CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 1949, Applicant v LEGAL AID SASKATCHEWAN, Respondent

LRB File Nos. 164-18 & 165-18; September 21, 2018

Vice-Chairperson, Graeme G. Mitchell Q.C.; Members: John McCormick and Mike Wainwright Kagis

For the Applicant:	Crystal L. Norbeck
For the Respondent:	Kevin C. Wilson, QC and Amy Gibson

Interim Application – Unfair Labour Practice – Legal Aid commenced a restructuring of its Saskatchewan operations – Restructuring resulted in the lay-off of six administrative staff members – Legal Aid contracted out three bail court duty counsel positions to private bar lawyers in Saskatoon – Union asserts that these changes made without consultation or negotiations with the Union constituted unfair labour practices contrary to section 6-62(1) of *The Saskatchewan Employment Act*.

Interim Application – Arguable Case – Board reviews evidence and determines that the Union's arguments respecting the unilateral nature of the restructuring satisfy the "arguable case" threshold.

Interim Application – Balance of Convenience – Board finds the labour relations harm to Legal Aid outweighed the labour relations harm to the Union were interim relief granted – Board dismisses the Union's application for interim relief but orders that the hearing of the unfair labour practice application be expedited.

Interim Application – Practice and Procedure – Legal Aid objected to the admissibility of certain paragraphs in supporting affidavits filed on behalf of the Union – Board reviews the relevant legal requirements governing the admissibility of affidavits on applications for interim relief – Board strikes out some of those paragraphs.

REASONS FOR DECISION

OVERVIEW

[1] **Graeme G. Mitchell, Q.C., Vice-Chairperson:** The Canadian Union of Public Employees, Local 1949 [Union] brings this application for interim relief pursuant to section 6-104 of *The Saskatchewan Employment Act*, SS 2013, cS-15.1 [*SEA*] against Legal Aid Saskatchewan [Legal Aid]. The Union alleges that Legal Aid committed a number of unfair labour practices in the course of an ongoing restricting of its two (2) offices in Saskatoon, Saskatchewan. This Unfair Labour Practice application is designated as LRB File No. 164-18 was filed with this Board on August 21, 2018, the same day the Union filed this application for interim relief.

[2] The Board heard this application on an expedited basis on August 30, 2018. At the conclusion of the hearing, the Board reserved its decision.

[3] On August 31, 2018, the Board issued its Order dismissing the Union's interim application, and directed that the hearing of the Unfair Labour Practice application should proceed expeditiously. As well, in that Order the Board stated that written reasons explaining its decision would follow. These are those promised reasons.

FACTUAL BACKGROUND

[4] Legal Aid was created by *The Legal Aid Act*, SS 1983, c L-9.1 with the laudable public objective of providing legal services to persons involved in criminal or civil proceedings who are financially unable to underwrite these services themselves. Since its inception in 1974, it has been administered by the Saskatchewan Legal Aid Commission. Legal Aid currently has offices throughout the province including North Battleford, Melfort, La Ronge, Regina, Saskatoon, Meadow Lake, Moose Jaw, Prince Albert, Estevan, Swift Current and Yorkton.

[5] This Board certified the Union as the exclusive collective bargaining agent for most of Legal Aid's employees, including its lawyers, in 1984. At present, the bargaining unit is comprised of between 130 and 150 members. The current collective bargaining agreement

expired on September 30, 2016. The parties are now in the process of negotiating a new agreement, and by all accounts those negotiations are not proceeding with dispatch.

[6] Earlier this year, Legal Aid determined it was necessary to restructure its operations in the City of Saskatoon so as to provide better and more efficient service to its clientele in accordance with its statutory mandate. For purposes of this application, this restructuring included:

- Merging the physical offices of the Saskatoon Criminal and the Saskatoon Family Legal Aid Are Offices effective October 2018;
- Laying off six administrative staff positions in the Saskatoon offices;
- Contracting out most duty counsel work in Saskatoon to private lawyers, beginning September 4, 2018;
- Creating one in-scope duty counsel position as well as eliminating the out-of-scope Family Office legal director position;
- Creating a new part-time administrative assistant position at the Saskatoon Rural Office;
- Transferring the Eligibility Officer positions in Saskatoon to work out of the Regina Office, and
- Creating a telephone application centre.

[7] To support its application, the Union filed the following three (3) affidavits: (1) Affidavit of Wanda Towstego dated August 21, 2018 [Towstego Affidavit]; (2) Affidavit of Ann Iwanchuk dated August 21, 2018 [Iwanchuk Affidavit], and Affidavit of Leah Steuart dated August 21, 2018 [Steuart Affidavit]. At the commencement of the August 30th hearing, a Supplementary Affidavit of Ann Iwanchuk dated August 30, 2018 [Iwanchuk Supplementary Affidavit] was admitted into evidence on consent.

[8] When Legal Aid filed its formal Reply to the Interim Application on August 29, 2018, it also delivered two (2) supporting affidavits: (1) Affidavit of Karl Austman dated August 28, 2018 [Austman Affidavit], and (2) Affidavit of Kyla Shea dated August 28, 2018 [Shea Affidavit].

[9] In its formal application at paragraph 4(d), the Union asserts the following violations of the *SEA*:

> *i. [Legal Aid] has breached the statutory freeze in section 6-62(1)(n) by changing the conditions of employment during active bargaining. First, the employer has provided layoff notices to six administrative support staff because of its decision during bargaining to merge its Saskatoon Family and Criminal Law offices. Second, [Legal Aid] has decided not to fill three vacant duty counsel positions and instead contracting out this in-scope legal work to private lawyers.*
>
> *ii. [Legal Aid] has similarly breached it duties under sections 6-62(1)(d) and 6-7 to bargain in good faith with the Union by failing to negotiate in good faith or at all regarding the above issues.*
>
> *iii. Finally, [Legal Aid] has breached section 6-62(1)(g) by issuing layoff notices to employees because of their support for the union and because of the exercise of rights granted to them under the SEA.*

[10] The Union also requested from this Board an array of remedial orders. This menu set out at paragraph 3 of the Union's formal application includes:

> *i. An interim order prohibiting [Legal Aid] from laying off six support staff members of the Union;*
>
> *ii. An interim order prohibiting [Legal Aid] from contracting out duty counsel work;*
>
> *iii. An interim order prohibiting [Legal Aid] from making any other changes to the conditions of employment that have not been negotiated with the Union;*
>
> *iv. An interim order that [Legal Aid] negotiate with the Union in a good faith manner, including regarding the proposed layoff of employees and contracting out of work;*
>
> *v. An interim order that [Legal Aid] provide the Union with full disclosure of its rationale for the proposed layoffs and contracting out of work, including financial and other information*
>
> *vi. An interim order requiring a copy of the Board's Order and Reasons for Decision to be posted in a conspicuous place in the workplace;*
>
> *vii. Such further and other relief as may be requested as this Board deems just and appropriate.*

[11] For its part, Legal Aid denies it breached the *SEA* in any way when carrying out its restructuring of the Saskatoon offices. Its' principal argument is that it followed the collective agreement "to the letter" which by virtue of section 6-39 of the *SEA* continues to operate until a

new collective agreement is achieved. In particular, it relies upon the management rights clause found at Article 2 of the collective agreement.

[12] A great volume of information was contained in the various affidavits filed on behalf of the parties. It is not necessary to rehearse, let alone summarize, all of it. However, so as to put our decision in context, a short summary of what the Board deems to be the relevant facts on this application is warranted.

[13] As already noted, the current collective agreement expired on September 30, 2016. Prior to that date, the Union served Legal Aid with a notice to bargain on or about June 28, 2016. To date, the parties have yet to achieve an agreement. Indeed, as attested to in the Towstego Affidavit, no agreement has been achieved on any substantive terms.

[14] On June 18, 2018, Legal Aid convened a meeting with the Union to inform its members that it had decided to proceed with the restructuring of its Saskatoon offices and service delivery in that centre. This meeting was an informational meeting only, and did not form part of the collective bargaining process.

[15] There is some dispute between the parties as to what was said by the representatives of Legal Aid at that meeting. Yet, it is accepted that Legal Aid advised the Union of its' restructuring plans for the first time. As well, Legal Aid advised that it would only fill one (1) of four (4) bail court duty counsel positions with a lawyer who is a member of the bargaining unit. The remaining three (3) positions would be filled on a contractual basis by members of the private bar who possessed the requisite criminal law expertise. These contracts were scheduled to come into effect on or about September 4, 2018.

[16] Subsequently, on June 27, 2018 in the course of a previously scheduled collective bargaining session, Legal Aid advised the Union for the first that this restructuring would entail the abolition of six (6) support staff positions, and those employees would be laid off effective September 4, 2018. The Union did not have prior knowledge of these layoffs. In addition, Legal Aid indicated it would not fill a currently vacant administrative assistant position in the Saskatoon Family Law Office.

[17] On July 5, 2018 representatives of Legal Aid met with the Union's Executive Committee for a further discussion respecting the restructuring. At that meeting, the Union proposed that Legal Aid hire part-time lawyers rather than contract out three (3) duty counsel

positions. After some consideration, Legal Aid's representatives rejected this proposal maintaining Legal Aid needed flexibility in how it managed its operations.

[18] Legal Aid does not dispute this chronology of events. However, it indicated that of the six (6) employees whose positions were being abolished, five (5) had already obtained alternate positions with Legal Aid, albeit positions that offer these individuals only short-term employment. The sixth employee decided not to accept an offer of alternate employment because it necessitated a move to Regina for both her and her family.

[19] Legal Aid asserts that all of the layoffs were conduct in accordance with the collective agreement. It notes that the Union has not grieved any of these layoffs. In addition, Legal Aid points out that once the affected employees apply for other positions or exercise their bumping rights, no more than three (3) employees will actually be laid off.

[20] Prior to explaining why this Board determined that an Order for interim relief was not warranted in this matter, it is necessary to address a preliminary objection raised by Legal Aid's counsel.

PRELIMINARY OBJECTION – UNION'S AFFIDAVITS ARE IMPROPER

[21] Legal Aid asserts that certain paragraphs found in the affidavits filed by the Union are improper and should be struck. Legal Aid does not ask this Board to strike those affidavits in their entirety, only those paragraphs that are found to offend the procedural requirements governing affidavits submitted on applications for interim relief.

A. Relevant Legal Principles

[22] Recently, in *UNIFOR, Local 649 v Health Sciences Association of Saskatchewan*, 2016 CanLII 74279, 2016 CarswellSask 597, 281 CLRBR (2d) 83 (SK LRB) [*Health Sciences*], this Board helpfully summarized the governing principles respecting affidavit evidence submitted on interim applications. For purposes of this application, the following paragraphs from the Board's Reasons for Decision in that case are apposite:

> ***[12]*** *Since LutherCare Communities and the advent of the SEA the Board has promulgated The Saskatchewan Employment (Labour Relations Board) Regulations [the "Regulations"]. The Regulations are intended to provide greater*

clarity respecting the processes before this Board. They do not purport to supersede Practice Note No. 1 but rather elaborate on procedural pre-requisites for applications initiated under the SEA.

[13] *Section 15 of the Regulations relates specifically to applications for interim relief. This provision sets out the requirements that govern the Union's objections to Mr. Job's affidavit and for this reason the relevant subsections are reproduced below:*

> ***15*** *(1) An employer, other person or union that intends to obtain an interim order pursuant to clause 6-103(2)(d) of the Act shall file:*
>
> > *(a) an application in Form 12 (Application for Interim Relief) with the registrar;*
> > *(b) an affidavit of the applicant or other witness in which the applicant or witness identifies with reasonable particularity:*
> >
> > > *(i) the facts on which the alleged contraventions of the Act are based, including referring to the provision or provisions of the Act, if any, that are alleged to have been contravened;*
> > > *(ii) the party against whom the relief is requested; and*
> > > *(iii) any exigent circumstances associated with the application or the granting of the interim relief;*
> >
> > *(c) a draft of the order sought by the applicant; and*
> > *(d) any other materials that the applicant considers necessary for the purposes of the application.*
>
> *(2) Subject to subsection (3), every affidavit filed pursuant to clause (1)(b) must be confined to those facts that the applicant or witness is able of the applicant's or the witness's own knowledge to prove.*
>
> *(3) If the board is satisfied that it is appropriate to do so because of special circumstances, the board may admit an affidavit that is sworn or affirmed on the basis of information known to the person swearing or affirming the affidavit and that person's belief.*
>
> *(4) If an affidavit is sworn or affirmed on the basis of information and belief in accordance with subsection (3), the source of the information must be disclosed in the affidavit.*

[14] *Section 15 incorporates much of what is set out in Practice Directive No. 1 and it also elaborates on other aspects of these applications, most notably the Board's ability in "special circumstances" to admit affidavits or portions of affidavits based on information and belief and not personal knowledge. See: subsection 15(3).*

[15] *This Board has already ruled that case-law interpreting section 5(3) of The Trade Union Act [RSS 1978, c T-17 [the "TUA"]] remains relevant when*

deciding applications for interim relief under subsection 6- 103(e)(d) of the SEA. See especially: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Aaron's Furniture, and Amalgamated Transit Union, Local 615 v Saskatoon (City). The Board explained in Amalgamated Transit Union, Local 651 as follows:

> *In our opinion, the legislative purpose and the policy restrictions associated with the exercise of the discretion set forth in s. 6-103(2)(d) are the same as that which was articulated by this Board in Saskatchewan Government and General Employees' Union v The Government of Saskatchewan. Simply put, the Board's authority to grant interim relief, the factors we take into consideration on interim applications, and the text employed in exercising our discretion have remained essentially unchanged following the repeal of The Trade Union Act and the proclamation of The Saskatchewan Employment Act.*

[16] *Simply stated, prior authorities respecting all aspects of applications for interim relief decided under the TUA remain good law unless they have been overtaken by more recent legislative changes or new developments in the Board's jurisprudence interpreting and applying the SEA.*

[17] *From these authorities, the following principles are applicable to the Union's objection. First, affidavits filed in support of an application for interim relief must be based on information within the personal knowledge of the affiant. This requirement has long been recognized by the Board in its' prior decisions and is now explicitly mandated by subsection 15(2) of the Regulations.*

[18] *Second, subsection 15(3) of the Regulations contemplates that an affidavit which is sworn on information and belief, and not personal knowledge, may yet be admitted if it is demonstrated that "special circumstances" exist for its admission. The Board has not considered what might qualify as "special circumstances" for purposes of this provision. No argument was advanced before us on the point so we decline to say anything more about it. Suffice it to say this provision appears to add a nuance to applications for interim relief which had not existed previously.*

[19] *Third, the Board will review an affidavit which contains statements that are not, or cannot be, based on personal knowledge of the affiant to assess whether the affidavit can stand with the offending portions excised or whether the affidavit must be struck in its entirety. In Grain Services Union (ILWU-Canada) v Startek Canada Services Ltd., for example, the Board critically reviewed the supporting affidavit which contained numerous paragraphs based on hearsay or information and belief without identifying the basis for the statement. Ultimately, the Board concluded that "the impugned portions of the affidavit and application document are too extensive to selectively excise and yet support the interim application". As a consequence, the application failed because there was no other evidence that the Applicant could rely upon to support its request for interim relief.*

[20] *Contrastingly, in United Food and Commercial Workers, Local No. 1400 v WalMart Canada Corp., the Board critically assessed the supporting affidavit of the Employer's Reply. The Board concluded that three paragraphs contained information outside the personal knowledge of the affiant and, accordingly, must be struck. However, the Board went on to admit the balance of the affidavit into evidence. (Citations omitted.)*

B. Impugned Paragraphs in Affidavits Filed by the Union

[23] Legal Aid impugns certain paragraphs found in two (2) of the affidavits filed on behalf of the Union: (1) the Towestego Affidavit, and (2) the Iwanchuk Affidavit.

[24] The following charts summarize Legal Aid's objections to the impugned paragraphs and the Board's conclusions respecting the admissibility of those paragraphs.

TOWSTEGO AFFIDAVIT

PARAGRAPH	IMPUGNED STATEMENTS	BOARD'S DECISION
Paragraph 12	In the second sentence of this paragraph, the affiant states that Legal Aid told some staff that their job descriptions would be revised but those revisions had not been announced as of the date the affidavit was sworn.	This assertion is not based on first-hand knowledge nor is any independent source for it referenced in the affidavit. It must be struck from the paragraph. The remainder of this paragraph is not challenged.
Paragraph 18	This paragraph asserts that the Legal Aid provided information to the Union which was "misleading or inaccurate".	This assertion lacks specificity and does not appear to be based on first-hand knowledge. Rather, it represents the Union's opinion of the sufficiency of the information provided to the it by Legal Aid. The reference to "misleading or inaccurate" should be struck from this paragraph. The remainder of the paragraph is admissible.
Paragraph 22	This paragraph asserts that Legal Aid's refusal to resile from the proposed restructuring has "sent a chill over the entire union membership", and engendered "a defeatist attitude towards the role of the Union in negotiating the terms and conditions of employment of the members".	This paragraph represents the opinion of the affiant respecting the effect the restructuring has had on the Union memberships' morale. As she is a Union member as well as a member of the Union's Executive, she has had first-hand experience with the aftermath of those changes and its' effect on the membership. Although these statements offer the affiant's opinion, they are based on her personal experience, and for that reason are admissible.
Paragraph 29	This paragraph contains a number of assertions. First, the affiant states that the staff at Saskatoon's Legal Aid office performs important work. Second, the restructuring will be harmful to the functioning of that office due to a lack of adequate resources. Third, the affiant states that Legal Aid did "not adequately canvass[] private lawyers to determine if there is capacity to take on this significant volume of work that is now to be contracted out…"	The first two (2) statements represent the affiant's views as a Union member respecting the effect the restructuring is having on the workings of the Saskatoon operations. These assertions represent her views based upon her experience in that office. As a result, the first three (3) sentences of this paragraph are admissible. The last sentence should be struck as there is no basis offered for this assertion.

Paragraph 31	This paragraph attests to how the lay-off will jeopardize the immigration status of an unidentified Union member.	Nothing in this paragraph indicates any personal knowledge possessed by the affiant. If the Union deemed this information worthy of inclusion as part of its case on this application, it would have been preferable for it to file an affidavit from the unidentified member. Accordingly, this paragraph should be struck in its entirety.

IWANCHUK AFFIDAVIT

PARAGRAPH	IMPUGNED STATEMENTS	BOARD'S DECISION
Paragraph 8	The second and third sentences assert that the Justice Minister told the Union that in March 2018, Legal Aid had proposed shutting down its offices in Saskatoon but he prevented that from happening.	The affiant is the Union's National Representative in Saskatoon. This evidence set out in these sentences appears to be hearsay. The affiant does not attest that she was present when the Justice Minister made these comments. As a consequence, these sentences should be struck from this paragraph. The balance of this paragraph is admissible.
Paragraph 11	In the second sentence of this paragraph, the affiant states that Legal Aid told some staff that their job descriptions would be revised but those revisions had not been announced as of the date the affidavit was sworn.	This sentence is identical to the objection raised by Legal Aid to paragraph 12 of the Towstego Affidavit. It was struck from that affidavit. The same reasoning applies here. This sentence will be struck but the balance of paragraph 11 is admissible.
Paragraph 21	This paragraph, in part, asserts that Legal Aid's refusal to resile from the proposed restructuring has "sent a chill over the entire union membership", and engendered "a defeatist attitude towards the role of the Union in negotiating the terms and conditions of employment of the members".	This paragraph is challenged on the same basis as paragraph 22 of the Towstego Affidavit. The same reasoning applies here. This paragraph is admissible.
Paragraph 22	This paragraph attests to Legal Aid displaying a "blatant disregard for the role of the Union" in representing its members. The affiant goes on to assert that Legal Aid's actions "are highly detrimental to the relationship with the Union".	This paragraph contains no factual assertions based on personal knowledge. Rather, it sets out the affiant's opinion respecting Legal Aid's conduct and actions. It should, therefore be struck.
Paragraph 28	This paragraph contains a number of assertions. First, the affiant states that the staff at Saskatoon's Legal Aid office performs important work. Second, the restructuring will be harmful to the functioning of that office due to a lack of adequate resources. Third, the affiant states that Legal Aid did "not adequately canvass[] private lawyers to determine if there is capacity to take on this significant volume of work that is now to be contracted out…"	This paragraph is essentially identical same as paragraph 29 of the Towstego Affidavit. However, unlike the affiant of the Towstego Affidavit, this affiant does not work at the Legal Aid offices in Saskatoon. As a result, the statements contained in this paragraph are not based on personal or first-hand knowledge. As a result, this paragraph should be struck out in its entirety.

Paragraph 30	This paragraph attests to how the lay-off will jeopardize the immigration status of an unidentified Union member.	This paragraph is identical to paragraph 31 of the Towstego Affidavit. As a result, it should be struck out in its entirety for the same reasons.
Paragraph 32	This paragraph expresses the affiant's concerns about the effect Legal Aid's actions may be having on the memberships confidence in the Union. It contends that this Board must act to prevent Legal Aid from by-passing the Union and making unilateral changes to the conditions of employment of its members.	This paragraph is not based on personal knowledge. Rather, it is an expression of opinion and editorial comment. As a result, it should be struck out in its entirety.
Paragraph 33	In this paragraph, the affiant asserts that Legal Aid has not provided to the union much information respecting the rationale for this restructuring.	The affiant is the Union's National Representative in Saskatoon. In that capacity she would have knowledge about what information Legal Aid provided to the Union respecting the restructuring. The first two (2) sentences in this paragraph are admissible. However, the last sentence should be struck out as it represents only the affiant's opinion and is not based on personal knowledge.

RELEVANT STATUTORY PROVISIONS

[25] The provisions of the *SEA* most relevant on this application read as follows:

> ***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;*
>
> *. . . . .*
>
> *(g) to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat of termination or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to his Part;*

. . . . .

> *(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[.]*

6-103*(1)* ***Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.***

(2) Without limiting the generality of subsection (1), the board may do all or any of the following:

. . . . .

> *(d) make an interim order or decision pending the making of a final order or decision.*

APPLICATION FOR INTERIM RELIEF

A. Relevant Legal Principles

[26] This Board has often enunciated the relevant legal test in applications for interim relief. In its' Brief of Law and Argument, the Union invoked the following paragraph from this Board's decision in *International Brotherhood of Electrical Workers, Local 2038 v AECOM Production Services Ltd.*, 2017 CanLII 72970 (SK LRB):

> ***[8]*** *An oft-quoted and helpful summary of the relevant legal principles relating to applications for interim relief is found in Saskatchewan Government and General Employee's Union v The Government of Saskatchewan [2010 CanLII 81339 (SK LRB)]. There the Board stated:*
>
> > ***[30]*** *Interim application are utilized in exigent circumstances where intervention by the Board is thought to be necessary to prevent harm from occurring before an application pending before the Board can be heard. Because of time constraints, interim applications are typically determined on the basis of evidence filed by way of certified declarations and sworn affidavits without the benefit of oral evidence or cross-examination. As such, the Board is not in a position to make determinations based on disputed facts; nor is the Board able to assess the credibility of witnesses or weigh conflicting evidence. Because of these and other limitations inherent in the kind of expedited procedures used to consider interim applications, the Board utilizes a two-part test to guide in its analysis: (1) whether the main application raises an arguable case of a potential violation under the Act; and (2) whether the balance of convenience favours the granting of interim injunctive relief pending a hearing on the merits of the main application interim orders…..*

> ***[31]*** *In the first part of the test, the Board is called upon to give consideration to the merits of the main application but, because of the nature of an interim application, we do not place too fine a distinction on the relative strengths or weaknesses of the application's case. Rather, the Board seeks only to assure itself that the main application raises, at least, an "arguable case"….*
>
> ***[32]*** *The second part of the test – balance of convenience – is an adaptation of the civil irreparable harm criteria to the labour relations arena…In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy. (Emphasis added, citations omitted.)*

[27] Since the advent of the *SEA*, this Board has stated on many occasions that the legal principles respecting interim relief applications crafted and applied under *The Trade Union Act* remain relevant. This is because "there is no difference between the authority granted to the Board to grant interim relief which was found in section 5.3 of *The Trade Union Act* and the authority provided in section 6-103(2)(d) of the *SEA*." See: *SEIU-West v Variety Place Association Inc.*, 2017 CanLII 43922 (SK LRB), at paragraph 31.

B. Onus

[28] In applications such as this one, the onus rests upon an applicant. See: *Health Sciences*, *supra*, at paragraph 34. As this Board's power to grant interim relief pursuant to clause 6-103(2)(d) is discretionary, all an applicant must demonstrate is that "there is a fair and reasonable question to be decided on the merits" following a full hearing. See: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Macdonalds Consolidated*, [1991] 2nd Quarter Sask. Labour Rep. 45, at 46. Admittedly, this is not a particularly onerous burden; however, it requires more than simple allegations. This Board in *Saskatchewan Government and General Employee's Union v The Government of Saskatchewan*, 2010 CanLII 81339 stated at paragraph 31 that the Board needs to be persuaded "the main application reasonably demonstrates more than a remote or tenuous possibility" of a breach of the *SEA* exists.

C. Has the Union Demonstrated an Arguable Case?

[29] This aspect of the inquiry requires the Board to assess whether the Union's Unfair Labour Practice Application brought pursuant to section 6-62(1) of the *SEA*, discloses an arguable case. The Board has often stated that this is not a rigorous standard. An applicant

"need not demonstrate a probably [*sic*] violation or contravention of the *Act*, as long as the main application reasonably demonstrates more than a remote or tenuous possibility". See: *SGEU*, *supra*, at paragraph 31. When making that assessment this Board is not to "place too fine a distinction on the relative strength or weakness" of the Union's case. See: *SGEU*, *ibid*.

[30] The Union advances three (3) separate bases for its Unfair Labour Practice Application. The Board will deal with each of them in turn.

[31] First, the Union asserts that Legal Aid violated the statutory freeze prohibition found in clause 6-62(1)(n) of the *SEA*. Counsel for Legal Aid contends this argument is a non-starter as this Board's jurisprudence is clear: the statutory freeze only applies between the time the Board issues a certification order and a first collective agreement is achieved. That, clearly, is not this case.

[32] With all due respect to counsel for Legal Aid, this Board's jurisprudence is not that categorical. In *Canadian Union of Public Employees, Local 1486 v The Students' Union of the University of Regina*, 2017 CanLII 44004, 302 CLRBR(2d) 53 (SK LRB), to cite but one (1) example, this Board canvassed its earlier jurisprudence, and observed the following about clause 6-62(1)(n), at paragraph 71:

> *[71] The first thing to observe is that unlike the general opening language in section 11(1)(m), i.e. "where no collective bargaining agreement is in force", the opening language…under subsection 6-62(1)(n) is more specific. It refers to situations where a union has been certified but a first collective agreement has not been achieved under section 6-24, and also to situations where the term of a collective agreement has expired but a renewal of the collective agreement under subsection 6-26 has not been concluded. This clarifies that under the SEA the statutory freeze operates in circumstances other than during the collective bargaining period of a first collective agreement.*

[33] This commentary from the Board's decision *Students Union of the University of Regina*, *supra*, supports the view that the Union has presented an arguable case that the statutory freeze may operate in the circumstances of this case. That is all it needs to do on an application for interim relief. It does not follow that the interpretation the Union urges this this Board to give to clause 6-62(1)(n) will ultimately prevail; however, it is not an unreasonable position for the Union to advance at this early stage of the proceeding.

[34] Second, the Union asserts that Legal Aid has failed in its obligation to bargain in good faith the changes in the terms and conditions of its' member's employment occasioned by Legal Aid's restructuring. To support this argument, the Union relied principally on the decision of the Alberta Labour Relations Board in *Re Shepherd's Care Foundation and the Alberta Union of Provincial Employees*, 2016 CarswellAlta 796, 275 CLRBR (2d) 1.

[35] Counsel for Legal Aid maintained that it is not the role of this Board to scrupulously supervise the bargaining strategies and processes between the two (2) parties to this dispute. He relies particularly on two (2) recent decisions of this Board: *Re Moose Jaw (City) v Moose Jaw Firefighters Association, Local 553*, 2016 CarswellSask 329, 275 CLRBR (2d) 53 (SK LRB), and *Re Battlefords and District Cooperative Ltd. v RWDSU, Local 544*, [2015] SLRBD No. 6, 257 CLRBR (2d) 74 (SK LRB) as illustrative of the reality that this Board's approach to enforcing the duty of bargaining in good faith "has historically been one of measured restraint". See especially: *Moose Jaw Firefighters Association, Local 553*, *supra*, at paragraph 96.

[36] Counsel for Legal Aid also contends that the restructuring undertaken by his client and which is being impugned in these proceedings is not subject to the duty to collectively bargain. That is because, in his submission, it is authorized by the management rights clause found in Article 2 of the collective agreement.

[37] The Board is persuaded that the question of whether Legal Aid's restructuring was an appropriate exercise of the management rights clause in the collective bargaining agreement or attracts the duty to bargain in good faith with the Union, is not one that can be determined definitively on an application for interim relief. As a consequence, we find that this question presents an arguable case for purposes of an application for interim relief.

[38] Third, the Union alleges that certain of the lay-offs were motivated by anti-union animus. In particular, the Union points to the termination of two (2) employees, one of which is attested to in the Steuart Affidavit. In that particular affidavit, the affiant who is also a member of the Union's bargaining team asserts that she believes her termination is motivated in part because she is among a group of employees who filed a formal complaint with the Law Society of Saskatchewan against the former legal director of the Saskatoon Legal Aid office.

[39] In its written submissions, counsel for the Union attempted to buttress the claim of anti-union animus by asking this Board to draw adverse inferences from the following facts:

- *When advising of the restructuring, the Employer did not initially advise that there would be layoffs. There was certainly no suggestion that a restructuring would automatically and necessarily lead to the layoff of employees.*

- *Support staff at the Saskatoon Criminal and Family Law offices are already over-worked, so the decision to layoff employees is not justified based on workload.*

- *Two of the employees who have been laid off were, along with the union, actively pursuing complaints against the employer. One of these employees was also on the negotiating committee.*

[40] Not surprisingly, Legal Aid strenuously disputes the Union's claim of anti-union animus. It asserts that the various lay-offs including that of Ms. Steuart were based on seniority and done in accordance with the Collective Agreement, in particular Article 17.04.

[41] To begin, it must be said that on the basis of the evidence presented at the hearing, the Union's claim of anti-union animus is weak, and were it the only argument to have been advanced by the Union, the Board would not be persuaded that it satisfies the arguable case requirement.

[42] However, it is not necessary for the Union to demonstrate that each of its allegations when viewed critically rise to the level of presenting an arguable case. The Board has already concluded that the two (2) other bases advanced by the Union raise issues in dispute, and satisfy the arguable case requirement. For this reason, it is necessary to consider where the balance of convenience in this matter lies.

D. Does the Balance of Convenience Favour the Union or Legal Aid?

[43] The second part of the test for interim relief asks whether the balance of convenience favours the issuance of an interim order. This aspect of the inquiry is analogous to the test for injunctive relief utilized by superior courts in the civil context. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Aaron's Furniture*, 2016 CanLII 1307, 282 CLRBR(2d) 281 (SL LRB) [*Aaron's Furniture*], for example, the Board stated:

> *[26] The second part of the test is whether or not the balance of convenience favours the issuance of an interim order. While there are other considerations…this factor [i.e. balance of convenience] is similar to the requirement that an applicant for interim relief must show that the labour relations*

> *harm in not issuing the interim order outweigh the labour relations harm in issuance of the requested order. At common law, this is generally regarded as the requirement to show irreparable harm if the interim order is not made.*

[44] In *Re Prairie Micro-Tech Inc*., [1994] SLRBD No. 62, the Board elaborated upon what an applicant needs to demonstrate on this aspect of the inquiry. At pages 5 and 6 of those Reasons for Decision, the Board stated:

> *Whether it is described as an interlocutory injunction or an interim order. . .what the Board is being asked to do is to issue an order for relief in circumstances where there is no opportunity for the parties to present evidence, and no full consideration can be given to the merits of the complaints enumerated in the application. Under these conditions, it is our view that the applicant must be required to show that there will be some prejudice to them which cannot be fairly addressed if they are required to await the full hearing and determination of the main application. There are, no doubt, circumstances in which the Board would issue orders pursuant to Section 5.3 without putting the applicant to such a test, but in this kind of case, where we are being asked to issue an order without the benefit of a hearing, we feel it is necessary that the applicant provide us with a persuasive rationale for granting relief in the form of a description of the harm which will accrue to them if the order is not granted. [Emphasis added.]*

[45] Applying the balance of convenience test, the Board concludes that the Union has failed to persuade us why our early intervention in this dispute is warranted for the following three (3) reasons.

[46] First, as the hearing unfolded the Board learned that while the positions occupied by the six (6) employees are to be abolished, these employees have found short-term employment. This means that most of these individuals will be gainfully employed for a further period of time. Only one (1) of those employees will be unemployed as of September 4, 2018; however, as already noted that is because she chose not to relocate to Regina, a choice that was entirely her right to make.

[47] The Board accepts that for some employees like Ms. Steuart these changes may have a detrimental financial impact on them. While this is regrettable, it is a matter which is compensable in financial damages should the Union's Unfair Labour Practice Application succeed. This is an important factor to take into account when weighing the balance of convenience in such cases.

[48] Second, the three (3) duty counsel positions which formed part of this application for interim relief, while being contracted out, are not abolished outright. This fact is significant

because if at the conclusion of this Board's hearing on the main application, the Union prevails in its challenge to the contracting out of these positions, we may order Legal Aid to terminate those contracts, and fill those positions with staff lawyers who are members of the bargaining unit. Such an order, quite simply, would return the situation to the *status quo ante*.

[49] Third, Legal Aid has begun its restructuring and, as well, contracted with a number of private lawyers in Saskatoon to serve as bail court duty counsel. Those contracts came into effect on or about September 4, 2018. Clearly then, Legal Aid would experience considerable disruption were this Board to order a halt to these activities at this late date.

[50] It is important to highlight, as well, that the Union learned of the contracting out of the bail court duty counsel positions on or about June 18, 2018, and of the six (6) layoffs on or about June 28, 2018. Yet, it did not file its Unfair Labour Practice application accompanied by this application for interim relief until August 21, 2018, almost two (2) months later. This delay in commencing these applications, particularly the interim relief application suggests that there is not sufficient urgency which should warrant the Board's early intervention in this matter. See *e.g.*: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Saskatchewan Indian Gaming Authority Inc. c.o.b. Painted Hand Casino*, 2003 CanLII 62861 (SK LRB), and the cases cited in that decision.

[51] The Board also directed that the hearing of the main application be expedited. Since the date of the hearing of the interim application, it has been determined that the main application will be heard on October 17 and 18, 2018 in Saskatoon.

[52] Accordingly, for these reasons, the Board is satisfied that on the evidence presented to us, the labour relations harm to Legal Aid outweighs the labour relations harm to the Union. As a result, the Union's application for interim relief is dismissed.

[53] The Board expresses its gratitude to all counsel for their excellent oral submissions and fulsome legal briefs. They were of great assistance to us.

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

DATED at Regina, Saskatchewan, this **21st** day of **September, 2018**.

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson