C.B., H.K. & R.D., Applicants v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 21, Respondent

LRB File Nos. 034-15, 035-15 & 037-15; November 2, 2015
Steven D. Schiefner, Vice-Chairperson (sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act*)

For the Applicants: Mr. Larry Kowalchuk & Mr. Micah Kowalchuk
For the Union: Mr. Robert Logue

PRACTICE AND PROCEDURE – Jurisdiction - Employees file occupational health and safety complaints with their employer, together with human rights complaints related to harassment in the workplace – Employees also ask trade union to file grievances with respect to same subject matter – Trade union ultimately files grievances – Global settlement reach with employer respecting all claims, including grievances - Employees allege trade union violated duty of fair representation – Trade union argues that Board has no jurisdiction with respect to allegations related to action or inaction of trade union in forums other than the grievance/arbitration process – Board notes that new legislation enacted governing duty of fair representation - Board not satisfied that it can properly examine the scope of the duty imposed on trade unions by new legislation prior to a full hearing on the merits.

PRACTICE AND PROCEDURE - Mootness – Employees file occupational health and safety complaints with their employer, together with human rights complaints related to harassment in the workplace – Employees also ask trade union to file grievances with respect to same subject matter – Trade union ultimately files grievances – Global settlement reach with employer respecting all claims, including grievances - Employees allege trade union violated duty of fair representation – Trade union argues that settlement reach by the parties rendered the matters in dispute moot – Trade union also argues that releases signed by employees prevent or restrict the Board's capacity to award any remedial relief – Board noting that releases do not prevent claims against the trade union – Board also satisfied that, even if the issues in dispute are moot, the proceedings raise issues of importance to the broader labour relations community that it would be in the public interest for the Board to decide.

Saskatchewan Employment Act, s. 6-59 & 6-111(1)(o) & (p)

REASONS FOR DECISION – PRELIMINARY MATTERS

Background:

[1] **Steven D. Schiefner, Vice-Chairperson:** These proceedings involve three (3) applications by three (3) individuals (the "Applicants"), all of whom are (or were) members of the Canadian Union of Public Employees, Local 21 (the "Union"). The Applicants have each filed applications with the Saskatchewan Labour Relations Board (the "Board") alleging that the Union violated Section 6-59 of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1 by failing to fairly represent them with respect to proceedings involving their former employer, the City of Regina. For reasons of privacy, the Applicants asked, and this Board has agreed, to anonymize the names of the Applicants, who are referred to only by their initials in these Reasons for Decision.

[2] In the replies it filed to each of the applications, the Union denies that it failed to fairly represent the Applicants or otherwise contravened s. 6-59 of *The Saskatchewan Employment Act*. Prior to hearing and by way of a preliminary motion, the Union asks this Board to dismiss the Applicants' applications on the basis that this Board lacks jurisdiction or, alternatively, on the basis of mootness. The Union's preliminary motion was heard by the Board on October 21, 2015. For the reasons that follow, I find that the Union's preliminary motion must be dismissed.

Facts:

[3] The essential facts necessary to determination the Union's preliminary motion were not in dispute and, for the most part, arise out of the applications filed by the Applicants. However, the Applicants supplemented the record with an affidavit deposed by H.K. In addition, various documents were entered by consent of the parties, including memorandums of settlement and releases signed by each of the Applicants. I will summarize the facts I find salient to the determination I must make on the preliminary motion.

[4] The Applicants were employed at the City of Regina and were members of the Union at all material times. As a result of incidents occurring in the workplace, the Applicants filed multiple harassment complaints under the City of Regina's harassment policy in the Winter/Spring of 2014. The allegations of wrongdoing set forth in these complaints involved co-workers of the Applicants, who were also members of the Union.

[5] In response to the complaints filed by the Applicants, the City of Regina appointed an investigator in March of 2014. During his investigation, the investigator interviewed the three (3) Applicants. Representatives of the Union were present when the Applicants were interviewed by the investigator.

[6] In April of 2014, while the investigator was conducting his investigation, the Applicants retained independent legal counsel.

[7] In April of 2014, before the investigator had concluded his investigation, the Applicants asked the Union to file grievances alleging the City of Regina had violated its collective agreement with the Union, together with complaints of discrimination and occupational health and safety violations. To assist the Union, the Applicants provided the Union with copies of draft grievances that had been prepared by their counsel. The Union declined to file grievances on behalf of the Applicants at that time.

[8] Prior to the investigator concluding his investigation and issuing his report, each of the Applicants filed discriminatory action complaints under Part III of *The Saskatchewan Employment Act* with the relevant officials within the Ministry of Labour Relations and Workplace Safety. The Union was not a party to these applications.

[9] In addition, prior to the investigator concluding his investigation, each of the Applicants filed human rights complaints with the Saskatchewan Human Rights Commission. The Union was not a party to these applications nor did it seek standing to participate in these proceedings.

[10] The City of Regina's investigator concluded his investigation and issued his report regarding the complaints of the Applicants on July 17, 2014. In his report, the investigation substantiated many (but not all) of the complaints alleged by the Applicants, including allegations of personal and sexual harassment by the Applicants' coworkers. As noted, the coworkers who were found to have personally and sexually harassed the Applicants were also members of the Union.

[11] In July of 2014, one of the Applicants, H.K. applied for (and ultimately received) Workers' Compensation benefits. H.K.'s workplace injury was alleged to be the result of the sexual harassment that took place in the workplace. The Union was not a party to this application.

[12] On August 1, 2014, the Applicants appealed the findings of the City's investigator to the Executive Director of Occupational Health and Safety alleging that the investigator improperly dealt with a number of the complaints of the Applicants (namely, the complaints that were not substantiated by the investigator). The Union was not a party to the appeals filed by the Applicants.

[13] In October of 2014, the Union filed grievances with the City of Regina on behalf of the Applicants alleging violations of the collective agreement, together with contraventions of provisions of Part III of *The Saskatchewan Employment Act*. In addition, in November of 2014, the Union also filed grievances on behalf of other members of the Union (i.e. the members against whom complaints had been sustained) alleging that the City of Regina's investigator had conducted a flawed investigation into the complaints alleged by the Applicants.

[14] As a result of either the appeals filed by the Applicants or the discriminatory action complaints filed with the Ministry of Labour Relations and Workplace Safety, an adjudicator was appointed to hear the appeals and/or complaints of the Applicants pursuant to Part III of *The Saskatchewan Employment Act*. The Union sought and was granted standing before the adjudicator. In doing so, the Union alleged that it had an interest in the proceedings before the adjudicator. The Union asked the appointed adjudicator to defer hearing the appeals/complaints of the Applicants pending prosecution and resolution of the grievances filed by the Union.

[15] In November of 2014 and in January of 2015, the Union wrote to the City of Regina asserting its status as exclusive bargaining agent on behalf of the Applicants and directing the City to refrain from dealing directly with the Applicants (and/or their counsel) with respect to any matters that could affect their employment.

[16] In February of 2015, the Applicants filed their respective applications with this Board alleging the Union had failed to fairly represent them; being applications bearing LRB File Nos. 034-15, 035-15 and 037-15.

[17] In April of 2014, the Applicants, the Union and the City of Regina entered into memorandums of settlement, wherein the Union agreed to withdraw the grievances it had filed on behalf of the Applicants and the Applicants agreed that their harassment complaints had been concluded and that their human rights complaints, discriminatory action complaints and appeals had all been settled. In exchange, the City of Regina agreed to pay monetary compensation to each of the Applicants. Concomitant with the minutes of settlement agreed to by the parties, each of the Applicants signed releases wherein they each agreed to release the City of Regina which reads, in part, as follows:

> *I, [**name of signatory has been deleted**], of the City of Regina, in the Province of Saskatchewan, do now, for and in consideration (receipt and sufficiency of which I hereby acknowledge) remise, release, and forever discharge the City of Regina, its directors, officers, employees, servants, agents and affiliates and each of them (collectively, the "Employer") of and from any action, cause of action, grievance, complaint, claim, demand, loss, damage, charge, expense, cost, and proceeding of any nature or kind whatsoever arising out of, connected with or incidental to the matters grieved by Canadian Union of Public Employees, Local 21 on my behalf identified as Grievance filed October 28, 2014.*
>
> ***FOR THE CONSIDERATION AFORESAID**, I hereby covenant and agree that I will not commence any action or proceeding of any nature or kind whatsoever including, without limitation, any grievance or any claim under the collective agreement between the Employer and Canadian Union of Public Employees, Local 21, The Saskatchewan Human Rights Code or The Saskatchewan Employment Act, against the Employer, its affiliates or against any of the Employer's employee benefit providers or against any third party which or who in turn might have a claim against the Employer.*

[18] In her Affidavit, H.K. deposed to the following:

> *1. I have personal knowledge of the matters herein deposed to.*
>
> *2. I make this Affidavit in support of the Applications listed above and in response to the various Replies and Amended Replies filed by the Respondent including but not limited to their Amended Replies (Preliminary Issues).*
>
> *3. Attached to this my Affidavit are a series of documents (marked collectively as Documents List) including written correspondence, email correspondence, written submissions before the OH&S Adjudicator all of which I have personal knowledge of and which are related to the matters in these proceedings.*
>
> *4. The attached Documents List confirms that CUPE 21 was in a conflict of interest regarding representing myself, C. and R. that was prejudicial and potentially contrary to representing our interests.*

5. The Documents List confirms that CUPE 21 completely refused to co-operate with our lawyer and rejected all offers to do so, which operated to the detriment of myself as well as R. and C., both legally and medically.

6. The actions of the Respondent since the filing of the Applications listed above continued to exacerbate my medical conditions and as of this date, I remain unable to work in any capacity, while continuing to follow the treatment plans of my medical practitioners.

7. This remains true as well for [C.B.].

8. The male harassers mentioned in the Applications remain fully employed at the workplace.

9. The three Applicants no longer work at our original workplaces nor with the City of Regina.

10. If the LRB permits and deems it necessary for the purposes of the Respondents submission of the issue of mootness, I will provide copies of the settlements concluded after our Applications were filed.

11. The settlements, monetarily, are essentially what was asked for in the last offer to settle presented by our lawyer to the City of Regina.

12. The settlements do NOT contain a release of the Respondent CUPE Local 21 regarding the Applications filed in this matter.

13. The settlements do not contain any proposals for programmic changes to the way the City deals with women who have been and continue to be harassed nor to protect women employees from being injured as a result of gender based and sexual harassment.

14. The settlement would not have been reached without the representation of myself and the other applicants by our lawyer for the whole period of their representation from February, 2014 to March, 2015 in negotiations with the City with the assistance of two mediators and mediation processes initiated outside the grievance process under statutes.

15. The settlements do contain a release of the City of Regina for all legal actions commenced by our lawyer as well as the one grievance filed by CUPE Local 21.

Argument on behalf of the Union:

[19] The Union's argument in its preliminary motion is two (2) pronged. Firstly, the Union argues that s. 6-59 of *The Saskatchewan Employment Act* does not impose any duty on trade unions to pursue collective bargaining rights through processes other than those set out in the relevant collective agreement for a particular workplace (typically, the grievance/arbitration processes). In other words, trade unions are under no obligation to pursue claims on behalf of their members in other fora, including human rights complaints, discriminatory action complaints, labour standard complaints/appeals, and occupational health and safety complaints/appeals.

The Union argues that, if it has no representational responsibilities in these other fora (i.e.: any forum other than the grievance/arbitration processes set forth in the collective agreement), it follows that the Union cannot breach its duty of fair representation for actions or inaction in relation to the human rights complaints, discriminatory action complaints, labour standard complaints/appeals and occupational health and safety complaints/appeals commenced by members of the Union. As a consequence, the Union argues that this Board should dismiss the components of the Applicants' applications that allege a breach of the duty of fair representation related to the proceedings before the Human Rights Commission, Workers' Compensation Board, and the applications pursuant to Part III of *The Saskatchewan Employment Act*.

[20] The second component of the Union's application is that all of the matters arising out of the complaints filed by the Applicants and the grievances filed by the Union are now resolved as a result of the settlement agreements reached by the parties and the City of Regina. Furthermore, the Union argues that the releases signed by the Applicants bar any remedial relief being granted by the Board even if the Board were to find that a violation had taken place.

[21] Counsel on behalf of the Union filed a brief of law which we have read and found to be helpful.

Argument on behalf of the Applicants:

[22] While the Applicants do not assert that s. 6-59 of *The Saskatchewan Employment Act* imposes a duty on the Union to represent the Applicants in proceedings outside of the collective agreement, they argue that the Union nonetheless breached its duty of fair representation by interfering in the processes that occurred outside the collective agreement, including asking the adjudicator to defer to another jurisdiction, attempting to insert itself as the exclusive bargaining agent for the Applicants with respect to these other proceedings, and by threatening the City of Regina with the commission of an unfair labour practice if its continued to deal with the Applicants other than through the Union.

[23] On the issue of mootness, the Applicants take the position that the releases they signed do not release the Union from claims by the Applicants. As a consequence, there continues to be a live issue in dispute between the parties. The Applicants also note that, while the most common remedy of the Board upon the finding of a violation of the duty of fair representation is to direct the impugned trade union to commence or continue grievance

proceedings to arbitration, other remedial relief is available to and has been granted by the Board.

[24] Counsel on behalf of the Applicants filed a brief of law, which we have read and found to be helpful.

Relevant statutory provision:

[25] The relevant provisions of *The Saskatchewan Employment Act* are as follows:

> ***6-59****(1) An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.*
>
> *(2) Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee.*
>
> . . .
>
> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> ***. . .***
>
> *(o) to summarily refuse to hear a matter that is not within the jurisdiction of the board;*
>
> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*

Analysis:

[26] In these proceedings, the Board is called upon to consider two (2) questions:

1. Are the allegations of the Applicants regarding proceedings other than the grievance/arbitration process beyond the scope of the duty of fair representation imposed by s. 6-59 of *The Saskatchewan Employment Act* and, therefore, beyond the jurisdiction of this Board?
2. Do the settlements and releases signed by the Applicants render their applications to this Board moot?

[27] I will deal with each of these issues in turn.

Are the allegations regarding proceedings other than the grievance/arbitration process beyond the scope of the duty of fair representation imposed by s. 6-59 of The Saskatchewan Employment Act and, therefore, beyond the jurisdiction of this Board?

[28] While the Union acknowledges that the language in s.6-59 of *The Saskatchewan Employment Act* is different than the language in s. 25.1 of *The Trade Union Act*, the Union argues that a purposive approach to interpreting s. 6-59 would lead this Board to the singular conclusion that, although the language in s. 6-59 appears broader than the language in s. 25.1, the legislature did not intend to expand the representational duties imposed on trade unions or the fora within which trade unions are responsible for representing their members. In this regard, the Union relies on the decision of the Canada Industrial Relations Board in *Gilberte Thibeault v. Canadian Flight Attendants Union and Jazz Air Limited Partnership*, 232 C.L.R.B.R. (2d) 261, 2010 CIRB 505 (CanLII); together with the decision of the Alberta Labour Relations Board in *Reid Joseph Imhoff, et. al. v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local No. 488*, 2013 CanLII 81419 (AB LRB); together with the decision of the Public Service Labour Relations Board in *Jamie S. Elliott v. Canadian Merchant Service Guild, et. al.*, 2008 PSLRB 3 (CanLII).

[29] In other words, the Union takes the position that s. 6-59 of *The Saskatchewan Employment Act* imposes the same duty of representation on trade unions that was imposed by s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c.T-17.1 (now repealed). On this footing and relying on this Board's decision in *Marilynne McEwan v. Canadian Union of Public Employees Local 1975 and University of Saskatchewan*, 2007 CanLII 68751 (SK LRB), 143 C.L.R.B.R. (2d) 253, LRB File No. 001-06, the Union argues that trade unions have no obligation to represent members against parties other than their employer or through proceedings or actions outside of the grievance proceedings and rights arbitration under a collective agreement.

[30] The Union argues that the right of employees to make occupational health and safety complaints or human rights complaints pursuant to the respective statutes does not arise out of the collective agreement nor Part VI of *The Saskatchewan Employment Act*. As a result, while a trade union has a statutory duty to represent its members with respect to their substantive rights in workplace-related legislation, the duty only applies to the prosecution of

those rights through the process(es) set out in any applicable collective agreement; typically, the grievance/arbitration process. Consequently, if trade unions have no responsibility in fora other than the grievance/arbitration process, it follows that any impugned actions or inactions on the part of Union related to the Applicants' complaints to the Human Rights Commission or their occupational health and safety complaints/appeals cannot give rise to a breach of a duty of fair representation. It is on this basis that the Union asks this Board to dismiss those aspects of the Applicant's applications involving the Union's conduct other than in the grievance/arbitration process.

[31] In my opinion, there are two (2) flaws in the Union's jurisdictional argument. Firstly, the language of s. 6-59 of *The Saskatchewan Employment Act* is different than the language previously used in s. 25.1 of *The Trade Union Act* and this Board has not made any determinations as to the significance, if any, of the change in wording. In other words, the Board has not made any determination as to whether or not the duty of representation imposed on trade unions by s. 6-59 is different from the duty imposed by s. 25.1. In my opinion, a preliminary application is not the proper forum for making such a determination. Rather, an appropriate examination of the scope of the duty imposed by s. 6-59 of *The Saskatchewan Employment Act* on trade unions requires evidence; certainly more and better evidence than is typically available on a preliminary motion. In this regard I note that, while the decision of the Canadian Industrial Relations Board in *Thibeault, supra*, was decided on a preliminary motion, the decision upon which the Canada Board relied in rendering its decision; namely, *Elizabeth Buchanan, infra*; was decided after an oral hearing. See: *Elizabeth Buchanan v. Canadian Telecommunications Employees' Association and Bell Canada*, 2006 CIRB 348 (CanLII).

[32] This Board's jurisprudence as to the application of s. 25.1 of *The Trade Union Act* developed through careful examination of that provision in context of specific fact situations. In most cases, the findings of the Board were facts specific and based on an analysis of many factors; all based on evidence presented and tested during a hearing. In its preliminary application, the Union asks this Board to now examine s. 6-59 of *The Saskatchewan Employment Act* and address all possible shades of meaning of that provision largely in the abstract; something I am not prepared to do.

[33] Secondly, the Applicants state they are not alleging that the Union was under a duty to represent them in any forum other than the grievance/arbitration process. Rather, the

Applicants allege that the Union interjected itself into these other proceedings (i.e.: the complaints and appeals filed by the Applicants) and interfered with the prosecution and/or resolution of these matters to the detriment of the Applicants. I don't know whether or not such an allegation falls within the duty of representation imposed on trade unions by s. 6-59 of *The Saskatchewan Employment Act*. However, I am confident that such a determination can only be made on the basis of a fulsome examination of the evidence; not on a preliminary motion.

Do the settlements and releases signed by the Applicants render their applications to this Board moot?

[34] The Union takes the position that the Applicants' applications are now moot because the issues between the parties pursuant to s. 6-59 of *The Saskatchewan Employment Act* were resolved with the memorandum of settlements signed by the parties. The Union argues that, if there are no longer any live issues between the parties, this Board should decline to hear the Applicants' applications. Relying on the decision of the British Columbia Labour Relations Board in the decision of *Glen O-Flaherty v. Vancouver Community College Faculty Association and City Centre Campuses, et. al.*, 189 C.L.R.B.R. (2d) 295, 2011 CanLII 1771 (BC LRB), the Union also argues that, even if this Board were to find a violation of the duty of fair representation, the releases signed by the Applicants preclude or erode this Board's capacity to award meaningful remedial relief. Succinctly put, the Union argues that the Applicants cannot, on the one hand consent to the settlements reached by the Union, and then on the other, turn around and claim that the Union failed in its representational duties with respect to the matters that have now been settled.

[35] In my respectful opinion, there are two (2) flaws with the Union's argument on mootness. Firstly, while the releases signed by the Applicants appear to have comprehensively settled all disputes that the Applicants had with their employer; the City of Regina; they do not appear to release the Union from claims by the Applicants. Secondly, even if it can be said that the settlements and releases signed by the Applicants would prevent or restrict this Board's capacity to award meaningful remedial relief, in my opinion, there are compelling reasons why this Board should, nonetheless, hear the Applicants' applications even if the issues set forth therein are now academic. The scheme of *The Saskatchewan Employment Act*, as was the case with the statute's predecessor, *The Trade Union Act*, intends that trade unions will be the exclusive bargaining agents for members in an organized workplace. Nonetheless, there are

parallel statutory schemes where employees can bring claims arising out of events occurring in their workplaces and the duties imposed upon employers to maintain safe, discriminatory-free and harassment-free workplaces. The human rights complaints filed by the Applicants are examples of employees invoking a statutory scheme outside of their collective agreement for the resolution of workplace disputes. Complaints and appeals pursuant to Part III of *The Saskatchewan Employment Act* are another example of a parallel statutory scheme (i.e.: a scheme for investigation and resolution of dispute that operates outside of the collective agreement).

[36] Periodically, these parallel processes become co-mingled with procedures under the collective agreement (as was the case for the Applicants) resulting in confusion as to the rights of individual employees to deal directly with their employer in resolving issues through processes outside of the collective agreement and the representational role of trade unions when the resolution of such matter affect the employment status of their members. In my opinion, these proceedings illuminate various legal questions of import to the broader labour relations community that it would be in the public interest for this Board to answer. For this reason, even if the particular issues in dispute between the parties are now moot, in my opinion, the circumstances in these proceedings are extraordinary and the strict application of the doctrine of mootness would prevent examination of important questions of significance to the broader labour relations community.

Conclusions:

[37] For the foregoing reasons, the preliminary motion of the Union is dismissed.

DATED at Regina, Saskatchewan, this 2nd day of November, 2015.

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson