The Labour Relations Board
Saskatchewan

SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Applicant v. THE GOVERNMENT OF SASKATCHEWAN, Respondent

LRB File No. 009-09; June 12, 2009
Chairperson, Kenneth G. Love, Q.C.; Members: John McCormick and Marshall Hamilton

For the Applicant: Juliana Saxberg
For the Respondent: Curtis Talbot

Unfair Labour Practice - Timeliness - Board considers what factors the Board should consider in the exercise of discretion to permit application to proceed if filed outside the prescribed time limit - Retrospective operation of amendment to *Act*.

***The Trade Union Act*, ss. 12.1(1), (2) and s. 24.**

REASONS FOR DECISION – PRELIMINARY ISSUE

Background:

[1] Saskatchewan Government and General Employees' Union ("SGEU" or the "Union") is the certified bargaining agent for certain employees of the Government of Saskatchewan (the "Employer"). On September 7, 2005, the Employer, through the Public Service Commission, instituted a new policy requiring all existing and new employees to obtain a criminal records check ("CRC") in accordance with the terms of that new policy. The policy announced on September 7, 2005 was not a new policy, but was a modification of a previous policy requiring a CRC for certain government employees. The policy expanded the scope of the CRC requirement to other employees of the public service, including not only SGEU members, but also persons represented by other unions.

[2] On December 21, 2005, the Canadian Union of Public Employees, Local 600-3, ("CUPE") representing some of the government employees subject to the revised CRC policy, filed an unfair labour practice application with the Board alleging that the Employer had committed and unfair labour practice by instituting the revised CRC policy unilaterally, that is, without negotiating such policy with CUPE.

[3] The unfair labour practice application was heard by the Board on April 11, 2006 (LRB File No. 238-05) before a panel consisting of then Vice-Chairperson Zborosky, and members, Patricia Gallagher and Leo Lancaster. Unfortunately, Ms. Gallagher passed away before a decision was rendered. The Reasons for Decision were issued on November 20, 2008 by Vice-Chairperson Zborosky and Mr. Lancaster. That decision held that the Employer had committed an unfair labour practice in failing to negotiate the CRC with CUPE.

[4] The Employer subsequently applied to the Board, for reconsideration of the Board's decision in LRB File No. 238-05. That application for reconsideration is currently scheduled to be heard by the Board on August 25, 2009.

[5] When the Board's decision in LRB File No. 238-05 became known to SGEU, SGEU filed the present application with the Board seeking a similar result to that obtained by CUPE in LRB File No. 238-05. In its reply the Employer objected to the filing of the Application on the basis that it was filed "out of time" due to the limitations placed on the filing of unfair labour practice applications in ss. 12.1(1) of the *Act*, which provision came into force on May 14, 2008.

[6] As in LRB File No. 238-05 involving CUPE, the SGEU also filed a policy grievance regarding the implementation of the CRC policy under the terms of its collective agreement. That policy grievance is currently being processed in accordance with the provisions of the collective agreement between the Union and the Employer.

[7] The parties agreed to argue a preliminary matter, as raised in the Employer's reply to the Union's application. The preliminary matter was to have the Board determine whether or not the application by the Union was timely, that is, was it filed outside the ninety (90) day time period contained in ss. 12.1(1), and if so, whether the Board should exercise its discretion to allow the application to proceed. These reasons relate solely to that preliminary matter.

Relevant statutory provision:

[8] Relevant statutory provisions are as follows:

> *Deadline to report unfair labour practice*
>
> *12.1(1) Subject to subsection (2), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew, or in the opinion of the board ought to have known, of the action or circumstances giving rise to the allegation, unless the respondent has consented in writing to waive or extend the deadline.*
>
> *(2) The board must hear any allegation of an unfair labour practice that is made after the deadline mentioned in subsection (1) if the respondent has consented in writing to waive or extend the deadline*

Analysis & Decision:

When does the ninety (90) day time period begin to run?

[9] The first matter to be determined with respect to the Union's application is to establish when the ninety (90) day period provided for in ss. 12.1(1) began to run. The Union argued that the time period only began to run from the date of the Board's decision in LRB File No. 238-05, which was November 20, 2008. The Employer , on the other hand, says the time period began when the policy was first promulgated in November of 2005.

[10] If we adopt the Union's argument, the filing of this application is timely, that is, it falls within the ninety (90) day time period set out in ss. 12.1(1). If we adopt the Employer's argument, then the application is well out of time. However, there is a secondary issue with respect to the Employer's position, which was that s. 12.1(1) was introduced into the legislation effective May 14, 2008.

[11] The Employer's argument is that, even if, prior to May 14, 2008, there was no time limit for filing applications such as this, then the ninety (90) day time period began to run on May 14, 2008. As a result, the Employer argues that the application is out of time.

[12] The Employer further argues that the legislative change on May 14, 2008 "marks a new approach to the issue of timeliness respecting unfair labour practice allegations." They further argue that the legislative change signals a consistent theme in labour relations throughout Canada, which is that "there is a compelling public policy need to air and resolve disputes quickly and with a minimum of delay."

[13] In support of their position regarding the need for expeditious resolution of disputes, the Employer quoted an unreported decision of Estey, J., CJO (as he was then) in *Consolidated-Bathurst Packaging Ltd. v. I.W.A., Local 2-69* (1984) 2 O.A.C. 277, wherein he noted that "[the] overriding principle invariably applied is that labour relations delayed are labour relations defeated and denied: The Journal Publishing Company of Ottawa Ltd. v. The Ottawa Newspaper Guild Ont. C.A. released May 17/77 (Unreported)."

[14] The Board supports and agrees with the comments of Mr. Justice Estey. In its analysis of s. 21.1 of the *Act* in *Dishaw v. Canadian Office & Professional Employees Union, Local 397*, 2009 CanLII 507 (SK L.R.B.), LRB File No.164-08, which subsection was added to the *Act* at the same legislative session that s 12.1 was introduced into the *Act*, the Board made the following comments at para. 36 of its decision:

> *Finally, while the Board has indicated that it has declined to rule as to whether or not s. 12.1 has application in the present case, the Board notes that the addition of this new provision to the Act, together with s. 21.1 (which was added at the same time) signals an intent by the authors of the legislation; that time is of the essence in dealing with disputes in a labour relations context; that the timely commencement and resolution of outstanding grievances is an important component in maintaining amicable labour relations in this Province; and that parties have the right to expect that claims, which are not asserted within a reasonable period of time, or which involve matters which appear to have been satisfactorily settled, will not later re-emerge.*

[15] That same comment was repeated by the Board in its later decision in *Peterson v. Canadian Union of Public Employees, Local 1975-01,* [2009] CanLII 13052, LRB File No. 156-08.

[16] While the Board was not required to deal directly with the impact of s. 12.1 in the *Dishaw* and *Peterson* cases, *supra,* a determination of the impact of the change to the *Act*, insofar as its effect on the current application must be considered here.

[17] The Employer argued that the effect of the change to the *Act* was retrospective in its operation as distinct from being retroactive or prospective in its application. The Employer conceded that much clearer words would be required to rebut the presumption against legislation being applied retroactively. Again, we agree with the Employer in respect of this position.

[18] While courts have often used the terms retrospective and retroactive somewhat interchangeably, as pointed out by counsel for the Employer, the terms have different effect as noted above. The Board recently considered the difference in impact of legislative change in its decision concerning an application for reconsideration regarding the granting of a certification Order to employees of Wal-Mart, at its store in Weyburn, Saskatchewan. (See *United Food and Commercial Workers, Local No. 1400 v. Wal-Mart Canada Corp.,* 2009 CanLII 13640 (SK L.R.B.), LRB File No. 069-04. In that decision dated March 26, 2009, the Board looks at the distinction between a change that is merely procedural and a change that impacts on significant vested rights.

[19] At paragraphs 52 & 53, the Board makes the following comments:

> *In the Board's opinion, the change to s. 6 found in The Trade Union Amendment Act, 2008 was not purely procedural as evident by the practical impact of the change in the legislation on the parties. If the original panel had proceeded in the manner suggested by the Employer and had directed a representative vote, the list of employees eligible to vote would have been confined to those employees within the unit (determined by the original panel) as of the date of the Union's application who continued to be employees of the Employer on the date of the vote. The evidence of the Employer was that, as of December 4, 2008, only thirteen (13) out of approximately eighty-nine (89) employees listed on the Statement of Employment continued to belong to the unit determined by the original panel. In other words, unless the original panel departed from the Board's jurisprudence as to the conduct of a representative vote and/or the determination of eligible employees, the desired representative vote could only have captured the wishes of a distinct minority of employees at the workplace. On the other hand, if the Union's application had been filed under a mandatory vote system, the original panel, when faced with the number and range of preliminary matters that arose in this case, could have directed that the pre-hearing vote take place; sealing the ballots until matters had been resolved. In so doing, the wishes of the employees could have been captured on a timely basis. However, because of the timing of the legislative changes (occurring 49 months after the Union's application), this course of action was not available to the original panel. The point is not which process would have been better but rather the Board's observation that, in the circumstance of this case, the practical impact of the change in the legislation was dramatic and self-evident; which tend to indicate that the change in the legislation was not purely procedural according to the criteria enumerated in Driedger, supra.*

> *Similarly, the change to the legislation altered the legal significance of the facts of the case. Under the old legislation, the clear and consistent precedent of the Board was to grant certification based on the Union's card evidence of majority support. There was no evidence before the original panel that would have triggered a discretionary or mandatory vote under s. 6 of the Act. However, following the change, the Board can no longer rely on card evidence of support for purposes of certification. Such evidence now can be relied on only for purposes of determining whether or not the Union has achieved the prescribed threshold of support necessary for the conduct of a representative vote of employees. Furthermore, the change to the legislation also altered the time limit on gathering card evidence of support (reducing the period from 6 months to 90 days). The retrospective operation of The Trade Union Amendment Act, 2008, supra, would also require the Board to re-examine the validity of the card evidence of support filed by the Union to determine if it was gathered within the reduced period. As can be seen, the change in the legislation altered the legal significance of a number of facts before the original panel, also indicating that this change was substantive and not merely procedural according to the criteria enumerated in Driedger, supra. On this basis, the Board is satisfied that the respective application of the legislative changes to s.6 of the Act to the Union's application for certification would produce an unjust result.*

[20] The use of the terms "procedural" versus "substantive" are also attempts by courts to distinguish the impact of legislation based on its affect of established rights as noted in the *Wal-Mart* case, above.

[21] In the present case, the change was certainly "procedural", that is that the rights of the Union to file and application for an unfair labour practice were not impacted retroactively such that ss. 12.1(1), took away their right to file the unfair labour practice application, notwithstanding that more than ninety (90) days had expired prior to May 14, 2008. However, the Board agrees with the position of the Employer , that the change to the legislation meant that the time limit for filing an application began on May 14, 2008 and the time was limited by ss. 12.1(1) such that the application was filed outside the ninety (90) day time period which began to run from May 14, 2008. As such, the Board may refuse to hear an application brought more than ninety (90) days from May 14, 2008 with respect to an alleged unfair labour practice which occurred prior to May 14, 2008.

[22] The Union, however, argues that the ninety (90) day time limit should be considered to run from the date of the decision of the Board in LRB File No. 238-05, since that case created or formed the basis for the unfair labour practice which is alleged to have occurred

in this case. With respect, we cannot agree with this position. The Union was not an intervenor or interested party in LRB File No. 238-05. The decision in LRB File No. 238-05 crystallized no right in favour of this Union. It only established that the Employer had engaged in an unfair labour practice insofar as CUPE was concerned. While the decision does reference potential impacts on other public sector Unions, it also makes it clear that each case needs to be determined on its own particular facts and merits. It further noted that an analysis of the particular collective agreement would be required to insure that there was, in fact, a duty to bargain the implementation of a CRC in the workplace.

[23] The Union here, with the knowledge that s. 12.1(1) had been promulgated into the *Act* on May 14, 2008, determined not to file an unfair labour practice application, awaiting the result of the CUPE decision in LRB File No. 238-05. It would have been a simple matter for them to apply for intervenor status or interested party status in that application, or alternatively, as a matter of abundant caution, file an application prior to the expiry of the ninety (90) day time limit that commenced on May 14, 2008, pending a determination of the CUPE decision. They cannot "hop on the bandwagon" now that a favourable decision has been given to CUPE regarding the implementation of the CRC policy.

Should the Board exercise its discretion to allow the Application to proceed?

[24] The second part of the analysis is to determine whether or not the Board should exercise the discretion given in s 12.1 to allow the application to proceed notwithstanding that it has been filed outside the ninety (90) day time period.

[25] Counsel for the Employer directed the Board to the decision of the Alberta Labour Relations Board in *Neville Toppin v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No 488* [2006] Alta. L.R.B.R. 31. In this case, the Alberta Board considered its jurisdiction under a similar provision in their Labour Code.

[26] That case provided five (5) guidelines for the exercise of jurisdiction by the Board which resulted from a review of decisions by the Alberta Board in cases involving applications filed outside the ninety (90)-day period. They were summarized in para. 30 of that decision as follows:

1. *The 90-day time limit is a legislative recognition of the need for expedition in labour relations matters.*
2. *"Labour relations prejudice" is presumed to exist for all complaints filed later than the 90-day limit.*
3. *Late complaints should be dismissed unless countervailing considerations exist.*
4. *The longer the delay, the stronger must be the countervailing considerations before the complaint will be allowed to proceed. There is no separate category of "extreme" delay.*
5. *Without closing the categories of countervailing considerations that are relevant, the Board will consider the following questions:*
   (a) *Who is seeking relief against the time limit? A sophisticated or unsophisticated applicant?*
   (b) *Why did the delay occur? Are there extenuating circumstances? Aggravating circumstances?*
   (c) *Has the delay caused actual litigation prejudice or labour relations prejudice to another party?*
   (d) *And, in evenly balanced cases, what is the importance of the rights asserted? And what is the apparent strength of the complaint?*

[27] This Board concurs with the Alberta Board's analysis with respect to the factors to be considered by the Board in determining whether or not to exercise its discretion to allow an application to proceed, notwithstanding that it has been filed outside the ninety (90) day period.

[28] For a number of reasons, based upon a review of the above noted factors, the Board has determined that it will exercise its discretion in this case to permit the application to continue.

[29] The Union argued that implementation of the CRC should be considered in the nature of a "continuing offence", that is, that the unfair labour practice complained of was ongoing insofar as the parties had yet to engage in any bargaining concerning the policy, which was what the Board ordered should occur in LRB File No. 238-05 insofar as CUPE is concerned. With respect, we cannot agree with this characterization, as the offence must be founded on a particular fact situation and timeline, which was, in our view, the implementation of the CRC in November of 2005.

[30] That having been said, however, as noted in the *Toppin* case, *supra,* at para. 29 “Delay may be excused where the complaint concerns a continuing policy or practice rather than a discrete set of events: *UNA, Loc. 23 et al v. Chinook RHA* [2002] Alta. L.R.B.R. LD-056.” This case clearly concerns a continuing policy implemented by the Employer which may have a considerable impact on its current and future employees. It was in force throughout the period in question and remains in force at present.

[31] Also, in *Toppin, supra,* at para. 29, the Alberta Board notes “[T]hough the Board may infer from delay that a respondent has been prejudiced, the inference may be negated by the fact that a timely grievance was filed about the same transaction: *UNA, Loc. 23 et al v. Chinook RHA, supra*.” That is the case here. A grievance was filed by the Union and CUPE concerning the implementation of the policy. Whether the Union grievance was timely is currently undecided, but it is clear that the CUPE grievance on the same issue was timely. Furthermore, in addition to the grievance, CUPE filed a successful unfair labour practice application in addition to the grievance.

[32] In summary, therefore, the Board agrees with the Union that there are countervailing considerations in this case as noted above which mitigate the usual rules as set out above that would require the board to dismiss the application. The Union is not unsophisticated (Point 5(a) in *Toppin*, *supra*) and hence are required to show greater countervailing reasons why the application should not be dismissed. Also, there were no extenuating circumstances to explain the delay (Point 5(b) in *Toppin*, *supra*). As noted above, it would have been simple for the Union to have filed a protective unfair labour practice application pending the outcome of the CUPE case in LRB File No. 238-05. Those points are countervailed by the factors noted above, as well as the fact that the Employer has suffered no actual litigation prejudice or labour relations prejudice in this case (Point 5(c) in *Toppin*, *supra*). The policy has been implemented and has remained in effect since implementation and remains in effect notwithstanding the suspension of the Board’s order in LRB File No. 238-05 to allow the parties to negotiate the policy. Finally, there is a strong case based upon the Board’s decision in LRB File No. 238-05, that there has been a similar breach concerning the Union which also mitigates towards allowing the application to proceed (Point 5(d) in *Toppin*, *supra*).

[33] The Employer's application for summary dismissal of the Union's application is therefore denied. This panel will not be seized with the final determination of this application.

DATED at Regina, Saskatchewan, this **12th** day of **June, 2009**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson