Labour Relations Board
Saskatchewan

SASKATOON POLICE ASSOCIATION, Applicant v. SASKATOON BOARD OF POLICE COMMISSIONERS, Respondents

LRB File No. 068-06; November 19, 2008
Chairperson, James Seibel; Members: Bruce McDonald and Brenda Cuthbert

For the Applicant: Gary Bainbridge
For the Respondent: Rob Gibbings, Q.C.

PRACTICE AND PROCEDURE – Particulars – Union alleged Employer bargained directly with employee on matters that resulted in resignation of employment and cessation of benefits under the collective agreement and sought disclosure of documents pertaining to the details of arrangement

Employer refused disclosure on basis terms of settlement were confidential and in relation to disciplinary matters under *The Police Act* – Board not satisfied that *The Police Act* absolved the employer from negotiating arrangements with Union but concluded that terms of settlement may not be relevant to the issue in dispute between the parties

Board refused to order production of documents and directed that matter proceed to hearing.

***The Trade Union Act*, s. 11(1)(c), 18(b).**

REASONS FOR DECISION

Background:

[1] The Saskatoon Police Association (the "Association") is the certified bargaining agent for all members of the Saskatoon Police Service below the rank of inspector, except for civilians. It filed an application alleging that the Saskatoon Board of Police Commissioners (the "Employer") had committed an unfair labour practice in violation of s. 11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "*Act*"), by negotiating an agreement directly with a member of the bargaining unit, one C.L., whereby C.L. resigned his employment. The Employer allegedly refused to provide the Association with details of the agreement on the grounds that they were "confidential". The Association alleges that the Employer failed to bargain in good faith.

In its reply to the application, the Employer says that this Board does not have jurisdiction over the matter as the dispute centered on discipline under the jurisdiction of *The Police Act, 1990*, S.S.

[2] In June 2006, the Association sought disclosure and production from the Employer of "all documents exchanged between the Employer and [C.L.] and her counsel that led to her resignation, including all 'settlement documents'", and C.L.'s payroll records. The Employer refused same, on the same jurisdictional grounds. The Association requested that the Board order production pursuant to s. 18(b) of the *Act*, which provides as follows:

> *18. The board has, for any matter before it, the power:*
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> *. . .*
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> *(b) to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing;*

[3] The Board heard the application for disclosure and the jurisdictional objection thereto as preliminary issues.

[4] The facts before the Board were those as set out in the application – the Employer did not dispute the material facts in its reply, but only raised the jurisdictional objection. A summary of those facts follows.

[5] At all material times, C.L. was a member of the Saskatoon Police Service as a Special Constable and a member of the Association and the bargaining unit.

[6] C.L. was off work on approved medical leave of absence for several years, and drawing benefits from the sick bank pursuant to the provisions of the collective agreement between the parties.

[7] In 2003, C.L. was charged with a breach of internal disciplinary rules arising out of an incident which allegedly occurred while an employee of the Saskatoon Police Service. Pursuant to the provisions of *The Police Act, 1990*, S.S. 1990-91, c. P-

15.01 ("*The Police Act "*), a hearing was convened in September 2004 before a hearing officer to inquire into the charges. The Association attended the hearing as an observer, as C.L. was initially self-represented. At the commencement of the hearing, C.L. requested an adjournment in order to retain legal counsel. The adjournment was granted. However, C.L. failed to attend on the adjourned date and the matter was further adjourned. The Association had no further involvement after that time with the disciplinary hearing or C.L.'s employment.

[8] On March 29, 2005, the Chief of Police circulated a routine Personnel Order that advised that C.L. had resigned employment effective March 24, 2005. Until then, the Association was unaware of such a development. To the Association's knowledge, C.L. was off work drawing sick leave benefits.

[9] The Association learned that C.L. may have resigned as the result of a "deal" negotiated directly with C.L. by the Employer without the knowledge or involvement of the Union. On 9 June 2005, the vice-president of the Association made a request of the Employer for the details of the arrangement. The request was refused. The Association made a second formal request for the information. The Association received a written response from counsel for the Employer acknowledging the existence of a "settlement" with C.L. and of "settlement documents", but the Employer refused to provide same because "the terms of the settlement arrived at are confidential", and in relation to disciplinary matters.

Arguments:

[10] Each party filed a written brief of argument, which we have reviewed. Counsel on behalf of each party also made oral argument.

[11] Mr. Bainbridge, counsel on behalf of the Association, argued that the Board has jurisdiction to order production of the requested documents pursuant to s. 18 of the *Act*. Counsel submitted that the request for production meets the applicable requirements, including, relevance, sufficient particularization, and probative nexus, and that the prejudicial aspect of production does not outweigh the probative value of the evidence, regardless of any "confidential" aspect. Counsel submitted that, while the settlement may have been for the purposes of resolving the disciplinary matter, it directly

affected C.L.'s terms and conditions of employment, specifically, resignation from employment, the termination of her sick pay and benefits under the collective agreement, and severance pay.

[12] Mr. Bainbridge asserted that the decision of the Supreme Court of Canada in *Regina Police Association v. Regina (City) Board of Police Commissioners*, 2000 SCC 14; [2000] 1 S.C.R. 360, was limited to the jurisdiction of a collective agreement arbitrator, not the Board. The present complaint does not arise out of the interpretation, application, administration or violation of the collective agreement, but a violation of *The Trade Union Act*. Secondly, the present issue does not relate to discipline, but, rather, to the relationship in the workplace between the Employer and the Association as the certified bargaining agent. In *Regina Police*, *supra*, the Supreme Court confirmed that *The Police Act, 1990*, ousts the jurisdiction of a collective agreement arbitrator (and presumably the Labour Relations Board) in respect of disciplinary matters, but not in respect of disputes arising out of the ordinary employer-employee relationship – a tribunal under *The Police Act* cannot make a finding of violation of *The Trade Union Act*, or grant remedies for such breaches, and deals with fundamentally different matters. This was made clear in *Saskatoon City Police Association v. Saskatoon Board of Police Commissioners*, [2000] Sask. L.R.B.R. 372, LRB File No. 086-99; [2000] S.J. No. 711 (Sask. Q.B.); [2002] S.J. No. 456 (Sask. C.A.) in upholding the decision of the Labour Relations Board that found the Employer acted in violation of s. 11(1)(c) of the *Act* when it refused to refer a grievance to arbitration, maintaining that it was a disciplinary matter.

[13] Mr. Gibbings, counsel on behalf of the Employer argued that the present matter is a disciplinary matter in its "essential character", and, as such, the Board is without jurisdiction to determine the matter of production of documents. Counsel submitted that, notwithstanding that the settlement of the disciplinary matter may have had collateral effects on cessation of collective agreement benefits, it did not change the essential character of the matter from one of discipline to one of employment. In support of this argument, counsel referred to the decision of the Supreme Court of Canada in *Regina Police*, *supra*.

Analysis and Decision:

[14] In this matter we agree with both the Association and the Employer in certain respects. Both the *Regina Police* and *Saskatoon Police* cases, *supra*, are instructive, but not determinative, in the present situation.

[15] The circumstances in *Regina Police*, *supra*, were that, on the eve of being charged under *The Police Act*, the police officer resigned. Shortly afterwards, he changed his mind and attempted to withdraw his resignation, but the Chief of Police refused to accept the withdrawal. The Regina Police Association filed a grievance. At arbitration, the arbitrator ruled that because the central issue in the case was one of discipline, and as the collective agreement expressly stated that all such matters had to proceed pursuant to the steps in *The Police Act* and regulations thereunder, she did not have jurisdiction to hear a grievance relating to the same thing.

[16] At the Supreme Court of Canada, Bastarache, J., on behalf of the Court, stated at paras. 31-32 and 35:

> *As Vancise J.A. outlined extensively in his dissent, both The Police Act and the Regulations specifically address the procedural issues at the investigative, adjudicative and appeal stages of a disciplinary process. The detailed provisions in the legislative scheme governing disciplinary matters are a clear indication that the legislature intended to provide a complete code within The Police Act and the regulations for the resolution of disciplinary matters involving members of the police force. …*
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> *Having examined the ambit of the collective agreement, and of The Police Act and regulations, it is clear that the dispute between Sgt. Shotten and the Employer did not arise, either explicitly or inferentially, from the interpretation of the collective agreement. The essential character of the dispute was disciplinary, and the legislature intended for such disputes to fall within the ambit of The Police Act and Regulations. As a result, I agree with Vancise JA that the arbitrator did not have jurisdiction to hear and decide the matter. …*
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> *….*
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> *In Weber, McLachlin J. emphasized that disputes which either expressly or inferentially arise from the collective agreement should be heard by an arbitrator. As a result, an arbitrator may upon jurisdiction of a dispute even when the factual context of that*

> *dispute extends beyond what was expressly provided for in the collective agreement, to include what is inferentially provided. It is whether the subject matter of the dispute expressly or inferentially is governed by the collective agreement that is determinative. As I have stated above, this approach applies equally in determining whether the Commission has jurisdiction to hear the dispute in the case at bar. Therefore, even if The Police Act and Regulations do not expressly provide for the type of disciplinary action that was taken in the case at bar, the action may still arise inferentially from the disciplinary scheme which the legislature has provided.*

[17] With respect to the principle of "essential character", the Bastarache, J. stated, at paras. 28-30:

> *The Union contends that the essential character of the dispute in the case at bar is not disciplinary. … It contends that the issue in this case is properly characterized as a dispute between the parties over the validity of a resignation. Resignation is a matter that can only arise out of the employment relationship. …*
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> *With respect, I disagree with the Union's interpretation of the essential character of the dispute in this case. To determine the essential character of the dispute, we must examine the factual context in which it arises, not its legal characterization. I agree with Vancise JA that, in light of the agreed statement of facts, this dispute clearly centres on discipline. The dispute began when Sgt. Shotten was advised that he would be charged with discreditable conduct pursuant to the regulations. He was also told that the Chief of Police intended to initiate disciplinary proceedings with a view to dismissal. Some time later, Sgt. Shotten was informed by the Chief of Police that discipline orders would be signed if the formal discipline proceedings were successful. It was in this factual context that Sgt. Shotten was given the option of resigning rather than being disciplined. I agree with Vancise JA that the informal resolution of this disciplinary matter did not change its essential character.*

[18] At para. 39, Bastarache J. stated in summary:

> *To summarize, the underlying rationale of the decision in Weber, supra, is to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties. The analysis applies whether the choice of forums is between the courts and a statutorily created adjudicative body, or between two statutorily created adjudicative bodies. The key question in each case is whether the essential character of a dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In determining this question,*

> *a liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction on a forum not intended by the legislature.*

[19] Ultimately, the Supreme Court determined that, on a liberal reading of ss. 60 and 61 of *The Police Act,* if Sgt. Shotten wished to appeal his dismissal, the Commission had jurisdiction to hear the dispute, because the dispute was clearly disciplinary (see, case report, para.38)

[20] But *Regina Police*, *supra*, is not determinative in the present situation. *The Police Act* and *The Trade Union Act* have two fundamentally different purposes. One does not have precedence over the other – a tribunal constituted under either may not assume the jurisdiction granted to the other – they each have areas of exclusive jurisdiction. The dispute in the present case is not the same as in *Regina Police*, *supra*. This case is not about a grievance of C.L.'s dismissal. While s. 84(1) of *The Police Act* does not allow negotiation of disciplinary matters between the Employer and the Association (see, *Saskatoon Police Association v. Saskatoon (City) Police Commissioners*, [2004] SaskCA No. 753), and there is no ability to grieve termination or discipline under the collective agreement as per *Regina Police*, *supra*. A hearing officer or the Commission under *The Police Act*, has exclusive jurisdiction regarding discipline (liberally interpreted), but no jurisdiction over disputes under *The Trade Union Act*, over which the Labour Relations Board has exclusive jurisdiction. The present complaint by the Association is that the Employer did not bargain collectively with the certified bargaining agent regarding a "settlement" that resulted in resignation from employment, cessation of collective agreement benefits, and perhaps other effects on collective agreement rights and obligations.

[21] In the present case, the Employer has simply asserted that the essential character of the dispute is "disciplinary". But it provides no evidence that that is the case. In our opinion, the party that asserts the Board lacks jurisdiction, bears the onus of providing the factual underpinning upon which a rational decision may be made with respect to the issue. In the present case, the Association has no access to that factual underpinning. Arguably, *The Police Act* does not expressly or inferentially empower the Chief, a hearing officer or the Commission to negotiate resignation from employment directly with a member of the bargaining unit, and the fact that a member negotiates

resignation while disciplinary proceedings are pending is not necessarily the same as negotiating a settlement of disciplinary action itself. An argument may be made that there is nothing in *The Police Act* that absolves the Employer from negotiating arrangements of the former kind with the Union rather than directly with the employee member – the Association is the agent of the member for all matters affecting rights under the collective agreement.

[22] So far in these proceedings, the Employer has not chosen to reveal the factual details to support its contention that the essential nature of the dispute is disciplinary. The Association has the right not to simply accept the Employer's word for it.

[23] However, the Employer seems to have admitted in its reply that it did bargain directly with C.L. in respect to matters that included not only the withdrawal of the disciplinary matter, but that resulted in resignation of employment and cessation of benefits under the collective agreement. To that extent, it is not an ineluctable inference that the "essential nature" of the dispute is disciplinary. However, we are not convinced that the Association cannot prove its case without access to the actual settlement documents. All that is required to found the alleged unfair labour practice is an admission that the Employer failed to bargain collectively with the Association with respect to the terms and conditions of the member's employment under the collective agreement before changing them unilaterally. Whether C.L. agreed to the settlement is immaterial to the existence of an unfair labour practice – it is not within C.L.'s authority to waive the Association's right protected by s. 11(1)(c). As we see it, it is not disputed that the Employer failed to bargain collectively, the only issue is whether it did so lawfully. If the Employer chooses not to adduce evidence to support its jurisdictional allegation, it runs the risk that the Board will not simply accept a bare assertion by its representative that the Board is without jurisdiction. The evidentiary burden in that regard is on the Employer.

[24] Accordingly, rather than ordering production of the requested documents at this stage of the proceedings, we direct that the matter shall be set for hearing, without prejudice to the Association's right to renew its request for production at any time

during the hearing should it consider same to be necessary. Therefore the present application for production is dismissed without prejudice.

DATED at Regina, Saskatchewan, this **19th** day of **November, 2008**.

LABOUR RELATIONS BOARD

James Seibel,
Chairperson