



ROB WESTFIELD, GARRY JUDD and DANNY SAWATSKY, Applicants v. THE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 8443, Respondent and SASKATOON PUBLIC BOARD OF EDUCATION, Respondent Employer

LRB File Nos. 144-16, 147-16 & 148-16 February 14, 2017

Chairperson, Kenneth G. Love, Q.C.; Chairperson (sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act*)

For the Applicants:	Self Represented
For the Respondent:	Juliana Saxberg
For the Respondent Employer	Kevin Wilson, Q.C.

Duty of Fair Representation – Employees apply to board alleging that Union improperly reconsidered decision to refer a grievance to arbitration. Application originally brought by employees under section 6-59 of *The Saskatchewan Employment Act*. Board hears evidence and determines that application should have been brought under section 6-58 of *The Saskatchewan Employment Act*.

Duty of Fair Representation – After hearing evidence, Board determines that application brought by employees under section 6-59 of *The Saskatchewan Employment Act* should be dismissed as disclosing no arguable case presented or question raised by the Employee's evidence.

Amendment of Application – Board allows employees to amend their application pursuant to section 6-112 of *The Saskatchewan Employment Act* to ensure that the real issue in dispute between the parties is heard.

Natural Justice – Board reviews actions of Union executive in reviewing and reversing decision to refer grievance to arbitration – Board finds that Union executive breached the rules of natural justice in reviewing the application without notice to affected employees. Board also notes that Union Bylaws, at the time in question, did not provide for any avenue for appeal of the decision to reconsider the referral to arbitration.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** This is an application by current and former employees (the “Employees”) of the Saskatoon Public Board of Education (the “Employer”). These employees were and are represented by the Canadian Union of Public Employees, Local 8443 (“CUPE”).

[2] The application was launched by the Employees under section 6-59 of *The Saskatchewan Employment Act* (the “SEA”). However, after hearing evidence from the employees, the Board was of the opinion that there was no arguable case presented or question raised by the Employee’s evidence under that provision. The application under section 6-59 was summarily dismissed, but the Board permitted the Employees, pursuant to section 6-112 of the SEA, to amend their application to allege a breach by the Union of section 6-58 of the SEA. That amendment was in relation to allegations that the Union did not follow proper procedures when it rescinded a motion to have a dispute between the Union (on behalf of the Employees and other employees of the Employer) and the Employer, referred to arbitration.

Facts:

[3] Rob Westfield was formerly the chief shop steward for the Union and was a part of the bargaining committee which was bargaining with the Employer for a new collective agreement in 2014. The Employer and the Union reached a tentative agreement regarding the new collective agreement for the period September 1, 2013 to August 31, 2016.

[4] When the Union was proofreading the new collective agreement, Rob Westfield noted that there appeared to be an error in how the wage calculations were done for a group of employees (known as the 12 month or annual salary employees) versus a group of other employees who were compensated based on different annual hour calculations. Mr. Westfield testified that he brought this calculation error to the attention of the bargaining committee, but the committee advised against making it an issue in bargaining because a tentative agreement had been reached and that the Union was concerned about an unfair labour practice allegation being made if they refused to sign the agreement. The Union did not raise the issue during the

ratification and execution of the collective agreement, but did take the matter to a Labour Management Committee meeting with the Employer.

[5] After the collective agreement was signed, and following the referral of the issue to the Labour Management Committee, Mr. Westfield pursued that matter with the Union executive in his capacity as the Chief Shop Steward by bringing forward a grievance which was filed by the Union on the issue.

[6] The grievance went through the stepped process set out in the collective agreement, but was denied by the Employer at each stage. At the Union executive meeting held on January 27, 2016, the executive passed a Motion that the grievance be referred to arbitration. The minutes contain this reference:

Chief Shop Steward – Rob Westfield

Spoke on 12 month grievance – would like to take to arbitration. He would have the board go back 5 years for back payment. Merv has looked at Rob's figures. Scott moved, Ray seconded we go forward with arbitration. Carried.

[7] Mr. Westfield, shortly after this executive meeting, resigned as the Chief Shop Steward for the Union for personal reasons. The referral of the grievance to arbitration began and the Employer was advised of the impending arbitration. In that respect, the Minutes of the Union executive's February meeting contain under the heading **Unfinished Business**:

12 month arbitration – Jamie Valentine and Dave have been communicating by email They both agreed to a one person arbitrator. Trent mentioned that Rob had done a lot of work with the numbers but it is stated in our current contract how they figure out the pay/salaries. It is going to be very difficult to win unless in our bargaining notes we find something to collaborate that they would not talk to us on this matter.

[8] Little progress was occurring with respect to the arbitration. Again at the March executive meeting, the Minutes report with respect to the arbitration and grievance; "*Janice is looking into this. Will be talking to CUPE Lawyer and notes.*"

[9] A general membership meeting was held on May 7, 2016 at which time, the then President of the Union, Dave Spence, reported as follows with respect to the grievance:

Met with Janice Janzen to look at the 12-month stage three, she will investigate further. Informal talk with Renee, she said no problem keeping in abeyance, but need to confirm with Jaime V.

[10] The Minutes of the May 25, 2016 executive meeting then report:

- *12 month arbitration – Janice Lawyer is willing to meet to answer questions. The CUPE lawyer suggested we don't go forward with arbitration. They feel it does not have a reasonable chance of success. Moved by Donna, seconded by Scott that we accept the CUPE lawyer's opinion on the 12 month arbitration. Carried Moved by Ray, seconded by Dave we consult CUPE lawyer and get a written summary on the 12 month arbitration decision. carried*

[11] The evidence heard established that during the period from the time that arbitration reference was approved in January, there had been some changes and temporary assignment of CUPE staff reps to this particular bargaining unit. The evidence also established that the national office of CUPE was responsible to provide legal advice to numerous Locals which operated independently under local Bylaws. When one of the various staff reps was made aware of the grievance, she was aware that another Local of CUPE had attempted to take a similar grievance forward to arbitration and had been unsuccessful. Contact was made with CUPE national office and legal counsel there provided a legal opinion with respect to the likelihood of success of the grievance. It was not optimistic. That was what was reported to the Union executive in the May 25, 2016 meeting.

[12] On June 15, 2016, the Union withdrew their request for arbitration and withdrew the grievance.

Relevant statutory provision:

[13] Relevant statutory provisions are as follows:

Internal union affairs

6-58(1) *Every employee who is a member of a union has a right to the application of the principles of natural justice with respect to all disputes between the employee and the union that is his or her bargaining agent relating to:*

- (a) matters in the constitution of the union;*
- (b) the employee's membership in the union; or*
- (c) the employee's discipline by the union.*

(2) *A union shall not expel, suspend or impose a penalty on a member or refuse membership in the union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the union if:*

(a) *in doing so the union acts in a discriminatory manner; or*

(b) *the grounds the union proposes to act on are that the member or person has refused or failed to participate in activity prohibited by this Act.*

Analysis:

[14] The principle arguments made by the Applicants were that the Union did not follow proper procedure in reconsidering and reversing the January 27, 2016 motion to move the grievance to arbitration. They also argued that in doing so, the Union failed to utilize proper parliamentary procedure as specified in the Union's Bylaws which is *Bourinot's Rules of Order*.

[15] However, there is a larger issue that must be considered, which is that section 6-58 provides that, union members have the "right to the application of the principles of natural justice with respect to all disputes between the employee and the union that is his or her bargaining agent..."

[16] The Board has recently provided some guidance with respect to the application of section 6-58. In *Jefferies v. Saskatchewan Government and General Workers Union*¹, the Board dealt with an issue concerning the interpretation of the text of a long term disability program administered by the Union for the benefit of its members. At paragraph 28, the Board quoted from the textbook, *Principles of Administrative Law*² to describe, in brief, what constitutes natural justice. At page 179, the authors say:

"Natural Justice" connotes the requirements that administrative tribunal, when reaching a decision, must do so with procedural fairness. If they err, the superior courts will step in to quash the decision by certiorari or prevent the error being made by prohibition. Such an error is jurisdictional in nature and renders the decision void.

[17] However, the Board also noted that "[T]he intuitiveness of the principles of natural justice are easy to understand, yet an all-encompassing definition of natural justice is difficult to achieve. Large legal tomes have been written to describe the aspects of what constitutes natural justice".

¹ [2016] CanLII 79629 (CanLII)

² Carswell, 2nd Ed., Jones and de Villars

Does s. 6-58 apply to the Decision of the Union Executive regarding the Grievance?

[18] The classification of various functions between judicial, quasi-judicial or administrative is often difficult. In this instance, the Union executive was not exercising a judicial function or a quasi-judicial one. Clearly, it was exercising an administrative function as the overseer of the grievance procedure on behalf of its members impacted by the grievance.

[19] As noted by the authors of *Principles of Administrative Law*, procedural fairness is the hallmark of natural justice. That is, that fairness throughout the process of decision making is essential to the validity of any decision reached. In this case, we are of the view that the union has failed to provide the Applicant's with natural justice. However, as noted by the Supreme Court in *Inuit Tapirsat of Canada v. Leger*³ at page 670, LeDain, J of the Federal Court of Appeal says:

Whether the procedural duty of fairness is to be regarded as something different from natural justice or merely an aspect of it, the majority opinion in the Nicholson case seems clearly to indicate that its application is not to depend on the distinction between judicial or quasi-judicial and administrative functions. Referring to the "emergence of a notion of fairness involving something less than the procedural protection of traditional natural justice", the Chief Justice said [at p. 681]:

What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question: see, generally, Mullan, "Fairness: The New Natural Justice", 25 Univ. of Tor. L.J. 28 (1975).

[20] Section 6-58 as enacted in the SEA provides for an expanded requirement for the application of the rules of natural justice to the actions of unions insofar as their members are concerned. However, the provision is applicable to disputes which arise in three areas. These are (1) matters in the Constitution of the union; (2) the employee's membership in the union; or (3) the employee's discipline by the union. For this Board to have jurisdiction to review such a decision is dependent upon the dispute falling within one of those three categories.

³ [1978] CanLII 2013 (FCA)

[21] A copy of the CUPE national Constitution and the local Bylaws for the Union were placed in evidence. A review of the national Constitution shows that it provides for the creation of self-governing local unions and the adoption of Bylaws to govern the local union as well as for oversight of those local unions. The Bylaws of the Union, prior to their amendment, provide for the governance of the Union. In those Bylaws, under section 2 - Objectives, item d) provides that one of the objectives of the Union is to “encourage the settlement by negotiation and mediation of all disputes between the members and their employer”.

[22] The Bylaws also provide for an executive position, the Vice-President Chief Shop Steward, which was the position formerly held by Mr. Westfield. The Bylaws also provide for regular membership meetings to be held during the first week of the month, September to June. Executive Board meetings are to occur prior to these regular membership meetings.

[23] The Bylaws are silent with respect to the right of members to attend and speak at these regularly held executive meetings. It appears from the evidence that rather than two meetings being held there was actually only an executive meeting held monthly with a membership meeting occurring in May of 2016. From this, a presumption can be drawn that due to the combined nature of the monthly meetings, general members would be permitted to attend and speak at these combined meetings.

[24] The Bylaws also specify the Rules of Order to be followed by the Local in the conduct of its business. An Appendix A is provided which outlines some rules to be followed as well as reference to *Bourinot's Rules of Order* to be consulted and applied. From this it is clear that procedural fairness in the conduct of the Union's business was to be provided under the terms of the bylaws. Those Bylaws are a product of the Union's Constitution. As such, section 6-58 requires that the Union apply the rules of natural justice in the conduct of its business and in the conduct of its meetings where those decisions impact upon members of the Union who may dispute that decision.

Did the Union apply the Rules of Natural Justice?

[25] We conclude that the Union has failed to provide natural justice to the employees. This conclusion derives from two sources. First is the fact that throughout the process of review of the January 27th decision to proceed to arbitration, the Applicants were not made aware of the ongoing reconsideration of the decision. Mr. Westfield was no longer a member of the executive following the January meeting and, as such, was not privy to

discussions that occurred subsequently to that meeting. As a member, he had access to the Minutes of meetings posted on the Union's website, but given the large number of employees potentially impacted by the grievance, the Union should have, in my opinion, have taken greater care to ensure that those persons impacted by the withdrawal of the grievance would be made aware of the possibility that the arbitration decision was being reconsidered.

[26] This conclusion comes from the basic rule of natural justice that persons affected by a decision have the right to be heard with respect to that decision. Not only do they have the right to be heard, they also have the right to be notified and attend the meeting at which such decisions are to be considered. In this case none of the Applicants, or for that matter, any of the other impacted employees were provided any notice that the decision to advance to arbitration was being reconsidered. Nor were they given notice to be present and speak to that decision.

[27] Similarly, when the grievance was withdrawn, it was withdrawn without any input from those affected. There was only the discussion at the May 25, 2016 executive meeting. The evidence which was heard established that the executive were of the view that the motion on May 25, 2016 was a rescission of the earlier Motion to proceed to arbitration. The executive, in rescinding the original referral to arbitration, relied upon legal advice which they had received to the effect that the grievance was not one that could be won at arbitration.

[28] The second concern the Board has relates to the lack of any procedure, other than recourse to this Board, for the decision of the executive not to proceed, to be challenged by any of those affected by that decision. Counsel at the hearing acknowledged this deficiency, and noted that the Union had recently amended its Bylaws to provide for an appeal provision in accordance with the CUPE national Constitution. That amendment was not in effect at the time this decision was made. Nor was it in effect at the time of the hearing, as it was still in the process of being reviewed by CUPE national for approval.

Decision:

[29] The Union failed to provide notice to the affected employees that the referral of the grievance to arbitration was being reconsidered. In doing so, it did not provide the affected individuals with an opportunity to be heard with respect to the reconsideration of the referral motion. Accordingly, we find the Union to be in breach of section 6-58 of the *SEA*.

[30] No submissions were made by the parties with respect to remedies. I will remain seized of this matter in order to hear submissions from the parties with respect to an appropriate remedy. That issue will be referred to this Board's next Motions Day for scheduling, being March 7, 2017.

DATED at Regina, Saskatchewan, this **14th** day of **February, 2017**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson