediately discontinue the program administered by and contracted out to Sibley (the Early and Safe Return to Work Program).

[4] These Reasons for Decision relate only to the application for interim relief.

Evidence:

[5] The Union filed affidavits sworn by Mario Kijkowski, Tim Nicholl, Sharon Benson, Troy Rusu and Susan Rader with its application for interim relief on February 21, 2008. The Employer filed affidavits of Nola Ayers and Michelle Monsen by fax prior to the hearing and provided full copies of those affidavits, complete with exhibits, at the hearing on March 19, 2008, along with a supplemental affidavit of Nola Ayers. The Employer also filed its reply to the unfair labour practice application at the hearing.

[6] On July 4, 2007 by memo addressed to Mr. Kijkowski, the Employer notified the Union of its intention to engage the services of Sibley to administer the Early and Safe Return to Work Program. In that memo, the Employer invited the Union to send representatives to information sessions regarding the administration of the Early and Safe Return to Work Program. Those information sessions were to be held:

Tues. July 31	13:00 – 15:30
	15:30 – 17:00
Wed. Aug. 1	09:00 – 11:30
	13:00 – 15:30
Mon. Aug. 13	13:00 – 15:30
Tues. Aug. 14	09:00 – 1130
	13:00 – 15:30
Wed. Aug. 15	09:00 – 11:30

[7] Paul Silvester of the Union attended one of the sessions held on August 14, 2007. Mr. Kijkowski deposes that he did not attend any of the offered sessions "because the HSAS was in the midst of a strike when I received the invitation."

[8] The strike between the parties was settled by memorandum of agreement dated July 10, 2007. The agreement was negotiated and signed by the Saskatchewan Association of Health Organizations ("SAHO") as bargaining agent for, *inter alia,* the Employer herein.

[9] Following the conduct of the information sessions, the Employer, by email sent by Ms. Ayers to Mr. Kijkowski, requested a contact person to whom information concerning changes which were being implemented could be sent. No response was received from the Union to that request.

[10] Mr. Kijkowski deposes that, on August 17, 2007, he received an email from one of the local representatives of the Union "raising questions regarding the Sibley policy." He says that this email, along with another one he received, caused him to examine the Early and Safe Return to Work Program more closely.

[11] However, without prior consultation with the Employer, on August 20, 2007 Mr. Kijkowski filed a policy grievance alleging a violation of articles 12.03 and 3.01 of the collective agreement between the parties. In his letter Mr. Kijkowski requested a meeting to discuss the grievance "at any time after September 10, 2007," as he was leaving for an extended holiday on August 21, 2007 and would not return until September 7, 2007. Mr. Kijkowski amended the policy grievance by letter dated October 31, 2007 addressed to Ms. Ayers. In that amending letter, Mr. Kijkowski suggested that the Union "is prepared to facilitate the hearing of this matter quickly" and proposed that the parties agree to have the hearing "expedited" in accordance with s. 26.3 of the *Act*.

[12] The Employer has denied and continues to deny the grievance. However, in her supplemental affidavit filed at the hearing, Ms. Ayers provided a copy of a letter dated March 10, 2008 addressed to the Union agreeing to the hearing of the grievance by a single arbitrator on dates to be agreed.

Relevant statutory provisions:

[13] Relevant provisions of the *Act* are as follows:

> *5.3 With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.*
>
> *. . .*
>
> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> *(a) to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating with his employees;*
>
> *(b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; but an employer shall not be prohibited from permitting the bargaining committee or officers of a trade union representing his employees in any unit to confer with him for the purpose of bargaining collectively or attending to the business of a trade union without deductions from wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purposes of such trade union;*
>
> *(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;*
>
> *. . .*

> *18. The board has, for any matter before it, the power:*
>
> *. . .*
>
> *(l) to defer deciding any matter if the board considers that the matter could be resolved by arbitration or an alternative method of resolution;*
>
> *. . .*
>
> *25(1) All differences between the parties to a collective bargaining agreement or persons bound by the collective bargaining agreement or on whose behalf the collective bargaining agreement was entered into respecting its meaning, application or alleged violation, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective bargaining agreement.*
>
> *(1.1) Subsections (1.2) to (4) apply to all arbitrations pursuant to this Act or any collective bargaining agreement.*
>
> *(1.2) The finding of an arbitrator or an arbitration board is:*
>
> *(a) final and conclusive;*
> *(b) binding on the parties with respect to all matters within the legislative jurisdiction of the Government of Saskatchewan; and*
> *(c) enforceable in the same manner as an order of the board made pursuant this Act.*

Arguments:

[14] The Union argued that the implementation of the Early and Safe Return to Work Program violated its rights under ss. 11(a), (b) and (c) of the *Act*. The Union application sought to preserve the *status quo* of this matter by returning the parties to the position they were in prior to July 4, 2007, being the day the Employer served notice on the Union of the change in the administration of its sick leave policy as the Early and Safe Return to Work Program.

[15] The Union argued that there would be irreparable labour relations harm in permitting the Employer to continue to with its administration of the Early and Safe Return to Work Program through Sibley.

[16] The Union also argued that there would be irreparable harm suffered by employees of the bargaining unit who would be required to submit private medical information to Sibley under the Early and Safe Return to Work Program, which information, once provided, would never be able to be recovered by them. Furthermore, the Union argued that there was a coercive element in the policy insofar as they argued that employees that failed to provide medical information would be denied access to sick leave as provided for in the collective agreement.

[17] The Employer argued that it had the right to contract with Sibley for the administration of the Early and Safe Return to Work Program. It further argued that it had the authority under article 7 of the collective agreement (the management rights clause) to implement the Early and Safe Return to Work Program without consultation with the Union.

[18] The Employer also argued that the Board should defer to the grievance and arbitration process under the collective agreement for resolution of disputes between the parties in accordance with s. 25(1) of the *Act*.

[19] Both parties requested that the Board issue an order with respect to this matter quickly, with Reasons for Decision to follow. The Board issued an Order denying the application and deferring to the arbitration process on March 19, 2008. These are the Reasons for Decision relating to that Order.

Analysis:

[20] It is the Board's decision that the application for interim relief should be denied and the matter be resolved by arbitration between the parties.

[21] The Board has a long history of deferral to the grievance arbitration process. In *Administrative and Supervisory Personnel Association v. University of Saskatchewan*, [2005] Sask. L.R.B.R. 541, LRB File No. 070-05, the Board says at 550

> *[26] The Board has followed a longstanding policy of deferring to the grievance and arbitration process contained in a collective agreement where the issues raised involve the interpretation or*

> *application of the terms of the collective agreement and where complete relief can be obtained through the arbitration process.*

[22] The Board concurs with this statement.

[23] What is at issue here is how the collective agreement is to be interpreted. The argument revolves around the provisions of the agreement in respect of the various articles of the agreement and their proper interpretation.

[24] The Union says that the Employer is not entitled to administer article 12 of the agreement in this fashion. The Employer responds that it is empowered under article 7 to manage the workplace, subject to the terms of the collective agreement and that the implementation of the policy is in accordance with that right.

[25] The largest bone of contention between the parties is what amounts to a "medical certificate" and what information the Employer may require in such certification. This dispute arises under article 12.03 of the collective agreement which provides as follows:

> *Certification of Illness/Disability*
>
> *The Employer reserves the right to request a medical certificate in respect of absence due to illness or disability. This certificate shall be requested prior to or during such illness or disability.*

[26] At the heart of the dispute between the parties is the content and nature of the information required to constitute a "medical certificate." The Union argues a doctor's note is all that is required and the Employer says that certification of the nature of the illness is required.

[27] The Union argues that any request greater than a doctor's note is an unwarranted breach of the employee's privacy rights. The Employer counters that such a breach is respected and confidential, and is voluntary on the part of the employee.

[28] What is clear is that the Board should not, in accordance with the longstanding policy outlined above, become embroiled in disputes in which the proper

interpretation of the collective agreement is at issue. Those matters of interpretation have been reserved to boards of arbitration under s. 25(1) of the *Act.*

[29] The Board, in an Order pursuant to ss. 5.3 and 18(l) of the *Act* dated March 19, 2008 dismissed the application for an interim Order and deferred deciding the application under ss. 5(d) and (e) of the *Act* as the Board considers the matter could be resolved by arbitration.

DATED at Regina, Saskatchewan, this **1st** day of **April, 2008.**

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.,
Chairperson