SASKATCHEWAN CROP INSURANCE CORPORATION, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent

LRB File No. 136-17; August 11, 2017

Chairperson, Kenneth G. Love, Q.C.; Members: John McCormick and Mike Wainwright

For the Applicant: Scott Wickenden
For the Respondent: Rick Engel, Q.C.

Summary Dismissal – Employer asks Board to summarily dismiss unfair labour practice application – Board determines material before it provides an arguable case.

Deferral to Grievance Process – Board asked to defer unfair labour practice application in favour of grievance process under collective agreement – Board reviews its jurisprudence respecting deferral – Board determines the matter should be heard by Board and declines to defer to the grievance process.

Practice and Procedure – Board reviews concerns respecting filing in multiple forums and with vague or incomplete applications – Board expresses concern in respect of process followed and level of detail provided in application – Board allows Union to amend its application to provide greater focus.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: The Saskatchewan Government and General Employees' Union ("SGEU") made application[1] to this Board alleging that the Saskatchewan Crop Insurance Corporation ("SCIC") committed an unfair labour practice contrary to section 6-62 of *The Saskatchewan Employment Act* (the "*SEA*"). In response to that application, the SCIC filed this application to have the unfair labour practice application summarily dismissed or, alternatively, that the Board defer hearing the application until the

[1] LRB File No. 112-17

conclusion of grievance proceedings which were underway arising, SCIC says, substantially from the same facts as the facts alleged in the unfair labour practice.

[2] There is an additional issue, not directed to the Board, arising from the facts in this case, which is a harassment claim against the grievor that is under investigation under SCIC's workplace harassment policy, which will be outlined more fully in the fact recitation below.

[3] Stemming from the incidents which are the subject of this application, SCIC alleges that SGEU was failing to bargain in good faith towards the conclusion of a collective agreement for the employees of SCIC. On July19, 2017, SCIC filed an unfair labour practice application[2] against SGEU alleging a failure to bargain collectively.

[4] For the reasons that follow, the Board denies SCIC's request for summary dismissal of the unfair labour practice. The Board, subject to our comments below, also denies SCIC's request for deferral of the unfair labour practice until the conclusion of the grievance process.

Facts:

[5] The materials filed with the Board on these applications disclose the following.

[6] An employee of SCIC, who is also a member of SGEU's bargaining committee and a shop steward for SGEU in the workplace, was disciplined by SCIC on May 24, 2017. There were two incidents related to the discipline of this employee.

[7] The first incident occurred on May 4, 2017 is acknowledged by SGEU and the employee to have been work related and therefore, the proper subject of discipline under the collective agreement.

[8] The second incident occurred on May 5, 2017 when the disciplined employee was contacted by another employee of SCIC in relation to rumors that the second employee had heard regarding layoffs in the workplace. The disciplined employee sent a "quick and firm" response to the second employee because she knew the rumor to be false.

[2] LRB File No. 147-17

[9] Later on May 5, 2017, a senior member of the SCIC's collective bargaining committee came to talk to the disciplined employee about bargaining issues. At that time, she mentioned that there was a rumor in the workplace concerning layoffs. The senior member of the SCIC bargaining committee acknowledged that he had heard similar rumors. In an Affidavit filed with the Board, the disciplined employee says that the senior member of SCIC's bargaining committee then said; "it started in part because employees do not hear from the SGEU bargaining committee". She deposed that this comment shocked her and that she took it as "meddling in SGEU internal affairs". She deposes as well, that she was concerned that the senior manager "may have been undermining SGEU's reputation in his private conversations with union members about the bargaining discussions". She deposes that she then contacted the employee who may have spoken to the senior member of SCIC's bargaining committee and quelled the layoff rumor. That employee, according to the discipline letter, felt that the disciplined employee was being either aggressive or intimidating in how she communicated in respect to quelling the layoff rumor.

[10] Overlaying these two fact scenarios, is a complaint against the disciplined employee and investigation regarding harassment in the workplace involving the disciplined employee. In another Affidavit filed with the Board, the deponent deposes that the investigation report concluded that there was not harassment of the disciplined employee in the discipline meeting on May 24, 2017.

The Legal Framework and Argument of the Parties:

[11] There was no disagreement between the parties as to the Board's jurisprudence and the principles to be applied to this matter. The parties, however, differed as to whether or not the two incidents were severable and how they should be treated, i.e.: by reference to the grievance process, or bifurcated and dealt with partially through the grievance process (the May 4th incident) and as an unfair labour practice application (as to the May 5th incident). SCIC favoured the first approach and argued for the Board to either dismiss the application under section 6-111(1)(p) or defer to the arbitration process under the Board's authority in section 6-111(1)(q). SGEU favoured the second approach. At the hearing, and in their written Brief, SGEU undertook to withdraw any reference to the May 5th incident in its grievance, if the Board determined to deal with that issue as an unfair labour practice.

Analysis:

Process and Procedural Issues:

[12] Issues related to the process and procedure utilized in this case where not specifically argued by the parties. Nevertheless, the Board wishes to comment on some aspects of the process and procedure adopted by the parties for the benefit of not only these parties, but for other members of the labour relations community.

[13] In some respects, this application is the result of parties taking a "shotgun" approach to their disputes. The Board appreciates that applications are often filed in haste to ensure that any time limits prescribed by the *SEA* or a collective agreement is met. Additionally, we recognize that parties must sometimes file grievances or applications before all of the relevant investigations have been completed and all of the facts discovered.

[14] The Board is often faced with situations where parties file a multitude of applications in various forums. Often in these cases, neither party is willing to concede any ground to ensure that their case does not get weakened. While this is, in part, the result of our adversarial system for adjudication of disputes, it would be helpful to the Board, and to other tribunals who may be impacted, to have the inquiry better focused and to have the parties better describe the discrete issues referred to the various tribunals where applications are made.

[15] Better care and precision can be taken in the drafting of both grievances and applications filed with this Board. Here, for example, SGEU conceded and undertook to withdraw a portion of its grievance insofar as the May 5th incident was concerned. In doing so, it was clearly making a choice between the forums which could potentially have jurisdiction over the matter in dispute and creating a separation of those issues, one to be decided by the Board and one potentially to be decided by an arbitrator. Those jurisdictional lines would be clear.

[16] SCIC, however, continued to treat the two incidents as a package and maintained that both issues should be dealt with through the grievance process, which resulted in SGEU having to maintain its position on an either/or jurisdictional issue, since if it withdrew one item, it would be faced with time limitations if it later had to refile, should either this Board or

the arbitrator decline jurisdiction or defer to the other's jurisdiction, as we are asked to do in this instance.

[17] Another aspect of this application and its underlying applications is the vagueness of the allegations referenced in the application and, in particular, the reference to the provisions of the *SEA* which the SGEU alleges were breached by SCIC. The application references merely section 6-62 of the *SEA*, which is the general provision dealing with unfair labour practice applications regarding employers. That section contains seven (7) subsections and numerous sub-sub-sections which contain specific unfair labour practices prohibited by the *SEA*. Some greater particularization should be expected.

[18] Additionally, the application before us lacks any request for any remedy to be imposed. SGEU acknowledged this at the hearing and noted that that deficiency had been noted by SCIC as well. In their written Brief, SGEU noted that it was seeking an order of the Board "both to vitiate the discipline arising out of union activity and to restore the integrity of the collective bargaining between the parties".

[19] This prayer for relief should, of course, have been contained in the application itself as should there have been a narrowing of the statutory provision which the SGEU alleges has been breached by SCIC.

[20] As noted above, and for the reasons which follow, we have determined not to defer the unfair labour practice application and to hear that application. Our Order in that respect, which will accompany these reasons will also provide that SGEU amend its application to narrow the issue to be determined to the issues arising out of the May 5th incident,, to narrow its focus on the provisions of the *SEA* which it alleges have been breached by SCIC, and to include within its application the nature of the remedy sought before this Board.

[21] Following the filing of that amended application, and confirmation of the withdrawal of that portion of the grievance dealing with the May 5th incident, SCIC shall be permitted 10 days to file an amended reply to that amended application.

Rationale for the Decision:

Summary Dismissal

[22] The Board recently reviewed and confirmed its jurisprudence respecting applications for summary dismissal in its decision in *Lyle Brady v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771 et al*[3]. This process was originally adopted by the Board in *International Brotherhood of Electrical Workers, Local 529 v. KBR Wabi Ltd.*[4] *[2013] CanLII 73114 (SKLRB), LRB File Nos. 188-12, 191-12 - 193-12, & 198-12 – 201-12*..

[23] In *KBR Wabi, supra*, the Board established the following test with respect to the exercise of its authority to summarily dismiss an application for lack of evidence or no arguable case. At paragraphs [79] & [80] the Board said:

> *[79] Taking all of this into consideration, we adopt the following as the test to be applied by the Board on the exercise of its authority under s. 18(p) of the Act.*
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> 1. *In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant proves everything alleged in his claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
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> 2. *In making its determination, the Board may consider only the application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim.*
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> *[80] However, the Soles case, supra, also provided for summary dismissal without an oral hearing pursuant to s. 18(q) of the Act. While we recognize that these two powers need not be exercised together, there are occasions when the Board may determine that a matter may be better dealt with through written submissions, without an oral hearing. This was the procedure contemplated by Soles.*

[24] In this case, there is little doubt that there is an arguable case made out by the materials filed with the Board. SCIC did not strenuously argue that case should be summarily dismissed. Rather, SCIC argued that the Board should defer to the grievance process in the collective bargaining agreement.

<u>Deferral to the Grievance Process</u>

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[3] LRB File No. 130-15 & 151-15, decision dated July 24, 2017 (not yet reported)
[4] [2013] CanLII 73114 (SKLRB), LRB File Nos. 188-12, 191-12 to 193-12 & 198-12 and 201-12.

[25] The Board's long standing jurisprudence regarding its discretion to defer pursuant to section 6-111(1)(l) of the *SEA* was most recently described by the Board in its decision in *Communications, Energy and Paperworkers Union of Canada, Local 911 v. ISM Information Systems Management Canada Corporation (ISM Canada)*[5]. In that decision, at paragraphs 14 – 24, the Board said:

> ***[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. 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.*
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> ***[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. 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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> ***[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. At paragraphs 90 – 92 of that decision, he says:*
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> > *[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.*

[5] [2013] CanLII 1940 (SKLRB)

> *[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. 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. 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**,** "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 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), 1998 CanLII 19440 (MB CA), 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;*
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> *(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 the Dispute the Same Dispute?

[26] This is the main issue in this dispute. SCIC argues that there is only one dispute, that is, a dispute arising out of the disciplining of an employee on May 24, 2017. This dispute

(i.e.: discipline imposed on an employee) is best dealt with using the grievance procedure and the Board should defer to this process. SGEU argues that there are two disputes, one arising out of the events on May 4, 2017, which it concedes is one that should be handled through the grievance procedures.

[27] SGEU argues that the events on May 5th are different and should be dealt with by the Board as they impact upon the fundamental principles enshrined in the *SEA* with respect to the bargaining relationship between the parties and what it alleges are attempts by SCIC to influence and control the internal processes of the union. Characterized in that way, the disputes are quite different.

[28] Based upon the arguments presented both orally and in writing, and on the materials filed we are of the opinion that the characterization espoused by SGEU is the proper characterization of the dispute. While there are underlying similarities insofar as both incidents are described in the disciplinary letter as being related to how the employee conducted herself in the course of communication with co-workers, there should be, we believe, a separation of the conduct related to communication related to collective bargaining matters insofar as the SCIC should not interfere with the means whereby the Union (or its officials) communicates with its members in respect to matters internal to the union.

[29] In making these comments, we do not adopt SGEU's view of the result or intention of the steps taken by SCIC, but rather wish to point out that there is a distinction in how that action should be viewed.

[30] Collective bargaining is one of the underlying objects of the *SEA* and its various provisions. The Board must be diligent to insure that its role in sponsoring and fostering collective bargaining is maintained. If, as alleged by SGEU, the discipline was an attempt to disrupt or influence the collective bargaining process, the Board cannot ignore such activity and defer its jurisdiction over such an important aspect of the labour relations scheme set out in the *SEA* to another forum.

Can the Grievance Process Resolve the Dispute?

[31] The Board's authority with respect to unfair labour practices is a unique jurisdiction granted to the Board to oversee the collective bargaining relationship between the

parties. This is not a jurisdiction that can be assumed or resolved through the grievance process. Assuming the matter eventually found its way to an arbitrator appointed under the collective agreement, that arbitrator would not have the authority granted to this Board to uphold and support the collective bargaining process. For this reason, the grievance process cannot resolve the dispute as framed by SGEU.

Can the Grievance Process Provide a Suitable Remedy?

[32] In short, the answer to this question is no. The grievance process, even if it proceeds to arbitration cannot supervise the collective bargaining relationship between the parties. An arbitrator's jurisdiction is limited to interpretation of the collective agreement and its provisions. He or she would not, acting as an arbitrator, be permitted to superintend the party's behavior in collective bargaining between the parties, nor supervise and maintain that relationship. An arbitrator could certainly look at the discipline to determine if it was warranted or not, or if it was in compliance with the collective agreement, but he/she would not be able to provide a suitable remedy to mend the relationship between the parties or to restore the balance of bargaining power as between them.

Decision:

[33] As noted above, we are of the opinion that the unfair labour practice, as alleged by SGEU, should not be summarily dismissed. Nor should the Board defer to the grievance procedure under the collective agreement to resolve the whole of the dispute. In reaching this conclusion, the Board has relied upon the statements made by SGEU in its written Brief that it will amend its grievance application to withdraw any reference to the events of May 5, 2017.

Board Order:

[34] The Board's Order will accompany these reasons as follows:

1. The application by SCIC for summary dismissal of LRB File No. 112-17 is denied.

2. The application by SCIC for deferral of LRB File No. 112-17 to the grievance process is denied.

3. SGEU shall be permitted pursuant to section 6-112(2) of the *SEA* to amend its application to narrow the issue to be determined to the issues arising out of the May 5, 2017 incident, to narrow its focus on the provisions of the *SEA* that it alleges have been breached by SCIC, and to include within its application, the nature of the remedy sought before this Board.

4. SCIC shall have (10) ten days in which to file an amended reply to SGEU's amended application.

5. SGEU shall forthwith amend its grievance filed under the collective agreement to remove any reference to events arising out of the incidents of May 5, 2017.

6. Upon the filing of the amended reply by SCIC, the file shall be referred by the Board's Registrar to the next following Motions Day for the scheduling of a settlement pre-hearing with the parties conducted by the Chairperson or Vice-chairperson of the Board.

[35] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this 11th day of August, 2017.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson