The Labour Relations Board
Saskatchewan

COMMUNICATIONS, ENERGY & PAPERWORKERS UNION OF CANADA (CEP), Local 911, Applicant v. ISM INFORMATION SYSTEMS MANAGEMENT CANADA CORPORATION (ISM Canada), Respondent

LRB File No.: 149-12; January 21, 2013
Chairperson, Kenneth G. Love, Q.C.; Members: Gloria Cymbalisty and Ken Ahl

For the Applicant Union: Bettyann Cox
For the Respondent Employer: Brian Kenny, Q.C.

Deferral to Arbitration – Board reviews principles and test for deferral to arbitration – Board discusses rationale for deferral - Board considers if deferral to arbitration appropriate.

Multiplicity of Proceedings – Board reviews Supreme Court of Canada decision concerning judicial economy and avoidance of multiplicity of proceedings – Board considers avoidance of a multiplicity of proceedings as an additional rationale for deferral to arbitration.

Practice and Procedure – Board determines to defer to Board of Arbitration – Retains jurisdiction to determine any matter unresolved by arbitrator which may amount to unfair labour practice.

REASONS FOR DECISION

Facts:

[1] **Kenneth G. Love, Q.C., Chairperson:** Communications, Energy & Paperworkers Union of Canada, Local 911, (the "Union") is certified as the bargaining agent for a unit of employees of ISM Information Systems Management Canada Corporation (ISM Canada) (the "Employer").

[2] The issues in this case arise out of the hiring of Adam Corrin as an operator trainee in the Enterprise Support Services Department of the Employer. He was hired into a term position with a start date of February 1, 2012. The term was stated in his hiring letter to be for (8) eight months. Mr. Corrin's term position, however, was cancelled on April 20, 2012. He was paid up to and including May 6, 2012.

[3] The Union heard that Mr. Corrin's term appointment had been cancelled and began to inquire as to the reasons for the cancellation. They initially approached his direct supervisor, Ms. Sherry Ross, who provided little rationale for the cancellation of his term appointment.

[4] The Union was unable to obtain any hard information as to why Mr. Corrin's term appointment was cancelled. To protect its position and that of Mr. Corrin, they filed a grievance (hereinafter referred to as Grievance S12-02) with respect to what they considered a termination and/or layoff of Mr. Corrin.

[5] Upon receipt of the grievance, the Union and the Employer scheduled a Step 3 (of the Grievance procedure under the Collective Bargaining Agreement (hereinafter the "CBA")) meeting on May 17, 2012. However, that meeting was cancelled by an email sent shortly before the meeting was to commence. In that email, the Employer requested that the Union provide information (particulars) of the Union's complaint as the grievance had been filed under numerous provisions of the CBA.

[6] A good deal of back and forth occurred between the parties related to this request by the Employer for the Union to provide particulars of the allegations in the grievance, which ultimately became a request that those particulars be "on the record". Finally, the Employer advised that it would not be prepared to attend any grievance procedure meetings until the requested particulars were provided.

[7] This stance by the Employer led to the Union filing a second policy grievance (hereinafter referred to as S12-06). The grievance alleged that the Company failed "to meet under the grievance procedure in reference to grievance S12-02."

[8] Grievance S12-02 was referred to Arbitrator Angela Zborosky in accordance with the terms of the CBA. An initial hearing by telephone has been held with respect to this application. An oral decision has been given wherein Arbitrator Zborosky determined that she will split the hearing into two (2) parts: (1) that the Employer's preliminary objections that the Employer should be provided sufficient particulars of the grievance, that the steps in the

grievance procedure have yet to take place and the arbitration is, therefore, premature, and that grievance S12-06 should be heard by Arbitrator Zborosky along with grievance S12-02 and not adjudicated independently; and (2) the merits of the grievance. As yet, no written reasons for this decision have been given.

[9] Nevertheless, the hearing to deal with the preliminary issues has been set to be heard by Ms. Zborosky on January 29 and 30, 2013. The hearing of the merits is scheduled to be heard on March 25 to 28, 2013.

[10] Meanwhile, grievance S12-06 was assigned to Arbitrator Robert Pelton, Q.C. pursuant to the CBA. A hearing before Arbitrator Pelton was scheduled for December 21, 2012, which was three (3) days after the Board hearing of this matter on December 18, 2012. At that hearing we were advised that the Employer intended to request that Arbitrator Pelton acknowledge that the grievances should be heard together by Arbitrator Zborosky.

[11] At the hearing on December 18, 2012, the Employer applied to the Board as a preliminary matter for the Board to defer deciding this matter pursuant to the authority of Section 18(l) of *The Trade Union Act*, R.S.S. 1878, c.T-17 (the "*Act*").

[12] By Order dated December 20, 2012, the Board made the following Order:

Kenneth G. Love, Q.C., Chairperson) ***DATED*** *at Regina, Saskatchewan, on*
Gloria Cymbalisty)
Ken Ahl) *the* ***20th*** *day of* ***December, 2012.***

ORDER

THE LABOUR RELATIONS BOARD*, pursuant to Sections 18(l) and 42 of The Trade Union Act,* ***HEREBY ORDERS*** *that:*

1. the Board will defer determination of this matter to the arbitration processes currently under way with respect to grievances filed by the Applicant Union scheduled to be heard by either arbitrator Zborosky or arbitrator Pelton; and

2. the Board will retain jurisdiction over any unfair labour practice determination that may be required upon completion of the above noted arbitration processes; and

3. the panel shall not be seized with respect to any such further proceedings.

LABOUR RELATIONS BOARD

These are the Reasons for that Order.

Relevant statutory provision:

[13] Relevant statutory provisions are as follows:

> *18. The board has, for any matter before it, the power:*
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> *. . .*
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> *(l) to defer deciding any matter if the board considers that the matter could be resolved by arbitration or an alternative method of resolution;*

Analysis:

[14] The parties are in agreement that the leading authority with respect to the Board's exercise of its discretion granted pursuant to section 18(l) of the *Act* is the Saskatchewan Court of Appeal decision in *United Food and Commercial Workers Union v. Westfair Foods Ltd.*[1] In that decision, then Chief Justice Bayda, speaking for the court, reviewed the Court's earlier decision in *Retail, Wholesale and Department Store Union v. LRB (Sask) and Morris Rod Weeder Co.*[2] and the decision of the Supreme Court of Canada in *Labour Relations Board of Saskatchewan v. The Queen ex rel of F.W. Woolworth Co. Ltd. et al.*[3]

[15] The Board, more recently, reviewed the principles and test for deferral to arbitration or other means of dispute resolution in *Teamsters, Local 395 v. PCL Industrial Constructors Inc.*[4] The law and principles regarding the Board's discretion to defer to an arbitrator or "an alternative method of resolution" are equally applicable here. As noted in that case, the majority of the jurisprudence related to deferral by the Board to alternative means of adjudication was developed prior to the amendments to the *Act* which added section 18(l), which provided specific authority, and discretion, to the Board to "defer deciding any matter if the board considers the matter could be resolved by arbitration or an alternative method of resolution."

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[1] [1992] 95 D.L.R. (4th) 541, 6 W.W.R. 481, 105 Sask. R. 17
[2] 78 CLLC 14, 140
[3] [1956] S.C.R. 82, [1955] CanLII 82 (S.C.C.)
[4] [2011] S.L.R.B.D. No. 37, 207 C.L.R.B.R. (2d) 103, LRB File No. 019-10

[16] The concept of deferral to arbitration was described by former Chairperson Ball (as he was then) in *United Food and Commercial Workers, Local 1400 v. Westfair Foods Ltd.*[5]. At paragraphs 90 – 92 of that decision, he says:

> *[90] Labour relations boards defer to a labour arbitrator if the essential nature of the complaint arises out of the collective agreement and if an arbitrator can provide complete relief in response to the complaint. The board will hear the complaint if arbitration is unavailable or unsuitable for any reason such as a remedial limitation. The board's deferral does not prejudice the applicant's right to bring the matter back to the board if the arbitrator declines jurisdiction. By taking that approach the board ensures that it does not abdicate its statutory responsibility while recognizing and promoting arbitration as the statutorily mandated scheme for the resolution of employer/employee disputes. See, for example, U.F.C.W., Local 1400 v. Western Grocers, [1993] 1st Quarter Sask. Labour Rep. 195; Saskatoon (City) v. C.U.P.E., Local 59 (1990) 8 C.L.R.B.R. (2d) 310; Canadian Linen Supply Co. and R.W.D.S.U. (1990) 8 C.L.R.B.R. (2d) 228; Saskatchewan Government Insurance, Regina, Saskatchewan v. Saskatchewan Insurance Office and Professional Employees Union, Local 397 (1987), 15 C.L.R.B.R. (NS) 313; United Steelworkers of America, Local 4728 v. Willock Industries Ltd. (1980) 31 Sask. Labour Rep., No. 5, 72 and see also Valdi Inc., [1980] O.L.R.B. Rep. 1254.*
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> *[91] The deferral approach has not been confined to labour relations boards and is not revolutionary. It was recommended by Professors Swan and Swinton in 1983, when they pointed out the need for human rights' adjudicators to develop doctrines of deference to the decisions of other tribunals based on the same factual situations and commended the deferral approach taken by Professor Kerr in Singh v. Domglas Limited (1980), 2 C.H.R.R. D/285. (See K. Swan and K. Swinton, "The Interaction of Human Rights Legislation and Labour Law" in Studies in Labour Law (Toronto: Butterworths, 1983) 111 at 141).*
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> *[92] The deferral approach has also been recommended by R. H. Abramsky in "The Problem of Multiple Proceedings: An Arbitrator's Perspective" in W. Kaplan, et al., eds., Labour Arbitration Yearbook 1996-97 (Toronto: Lancaster House, 1996) 45 and suggested by The Honourable Mr. Justice William J. Vancise of the Court of Appeal for Saskatchewan in papers presented to the Canadian Bar Association in 1999 (see "Button, Button—Who gets the Button? Which Statutory Forum has Jurisdiction?" (Canadian Bar Association, Ottawa, Ontario, November 19, 1999)) and the University of Calgary, (see "Button, Button—Who gets the Button? Which Statutory Forum has Jurisdiction? (No. 2)" (University of Calgary, Labour, Arbitration and Policy Conference, June 7 and 8, 2000, Calgary, Alberta)).*

[17] The exercise of the Board's jurisdiction to defer to decide any matter as provided in s. 18(l) also aids in judicial efficiency as it avoids the multiplicity of proceedings which often result when parties take a shotgun approach to the remedy which they seek. That is, the aggrieved party files multiple proceedings in various forums seeking essentially the same relief.

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[5] [2002] CanLII 154 (SKQB), 213 DLR (4th) 715; [2002] 8 WWR 654; 44 Admin LR (3d) 100; 218 Sask R. 196

The difficulty, of course, which this approach presents, is that there is the potential for conflicting decisions to result from the various bodies from which relief has been sought.

[18] The Supreme Court of Canada dealt with the issue of judicial economy and "multiplicity of proceedings" recently in *Halifax Regional Municipality v. Nova Scotia Human Rights Commission and Canadian Human Rights Commission.*[6] In that decision, the head note reads, in part:

> *Even more fundamentally, contemporary courts would not so quickly accept that questions such as the one dealt with in Bell (1971) can be answered by an abstract interpretive exercise conducted without regard to the statutory context. Early judicial intervention also risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes. Moreover, contemporary administrative law accords more value to the considered opinion of the tribunal on legal questions, whether the tribunal's ruling is ultimately reviewable in the courts for correctness or reasonableness.*

[19] At paragraph [37], the Court overruled *Bell v. Ontario Human Rights Commission*[7]**,** "in relation to its approach to preliminary jurisdictional questions or when judicial intervention is justified on an ongoing administrative process".

[20] At paragraph [36], the Court provided the following rationale for deference by lower courts to avoid multiplicity of proceedings.

> *While such intervention may sometimes be appropriate, there are sound practical and theoretical reasons for restraint: D. J. Mullan, Administrative Law (3rd ed. 1996), at §540; P. Lemieux, Droit administratif: Doctrine et jurisprudence (5th ed. 2011), at pp. 371-72. Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes: see, e.g., Szczecka v. Canada (Minister of Employment and Immigration) (1993), 170 N.R. 58 (F.C.A.), at paras. 3-4; Zündel (1999), at para. 45; Psychologist Y v. Board of Examiners in Psychology, 2005 NSCA 116 (CanLII), 2005 NSCA 116, 236 N.S.R. (2d) 273, at paras. 23-25; Potter v. Nova Scotia Securities Commission, 2006 NSCA 45 (CanLII), 2006 NSCA 45, 246 N.S.R. (2d) 1, at paras. 16 and 36-37; Vancouver (City) v. British Columbia (Assessment Appeal*

[6] [2012] SCC 10 (CanLII), 1 S.C.R. 364,
[7] 1971 CanLII 1 (SCC), [1971] S.C.R. 756

> *Board) 1996 CanLII 1076 (BC CA), (1996), 135 D.L.R. (4th) 48 (B.C.C.A.), at paras. 26-27; Mondesir v. Manitoba Assn. of Optometrists reflex, (1998), 163 D.L.R. (4th) 703 (Man. C.A.), at paras. 34-36;U.F.C.W., Local 1400 v. Wal-Mart Canada Corp., 2010 SKCA 89 (CanLII), 2010 SKCA 89, 321 D.L.R. (4th) 397, at paras. 20-23; Mullan (2001), at p. 58; Brown and Evans, at paras. 1:2240, 3:4100 and 3:4400. Thus, reviewing courts now show more restraint in short-circuiting the decision-making role of the tribunal, particularly when asked to review a preliminary screening decision such as that at issue in Bell (1971).*

[21] This rationale also provides justification for the Board's authority to defer in cases when multiple proceedings can, and should, be avoided to allow for judicial economy.

[22] Our Court of Appeal in *United Food & Commercial Workers, Local Union 1400 and The Labour Relations Board et al.,* established the following criteria for the Board to exercise its authority to defer to arbitration:

> *(i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute;*
>
> *(ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance arbitration procedure; and*
>
> *(iii) the remedy sought under the collective agreement must be a suitable alternative to the remedy sought in the application before the Board.*

Is it the same dispute?

[23] The parties in this case take opposite views of criteria (i) in this case. The Employer argues that the dispute before the arbitrator, particularly in respect of grievance S12-06 (a failure to meet under the Grievance Procedure in reference to grievance S12-02) is the same dispute as the Board has been asked to adjudicate under its authority to determine unfair labour practice violations under subsections 11(1)(c) and (d) of the *Act*.

[24] The Union argues that the disputes are distinct and should be adjudicated as such. They say that by failing to meet to consider grievance S12-02, the Employer is failing to bargain collectively, which is an unfair labour practice.

[25] Had the policy grievance S12-06 not been filed, the Union may have been in a better position to argue that the disputes are distinct. However, it is clear to us that the dispute

which the Union wants Arbitrator Pelton or Zborosky to determine in Grievance S12-06 is the same dispute that they wish the Board to determine, that is, whether or not the Employer was entitled to rely upon the alleged failure to provide particulars as a rationale for refusal to meet to consider grievance S12-02.

[26] Furthermore, the matter has, notwithstanding the failure of the Employer to meet to consider the grievance, made its way to an arbitrator, in accordance with the terms of the CBA. The arbitrator has the jurisdiction to determine all of the questions put by the parties under both of the filed grievances.

Is the Arbitrator able to resolve the Grievance?

[27] From the submissions of the parties, it is clear to us that either Arbitrator Pelton or Zborosky will be able to determine the issues. There may be a finding that the Union should provide the requested particulars prior to either the arbitration process or a resumption of the process at the appropriate step under the collective agreement. There may be a finding that the Employer should not have refused to meet absent the particulars being provided and the arbitrator assuming jurisdiction to resolve the grievance. Or, there may be other results. Nevertheless, there is no purpose, as noted in *Halifax Regional Municipality v. Nova Scotia Human Rights Commission and Canadian Human Rights Commission*[8] for there to be a multiplicity of proceedings both before the arbitrator (or arbitrators) and the Board.

Is the Remedy Available a Suitable Alternative?

[28] In its application to the Board, the Union sought no remedy. In argument before the Board, the Union's counsel advised the Board that the Union was "seeking a declaratory order that an Unfair Labour Practice under subsections 11(1)(c) or (d) had occurred". No other remedy was sought.

[29] In Grievance S12-06, the Union sought the following remedy:

> *Adhere to the grievance procedure in reference to Grievance S12-02.*
>
> *The union demands that the Company cease and desist from violating the Collective Agreement, that the incident(s) be rectified, that proper compensation,*

[8] [2012] SCC 10 (CanLII), 1 S.C.R. 364

> *including benefits and overtime, at the applicable rate of pay, be paid for all losses; and further that all those affected be made whole in every respect.*

[30] The remedies sought in Grievance S12-06 and the remedy sought under the Unfair Labour Practice application before us are strikingly similar. Clearly, the arbitrator, should he/she grant the application, will be able to deal with the matter in a wholesome fashion. A declaratory order as sought from the Board would not be as effective as the arbitrator's authority to grant additional remedies as sought, including compensatory remedies.

Decision

[31] For these reasons, the Board issued its Order on December 20, 2012 in relation to this matter as follows:

> **1.** *the Board will defer determination of this matter to the arbitration processes currently under way with respect to grievances filed by the Applicant Union scheduled to be heard by either arbitrator Zborosky or arbitrator Pelton; and*
>
> **2.** *the Board will retain jurisdiction over any unfair labour practice determination that may be required upon completion of the above noted arbitration processes; and*
>
> **3.** *the panel shall not be seized with respect to any such further proceedings.*

DATED at Regina, Saskatchewan, this **21st** day of **January**, **2013.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson