Saskatchewan

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August 15, 2008

Tim Siekawitch
18 — 2105 Cornwall Street
REGINA SK S4P 2K8

Crystal Norbeck
Legal and Legislative Representative
Canadian Union of Public Employees
3731 E. Eastgate Drive
REGINA SK S4Z 1A5

Dear Mr. Siekawitch and Ms. Norbeck:

RE: LRB File No. 122-07; Duty of Fair Representation Application
Tim Siekawitch, Employee, Regina v. Canadian Union of Public Employees, Local 21

Mr. Siekawitch, (the "Applicant") a former Employee of the City of Regina, who was represented by the Canadian Union of Public Employees, Local 21 (the "Union") during the time he was an employee of the City of Regina, applied to the Labour Relations Board (the "Board") on October 10, 2007, pursuant to section 25.1 of *The Trade Union Act,* R.S.S. 1978, c.T-17, (the *"Act"),* alleging that the Union failed to properly represent him in that it:

> *(a)* *Did not persue [sic] a grievance on my behalf more than once; and*
>
> *(b)* *Did not assist me with my WCB claim of Oct. 4 lh, 2000; and*
>
> *(c)* *Did not assist me/represent me with LTD issues OR (any) issues arising in the (mg) workplace*

The Union filed a reply to the application on November 1, 2007. In its reply, the Union specifically denied:

> *(a)* *That the Union has engaged in an unfair labour practice within the meaning of Section 25.1 of The Trade Union Act or at all; and*
>
> *(b)* *That the Union did not pursue a grievance on behalf of Mr. Siekawitch; and*

(c) *That the Union did not assist Mr. Siekawitch with his WCB claim of October 4, 2000; and*

(d) *That the Union did not assist Mr. Siekawitch with his LTD issues; and*

(e) *That the Union failed to assist Mr. Siekawitch with his workplace issues.*

In its reply, the Union also noted: "The Union states that it will not be in a position to fully address Mr. Siekawitch's allegations until further and better particulars of the allegations are provided."

A pre-hearing conference was held on March 11, 2008 in the Board office's in Regina. As noted in the March 11, 2008 letter from the Board Registrar, following that pre-hearing, no settlement was achieved and as a result, a hearing would be necessary. However, an agreement on a preliminary matter was achieved, as follows:

> *The issue of particulars was discussed at the pre-hearing and the applicant agreed to attempt to provide particulars of the application to the Union by the end of April 2008. If the applicant does not provide sufficient particulars by April 30, 2008, the union may request a conference call hearing before the Board's Executive Officer to deal with the issue.*

By letter dated May 5, 2008, the Union advised that they had not received the particulars which the Applicant had agreed to provide within the agreed time frame. As a result, a conference call was scheduled with the parties and the Executive Officer of the Board to deal with the Union's request. That conference call took place from the Board's offices on May 30, 2008.

The Applicant and a representative, Mr. Morgan Zaba, attended to the Board's offices with the Executive Officer and Ms. Norbeck, as representative of the Union was reached by speaker phone. During that conversation, the Applicant advised that while he could provide the particulars, that he was not inclined to do so, feeling he should not be required to disclose details of his case in advance.

There was some suggestion that Mr. William Mclssac was acting for the Applicant. Following the conference call, the Executive Officer of the Board was able to contact Mr. McIssac, who advised he was not acting for the Applicant with respect to this matter.

The Executive Officer of the Board issued an Order on May 30, 2008 directing the Applicant to provide particulars to the Union, as specified in the Order, on or before June 16, 2008. The Order also provided that in the event that the Applicant failed to

provide the particulars as ordered, the Union would have leave to apply to the Board to have the application dismissed.

The Applicant did not provide the particulars as ordered but instead sent the following correspondence dated June 13, 2008 to the Board:

> *It is my opinion based on legal advice that the current Order for me to provide burden of proof goes against the principle of natural justice.*
>
> *The information being ordered is already in the hands of the respondent.*
>
> *The initial grievance was filed and to this date the Union CUPE Local 21 only appointed and arbitrator then cancelled the arbitration without providing me any reason or prior notice.*
>
> *I feel my application #122-07 should continue. I trust said application will not be dismissed on June 16-08 pursuant to your Order for the reasons above stated*

Nothing further was received from the Applicant by the Board or the Union. By letter dated June 20, 2008, the Union wrote to the Board requesting summary dismissal of the Applicant's claim without an oral hearing and filed a Brief in support of that request.

The letter from the Union and the supporting Brief were forwarded to the Applicant on June 25, 2008. In that letter, the Acting Board Registrar advised the Applicant that it was her intention to "ask a panel of the Board to consider the Union's request that the application be dismissed pursuant to ss. 18(p) and (q) of the *Act."*

The practice for the Board in dealing with requests for summary dismissal was established *in Soles v. Canadian Union of Public Employees, Local 4777 and Parkland Health Region,* [2006] Sask. L.R.B.R. 413, LRB File No. 085-06 and can be summarized as following:

1. The respondent files a letter with the Board requesting relief under the applicable provisions of s. 18 and setting out its argument as to why the Board should exercise its discretion pursuant to those provisions. A copy of this letter is also forwarded to the other party(s) to the proceedings.

2. The Board advises the applicant in writing that the respondent's request pursuant to s. 18 is to be placed before a panel of the Board for consideration without a hearing and that, should that panel determine that summary dismissal of the application is an option, the applicant will be invited to file a written response to the respondent's request with the Board.

3. The respondent's s. 18 request is then placed before a panel of the Board in camera.

4. Following the Board's in camera consideration of the s. 18 request, the parties are advised either (a) that summary dismissal of the application is an option (in which case the applicant is invited to make a written response); or (b) that summary dismissal of the application is not an option (in which case the application will proceed to hearing in the normal course).

The Union's request for summary dismissal of the application was heard by an *in camera* panel of the Board on July 10, 2008. That panel determined that dismissal of the application was an option. In keeping with the practice of the Board, the Applicant was provided an opportunity, as outlined in the July 10, 2008 correspondence from the Acting Board Registrar, to provide written submissions to the Board in response.

No response was received from the Applicant to the Board's correspondence of July 10, 2008 within the fourteen days specified in the letter. The Acting Board Registrar again wrote to the Applicant on August 5, 2008 to advise that as no response had been received within the period provided for reply, that the matter would again be placed before an *in camera* panel of the Board for a final consideration of the request for summary dismissal.

A panel of the Board considered the request for summary dismissal on August 7, 2008.

The Union's Brief in support of their application for summary dismissal of the application cited s. 18(p) and (q) of the *Act* as well as Board decisions that had considered those sections. Those provisions are as follows:

> *The board has, for any matter before it, the power:*
>
> *(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;*

The above provisions, which came in to force in Saskatchewan in 2005, originated in *The Canada Labour Code, Part I,* have been considered by several cases in the Federal jurisdiction. Those cases are clear authority for the proposition that the Board may proceed, in appropriate circumstances, to dismiss an application without an oral hearing where the documents provided on the application show there is either a lack of

evidence or no arguable case. Those documents, which form a part of the record such as the Application and Reply, can be supplemented by reports of investigations conducted by the Board or written submissions of the parties.

The Applicant in his application, as outlined above, give no factual basis for his complaint. There are allegations concerning how he was dealt with by the Union, but there is no support for those allegations. It was this factual underpinning that the Union sought to have disclosed by its request for particulars, in order that it would know the case which it was required to meet.

In his application, the Applicant alleges that the Union failed to pursue "a grievance on my behalf more than once." However, there are no details of the alleged failure in that there are no times, dates, or subject matter of the grievance at issue, nor are there any details of the alleged failure in representation.

Similarly with respect to the allegation that the Union did "not assist me with my WCB claim of Oct. 4th, 2000,". While the date of the claim is known, there is no factual support for the claimed failure of representation. Additionally, but without making any ruling in respect of such claim, it may be questionable as to whether the duty of representation specified in s. 25.1 of the *Act* would include representation in respect of WCB claims. There are specific statutory provisions that provide the services of a worker's advocate in respect of such claims outside of any representation by a Union.

In respect of the allegation that the Union did not "assist me/represent me with LTD issues," there is a similar defect in a lack of factual support or details as to when, where or how the Union failed in its representation. Again, without making any ruling in that regard, it is again questionable if the duty of representation set out in s. 25.1 of the *Act* would encompass such a claim.

In respect of the final claim by the Applicant that the Union did not represent him in respect of "issues arising in the (mg) workplace", this claim, absent any details, is so general that the Union and the Board would have no basis to determine what the allegation was in respect of.

Caution must be observed by the Board when dealing with self represented Applicants as is most often the case when dealing with s. 25.1 of the *Act.* In its decision in *McRae-Jackson and Jacolin Shepard v. CAW-Canada and Air Canada Jazz and Edwin Snow v. Seafarers' International Union of Canada and Seabase Limited* [2004] CIRB No 290, C.I.R.B.D. No 31, the Canada Industrial Relations Board adopted the comments made in its earlier decision in *Stephen Jenkins* et al., June 9, 2004 (CIRB LD 1102) where it says:

> *In a majority of cases under Section 37, complainants are not represented or assisted by legal counsel. ... 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 frequently 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.*

Notwithstanding the care that must be taken with respect to those who are self represented and who may not appreciate fully the nature of the application and the burden of proof which they face, the Board followed the consistent practice with respect to requests for summary dismissal of s. 25.1 application. This practice provides for opportunity for the Applicant to provide the factual basis for his complaint such that the Board could judge whether or not he has an arguable case. Similarly, the Union, by its request for particulars, attempted to assist both themselves and the Board with respect to framing the issues to be determined and the case which it was required to meet.

In Soles, [supra] the Board made the following comment at 37:

> **[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:**
>
> > ***1491*** *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.*

> ***1501 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]*

In his June 13, 2008 letter, the Applicant states that he has taken legal advice. The nature of that advice and who provided it was not disclosed and, as such, the Board cannot judge the adequacy or sufficiency of that advice. Nevertheless, the Applicant seems to be convinced that he is not required to provide particulars of his claim to support the allegations contained in his application.

The Board provided the Applicant with opportunity to provide the necessary particulars, and his failure to provide such particulars in contempt of the Order of the Executive Officer of this Board cannot be condoned. He was informed of the consequences of his failure to provide the particulars requested but steadfastly refused to provide the information requested despite the prospect that his application may be dismissed.

Section 25.1 provides as follows:

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

For an applicant's case to succeed under s. 25.1, it is necessary for him to show the elements necessary to provide at least an arguable case that the Union failed to properly represent him. At a minimum as stated in *Soles,* [supra] at 38 and 39 the following is required:

> [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]*

As a minimum, it is necessary for an applicant to identify the grievance or collective agreement provisions under which the Union has failed to fairly represent

him or her. Secondarily, there must be some factual basis or claim that the Union acted in an arbitrary or discriminatory manner in its representation (or lack thereof) or had in some fashion acted in bad faith towards the Applicant. None of these elements are present in the application filed by the Applicant. As the Applicant has elected not to supplement his very general application to provide the Board with some basis for a finding that there is an arguable case under s. 25.1, his case falls to be dismissed under the provisions of s. 18(p) and (q) of the *Act.*

A formal Order of the Board will issue dismissing the application.

Yours truly,

eth G. Love, Q.C.
Chairperson

KGL/cdb