UNIFOR, LOCAL 609, Applicant v. HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN, Respondent

LRB File No. 125-16; November 21, 2016

Chairperson, Kenneth G. Love, Q.C.; Members: Laura Sommervill and Duane Siemens

For the Applicant: Larry Kowalchuk
For the Respondent: Kevin Wilson, Q.C. and Amy Gibson

Unfair Labour Practice – Union alleges that Employer committed unfair labour practice when it implemented changes to hours of work for employees after having introduced a bargaining proposal on the same topic which was subsequently withdrawn from bargaining. Section 6-62(1)(e).

Unfair Labour Practice – Board reviews evidence and finds that Union failed to satisfy onus of proof of an Unfair Labour Practice.

Unfair Labour Practice – Union alleges that Employer unilaterally changing terms and conditions of employment during the term of a collective agreement constitutes an Unfair Labour Practice. Section 6-62(1)(n).

Unfair Labour Practice – Board reviews statutory provision and determines that conditions precedent for operation of section not present.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: Unifor, Local 609 (the "Union") makes application to the Board alleging that Health Sciences Association of Saskatchewan ("HSAS") has committed an unfair labour practice contrary to section 6-62(1)(d) or 6-62(1)(n) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 (the "*SEA")* by changing the hours of work for some of its employees (Labour Relations Officers).

Facts:

[2] The Board heard considerable evidence and received numerous exhibits over two (2) days from three (3) witnesses for the Union and 2 witnesses for HSAS. The following facts underscore the basics of the dispute between the parties. Other testimony or fact which is relevant to the issue under discussion will be referenced as necessary in the analysis portion of this decision.

[3] HSAS is a trade union certified by this Board to bargain collectively on behalf of certain health care professionals working throughout the Province of Saskatchewan. The Union is certified to represent the employees of HSAS, including Labour Relations Officers, who work to assist members of HSAS in respect of issues arising from their employment with the various Health Regions in Saskatchewan.

[4] HSAS and the Union began negotiations towards a new collective bargaining agreement during 2013 and 2014. During that round of bargaining, the Employer, on September 25, 2013, HSAS proposed an amendment to Article 14 of the previous collective agreement as follows: (the proposed additional text is in bold text)

> ***Article 14***
>
> *2. Field Staff – Full Time Labour Relations Officers shall normally work one hundred and twelve and a half hours (112.5) in a three (3) week period,* ***exclusive of any overtime, weekend or evening hours worked.***

[5] HSAS and the Union had difficulty arranging for bargaining due to there also being ongoing negotiations during that time for a new collective bargaining agreement for HSAS members. HSAS and the Union finally agreed, in March of 2015, to withdraw all unresolved proposals, including the proposal outlined above, and conclude a collective agreement. That was done and the new collective agreement was signed on April 15, 2015 to be effective from January 1, 2013 to December 31, 2016.

[6] One of the changes approved during the negotiations for the new collective agreement was for a change to Article 14.4 of the collective agreement to provide that employees be paid on a bi-weekly basis. That provision, which was implemented in September, 2015 required that, *inter alia*, Labour Relations Officers (“LRO’s”) employed by

HSAS would be required to submit weekly time sheets for payroll purposes. Affected employees were advised of this new requirement.

[7] On September 23, 2015, Mark Jagoe, the Office Manager for HSAS, sent a memo to all staff, including the LRO's, with respect to this bi-weekly pay provision. In that memo, it noted that the first bi-weekly pay period would be October 31 – Nov. 13, 2015. It also noted that LRO's and Admin staff would be required to submit weekly timesheets commencing on November 6, 2015.

[8] Evidence was provided by witnesses for the Union to the effect that the LRO's viewed the requirement to submit weekly time sheets as an infringement on their practice of "taking back" time, that is, when they worked late, or on weekends or holidays, they had a practice of taking time off in lieu of that extended time so as to average their required working hours of one hundred and twelve and a half hours (112.5) hours in a three (3) week period.

[9] The Union filed a grievance on behalf of the LRO's, in relation to the filing of weekly time sheets, on December 17, 2015. That grievance is scheduled to be heard by an arbitrator in November, 2016.

[10] On April 29, 2016, the HSAS Executive Director sent a memo to all LRO's regarding their hours of work, which had an effective date of May 24, 2015. The complete memo is attached as Exhibit "A" to these Reasons. In part, the memo says:

> *It is understood that the duties of LRO's also require, on occasion, work, outside of core office hours. In recognition of the need to incur overtime, Article 15.4 of the collective agreement provides that LRO's will receive 15 paid days off per year (credited at the beginning of the year) as compensation for overtime worked.*
>
> *It is not acceptable for LRO's to bank overtime worked in a 3 week period at their own initiative to take time off in lieu during that 3 week period and at the same time still enjoy the benefits of Article 15.4 of the collective agreement.*

[11] On May 16, 2014, the HSAS Executive Director sent a memo to all LRO's also in regard to their hours of work. That memo was also to be effective on May 24, 2016. In that memo, the Executive Director specified core hours of work for each of the 5 LRO's. The memo also prescribed that lunch periods should be between 11 am and 2 pm daily and that those periods be staggered to ensure that someone was available to take calls from HSAS members. The memo also prescribed a process for the pre-authorization for working overtime hours.

[12] Following receipt of these memos, the Union brought this application.

Relevant statutory provisions:

[13] Relevant statutory provisions include the following:

> ***Interpretation of Part***
> ***6-1****(1) In this Part:*
>
> *. . .*
>
> *(e)* ***"collective bargaining"*** *means:*
>
> *(i) negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision;*
>
> *(ii) putting the terms of an agreement in writing if those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;*
>
> . . .
>
> ***Good faith bargaining***
> *6-7 Every union and employer shall, in good faith, engage in collective bargaining in the time and in the manner required pursuant to this Part or by an order of the board.*
>
> . . .
>
> ***6-62****(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
>
> ***. . .***
>
> *(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;*
>
> . . .
>
> *(n) before a first collective agreement is entered into or after the expiry of the term of a collective agreement, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in a bargaining unit without engaging in collective bargaining respecting the change with the union representing the employees in the bargaining unit;*

Union's arguments:

[14] The Union argued that HSAS had engaged in bad faith bargaining based upon the following facts:

a) That, during the bargaining between the parties in 2013 and 2014, the Employer attempted to negotiate a change to the hours of work and averaging of hours, and withdrew this proposal when the Union refused to accept it, for the purpose of achieving a collective agreement;

b) That the Employer, due to a previous grievance, was aware that any desire to implement such a policy would be of great concern to the Union and would significantly affect the bargaining unit;

c) That, as illustrated by the Collective Agreement of 2007 - 2009, compared to the Collective Agreement of 2010 - 2012 and 2013 - 2016, this policy was one of importance to the bargaining unit and any desire or intention to implement this policy would have a significant impact;

d) That, as outlined in the email sent out by Bridget Koop, the approach to averaging of hours was accepted and implemented in the workplace in 2013;

e) That, in July of 2015, the Employer attempted once again to implement this policy within the workplace, and backed down when informed by the Union that it was contrary to the collective agreement;

f) That, in December of 2015, the Employer once again attempted to apply this policy to an employee in the workplace, Jennifer Bowes, and was told that she would be grieving this action by the employer; and

g) That on April 29, 2016 and May 16, 2016, the Employer implemented the exact policy the Union had rejected during collective bargaining.

[15] The Union also argued that the actions of HSAS constituted a unilateral change in the terms and conditions of the LRO's employment contrary to section 6-62(1)(n) of the *SEA* based upon the following facts:

a) That the Employer conceded on the change to work hours and averaging of hours at the bargaining table;

b) That the work hours and averaging of hours have been performed in the same manner since 2010 and have been within the collective agreement since that time, as a result of a grievance filed in 2008;

c) That the work hours show the past practice within the workplace with them performed in the manner outlined in the collective agreement since the 2010 collective agreement was agreed upon;

d) That, as outlined in the email sent out by Bridget Koop, the approach to averaging of hours was accepted and implemented in the workplace in 2013;

e) That the Employer once again attempted to unilaterally change the work conditions in July of 2015 and again in December of 2015, before issuing the memos to unilaterally change the conditions of work in April and May, 2016; and

f) That nowhere within the New Member Orientation Handbook or the Labour Relations section of the Employer's website is there a mention of LRO's only being available during a daytime shift, or that LRO's are not available outside the normal hours of work. In the New Member Orientation Handbook, it specifically notes that the Employer's workplace does not have shop stewards, and that the LRO's are the only ones who handle grievances and resolve day-to-day workplace issues, which specifically can occur outside the regularly scheduled work hours.

Employer's arguments:

[16] HSAS argued that the Union bore the onus of proof with respect to its alleged unfair labour practices committed by HSAS.

[17] HSAS also argued that the unfair labour practice applications were barred by section 6-111(3) of the *SEA*, which provision requires that an unfair labour practice allegation must be filed within ninety (90) days of the "action or circumstances giving rise to the allegation". HSAS argued that any unfair labour practice arising out of the September 23, 2015 email from the Employer, is now barred.

[18] HSAS also argued that the Board was without jurisdiction to deal with the issues raised in the application as the matter was one that should be dealt with by an arbitrator pursuant to the collective agreement.

[19] HSAS also argued that there was no requirement for the Employer to engage in mid-term bargaining with respect to hours of work. It argued that the setting of hours of work fell within the authority of management.

[20] HSAS denied that it had bargained in bad faith insofar as it did not act in a manner which impeded discussion of matters under consideration at the bargaining table. It argued that the proposed changes to Article 14 reflected clarification language and was not a change in intent. Nor, it argued, did it fail to disclose any decision regarding hours of work since no decision had been made respecting that issue at the time of collective bargaining.

Analysis:

Preliminary Matters:

[21] At the beginning of the hearing, the Board asked the parties if there were any preliminary applications which the Board should consider. The parties identified none. However, the Board raised the issue of its jurisdiction, particularly in respect to whether or not this was a matter, which should be deferred to an arbitrator, since, at first blush, it seemed to arise out of the interpretation of the collective bargaining agreement.

[22] The Board heard argument from the parties in respect of the issue and then adjourned to consider the arguments advanced. After consideration, the Board agreed that it would proceed to hear the matter, but that the Board would only deal with the two (2) issues raised by the Union which were:

1. **Did HSAS fail to bargain in good faith?**

2. **Was there a unilateral change in the terms and conditions of employment of the LRO's contrary to section 6-62(1)(n) of the *SEA?***

The Board also made it clear that it would not become involved in the interpretation of the collective agreement.

[23] There was also an issue raised by the Union during final argument with respect to HSAS's argument that the application was out of time pursuant to section 6-111(3) of the *SEA*. The Union argued that this matter should also have been dealt with as a preliminary matter and that notice should have been provided to the Union regarding HSAS's position in respect thereto.

[24] We concur with the Union that HSAS should have raised this issue in a preliminary fashion and should have provided notice to the Union that it would be asserting section 6-111(3). However, the Union stopped short of requesting an adjournment to deal with the issue and addressed the issue.

[25] Similarly, HSAS took exception to the introduction of the Union's arguments under section 6-62(1)(n) of the *SEA* as there was nothing in the original application dealing with this argument. Nevertheless, HSAS responded to the issue through both evidence and argument.

[26] Procedurally, both of these issues are of concern. From a practice perspective, the Board has tried to emulate the Courts in moving away from "trial by ambush". In making this comment, we clearly do not direct it at the parties in this case, both of whom are very experienced counsel before this Board. Unfortunately, as well, the Board does not have the strict procedural rules utilized by the Courts. Rather, the Board attempts and is directed by section 6-112 of the *SEA* to ensure that its procedures do not get overly formalistic and that parties be free to appear before the Board and to have the "real question" in dispute between the parties heard.

[27] In order to have the "real question" determined, the Board must often exercise some flexibility with respect to both its forms and procedures. For these reasons, we will deal with each of the issues raised by the Union and HSAS.

Was the Application Out of Time under Section 6-111(3) of the *SEA?*

[28] The Board has recently confirmed its approach to section 6-111(3) of the *SEA* in its decision in United Steelworkers, Local 7656 v. Mosaic Potash Colonsay ULC[1]. That decision confirmed the Board's earlier decision in *Saskatchewan Polytechnic Faculty Association v. Saskatchewan Polytecnic*[2]. Those decisions relied upon the factors approved by the Board from the Alberta Labour Relations Board decision 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*[3].

[29] The factors annunciated in *Toppin* are:

> 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? [Toppin, supra, at 265-66, para. 30].*

[30] HSAS argued that testimony from the Union's witnesses all established that the genesis of this complaint was the memo from Mr. Jagoe on September 23, 2015. No alternative

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[1] LRB File No. 132-16 & 146-16, Decision dated November 16, 2016 (unreported)
[2] LRB File No. 229-15, 2016 CanLII 58881, 2016 CarswellSask 502 (SK LRB)
[3] [2006] Alta. L.R.B.R. 31, 123 C.L.R.B.R. 253

date was suggested by the Union as being the seminal date on which the Union knew, or ought to have known, of the action or circumstances giving rise to the application. This application was not brought to the Board until June 1, 2016, a period well in excess of the 90 day period provided for in section 6-111(3).

[31] In this case, HSAS has not waived the timeline provided for in section 6-111(3). Accordingly, the Board is required to consider the *Toppins* factors to determine if the Board should permit the application to proceed, notwithstanding its having been filed outside the timelines provided for.

[32] As pointed out by the Board in *United Steelworkers*, and as noted by the Ontario Court of Appeal in *Journal Publishing Co. of Ottawa v. Ottawa Newspaper Guild Local 205*[4], the purpose of this provision is to insure that disputes between parties in the labour relations context are dealt with expeditiously. In the words of the Ontario Court of Appeal in *Journal Publishing* is that "[the] overriding principle invariably applied is that labour relations delayed are labour relations defeated and denied". This is consistent with the first principle anunciated in *Toppins*.

[33] Once delay has been found, we are directed by *Toppins* that labour realtions prejudice must be presumed to exist. Furthermore, we are directed that unless excused, late complaints should be dismissed unless countervailing considerations exist. Those considerations include those listed above in 5(a) – (d).

[34] While the delay here is not extreme, it is more that double the time prescribed by section 6-111(3). As directed by *Topping*, the length of delay will require that the reasons and countervailing considerations must be stronger.

Is the Applicant a sophisticated or unsophisticated applicant?

[35] In this case, we have probably the most sophisticated applicant that might be under consideration. The Employer in this case is a trade union and the Union represents the employees of the Trade Union. Those employees, as LRO's must be taken to be both aware of section 6-111(3) and the effect of non-compliance therewith. The parties have a mature bargaining relationship. Furthermore, the Union filed a grievance in respect of the same matter

[4] [1977] O.J. No. 8.

well within the 90 day time period, that is, on December 17, 2015, just over a month from the time of the memo complained against.

Why did the delay Occur – Were there Extenuating or Aggravating Circumstances?

[36] No explanation was given for the delay in filing the application. There were, however, some extenuating or aggravating circumstances which related to the memos from the new executive director, Mr. Job with respect to establishment of hours of work. Nevertheless, when these memos were issued, the 90 day limitation period had already passed.

Has the Delay caused litigation prejudice?

[37] No prejudice was claimed by either side as a result of the delay.

The Importance of the Rights Claimed and the Strength of the Complaint?

[38] In cases where there is an even balance between the parties, *Toppin* directs that the Board also consider the importance of the rights asserted and the apparent strength of the complaint. In this case, the balance tips in favour of HSAS, and accordingly, it is unnecessary for us to consider these elements. However, we have also considered the Union's arguments and the legislation below, in the event we are found to have erred with respect to this preliminary point and have found that there is little strength in the Union's case.

[39] For these reasons, we are obliged by section 6-111(3) to dismiss the application as being untimely. However, in the event that we are found to have erred with respect to this determination, we have also provided the following reasons for which we would have dismissed the application even if it were found to have been timely.

Did HSAS fail to bargain in good faith?

[40] In its argument, the Union suggested that the jurisprudence of the Board supports a violation of the duty to bargain in good faith where:

1. There is any failure to bargain in good faith regarding any dispute or grievance as well as collective agreement negotiations;

2. A party has misrepresented the facts or their proposals to the other party;

3. The proposals advanced are indicative of a desire to subvert, frustrate or avoid the collective bargaining process;

4. There is a failure to disclose pertinent information to a union needed to adequately comprehend a proposal or employer response;

5. There is a failure to inform the union of decisions already made which will be implemented during the term of a proposed agreement and may have significant impact on [the] bargaining unit; and

6. There is a failure to answer honestly about whether employer will probably implement changes during term of a proposed agreement that may significantly impact on [the] bargaining unit.

We will deal with each of these in turn.

Failure to bargain in good faith regarding any dispute or grievance as well as collective agreement negotiations.

[41] There was no evidence to support this violation. The evidence was that all disputes or grievances arising out of the collective agreement were dealt with through the established grievance procedure. Evidence was lead by the Union of a proposed grievance in December of 2015 related to hours of work for one of the LRO's, Jennifer Bowes, but the evidence established that no grievance was ultimately filed. Nor was there evidence that HSAS failed to bargain towards the conclusion of a collective agreement. There was contradicted evidence on both sides which showed that any difficulties in negotiations was the result of ongoing negotiations with respect to the HSAS collective agreement for its members. Ultimately, it was suggested that both parties put their guns away and accept the agreement as it stood then as the final agreement. Both sides agreed to this and the collective agreement was signed off by the parties.

A party has misrepresented the facts or their proposals to the other party

[42] There was no evidence that any facts or proposals had been misrepresented by HSAS. The Board heard evidence from witnesses from both sides who were present at the negotiations for the new collective agreement. Those witnesses provided notes from the bargaining sessions. Undoubtedly there was a difference of opinion as to the meaning of the proposal in respect of Article 14, the Union thinking that it was designed to erode their current position and HSAS taking the view that it was merely a clarification of the current wording. What the words mean is not for this Board to determine. We will leave that to the arbitrator appointed under the collective agreement.

The proposals advanced are indicative of a desire to subvert, frustrate or avoid the collective bargaining process

[43] There was no evidence to support that the proposal regarding Article 14 was indicative of a desire to subvert, frustrate or avoid the collective bargaining process. The evidence was clear that the parties' desire to negotiate was frustrated only by the ongoing negotiations for a new agreement for the HSAS membership. Ultimately they resolved that issue as noted above.

There is a failure to disclose pertinent information to a union needed to adequately comprehend a proposal or employer response

There is a failure to inform the union of decisions already made which will be implemented during the term of a proposed agreement and may have significant impact on [the] bargaining unit*;*

There is a failure to answer honestly about whether employer will probably implement changes during term of a proposed agreement that may significantly impact on [the] bargaining unit

[44] These three (3) heads can conveniently be dealt with together since they all stem from the Union's argument that HSAS was not forthright and candid about its plans to unilaterally implement changes to the hours of work for the LRO's. With respect to their position, we disagree. No evidence was lead to support this hypothesis. In order to reach the conclusion suggested by the Union, we must engage in speculation or conjecture. The Union

argues that HSAS "laid in the weeds" so to speak with respect to its plans to implement changes to hours of work. The facts simply do not bear out this hypothesis.

[45] The first fact which appears to contradict the Union's position is that there were totally different executive directors in place during the negotiations and during the time the hours of work memos were issued. At the time of the negotiations, the executive director was Mr. Bill Craik. At the time of the memos, Mr. Dean Job held that position.

[46] There could have been some continuity in policy between the two (2) executive directors, however, we have no evidence to support any such plan on the part of Mr. Craik. Mr. Craik, though available, was not called to testify. We do not, however, draw any inference from the failure to call him as a witness since there was no evidence which he could have confirmed or denied by his testimony.

[47] As pointed out by HSAS in its argument, the onus of proof of the alleged unfair labour practice falls upon the Union to prove on a balance of probability. That it has failed to do. This aspect of the application is dismissed.

[48] Additionally, as pointed out by HSAS, there is no obligation on either party to enter into mid-term bargaining[5] with respect to what one party alleges is a change to a term or condition of employment. The process for resolution of disputes as set out in the collective agreement would apply to these situations.

Was there a unilateral change in the terms and conditions of employment of the LRO's contrary to section 6-62(1)(n) of the *SEA*?

[49] Section 6-62(1)(n) of the *SEA* contains conditions precedent for its availability. Changes to terms and conditions of employment are interdicted in two cases, neither of which is applicable here. The first is a situation where the parties are negotiating a first collective agreement. The second is where a collective agreement has expired.

[50] During the term of a collective agreement, disputes regarding issues such as hours of work are to be resolved through either the process provided for in the collective agreement, or, if no such process exists, in accordance with the provisions of the *SEA*. It is for an arbitrator to determine whether or not such a change is permissible under the terms of the

collective agreement. Accordingly, absent one of the two conditions precedent to the applicability of the subsection, the Board has no jurisdiction to deal with this issue.

[51] This aspect of the complaint is also dismissed.

[52] This is a unanimous decision of the Board. An appropriate order will accompany these reasons.

DATED at Regina, Saskatchewan, this **21st** day of **November, 2016.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

[5] See C.U.P.E., Local 600-3 v. Government of Saskatchewan (community living division) [2009] CanLII 49649 (SKLRB)