Government of Saskatchewan

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July 18, 2018

Plaxton Jensen
Barristers and Solicitors
500, 402 – 21st Street East
Saskatoon, Saskatchewan
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Attention: Mr. Drew Plaxton, Q.C.

MLT Aikins
Barristers and Solicitors
1600 – 520 – 3rd Avenue
Calgary, Alberta
T2P 0R3

Attention: Ms. M. Jean Torrens

Dear Mr. Plaxton and Ms. Torrens:

Re: LRB File Nos. 171-17 & 232-17 – *United Food and Commercial Workers, Local 649 v Federated Co-operatives Limited* – Application to Defer Unfair Labour Practice Application to An Arbitrator

OVERVIEW

[1] This letter addresses an application by United Food and Commerical Workers, Local 649 [Union] to defer this Board's consideration of two (2) unfair practice applications against Federated Co-operatives Limited [FCL] pending the decision of an arbitrator on certain Head Office Grievances. The Union contends those grievances are based on the same or similar factual allegations that underpin the unfair labour practice applications. These applications allege the Employer created new out-of-scope positions without consultation with, let alone the consent of, the Union. The first application designated LRB File No. 171 – 17 was filed with this Board on August 24, 2017. The second application designated LRB File No. 232-17 was filed on November 9, 2017.

[2] This panel of the Board comprised of Members Maurice Werezak and Laura Sommervill, and myself as Vice-Chairperson has already heard seven (7) days of evidence in relation to a preliminary objection brought by FCL to the Union's unfair labour practice applications. FCL objects to the bulk of these applications proceeding for reasons of delay based upon this Board's jurisprudence respecting undue delay generally, and the Union's failure to comply with the statutory time period set out in subsection 6-111(3) of *The Saskatchewan Employment Act, SS 2013*, cS-15.1 [*SEA*].

[3] Contemporaneously, the Union also filed a number of grievances in relation to these factual circumstances pleading the same issues and advancing the same grounds as set out in its' two (2) unfair labour practice applications. Three (3) of those grievances have been advanced to an arbitrator.

[4] These arbitration proceedings commenced on June 15, 2108, before Arbitrator Ish. At that time a number of preliminary issues were raised by both counsel for the Union, and counsel for FCL. In particular, Arbitrator Ish heard argument respecting FCL's application asking him to defer assuming jurisdiction over the grievances until this Board had resolved the Union's unfair labour practice applications.

[5] On June 15, 2018, Arbitrator Ish issued a "letter award" in which he acceded to FCL's request. However, he added that this deferral is "subject to a 'double deferment' condition", *i.e.* either party could come back to this Board, and request it to defer deciding the Union's unfair labour practice applications until the arbitration had concluded. He noted that should "the LRB defer[] jurisdiction to this arbitrator, as the LRB has done in other cases in the past, the current proceedings will resume". See: Letter from Daniel Ish, Q.C. to Mr. Plaxton and Ms. Torrens dated June 17, 2018, at p. 2.

[6] On July 13, 2018, this Board reconvened by telephone conference call to consider the Union's application to defer its' unfair labour practice applications as suggest in Arbitrator Ish's letter award. Both Mr. Plaxton and Ms. Torrens participated by telephone. At the conclusion of this hearing, the Board reserved its decision.

[7] In the interests of expediency, the Board has decided to issue this "bottom line" decision. For the reasons that follow, we have concluded the Union's application should be allowed. However, while the Board has decided to defer the substantive aspect of the two (2) unfair labour practice applications to Arbitrator Ish, we retain jurisdiction over the timeliness objections brought by FCL to those applications. Accordingly, the Board will convene on August 13, 2018 to hear final argument on those objections, and will render a final decision on those objections. In this way, the Board ensures that the time and effort expended thus far is not wasted. As well, should the Union come back to this Board to prosecute those unfair labour practice applications, both parties will know, in advance, the scope of those applications.

RELEVANT STATUTORY PROVISIONS

[8] For the purposes of the Union's application, the following provisions of the *SEA* are the most relevant:

> ***6-45****(1) Subject to subsections (2) and (3), all disputes between the parties to a collective agreement or persons bound by the collective agreement or on whose behalf the collective agreement was entered into respecting its meaning, application or alleged contravention, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective agreement.*[1]
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> . . . . . .
>
> ***6-111****(1) With respect to any matter before it, the board has the power:*
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> . . . . . .
>
> *(k) to adjourn or postpone the hearing or proceeding;*
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> *(l) to defer deciding any matter if the board considers that the matter could be resolved my mediation, conciliation or an alternative method of resolution[.]*

ANALYSIS AND DECISION

[1] Subsections 6-45(2) and (3) of the *SEA* have no application to the matter under consideration here.

[9] The parties agree that generally speaking, this Board will defer to an arbitrator in circumstances where an unfair labour practice application, for example, engages issues involving the interpretation of a collective bargaining agreement about which a grievance has also been filed. However, such deferral is neither automatic nor unconditional. As this Board stated in *Canadian Union of Public Employees, Local 3736 v North Saskatchewan Laundry and Support Services Ltd.*, [1996] Sask LRBR 54, at p. 60:

> *It is our view that the jurisdiction of this Board and of an arbitrator under a collective agreement must, in many cases, be viewed as concurrent. Consequently, it will continue to be necessary for this Board, depending on the circumstances of each case, to confront the question of when we should exercise our discretion to defer a question to an arbitrator.*

See further: *International Brotherhood of Electrical Workers, Local 2038 v PCL Intracon Power Inc.*, 2017 CanLII 68787 (SK LRB) [*PCL Intracon*], at para. 32.

[10] The parties also agree that the analytical framework to be applied in a deferral application is the three (3) part test announced by the Saskatchewan Court of Appeal in *United Food and Commercial Workers, Local 1400 v Westfair Foods Ltd. et al.* (1992), 95 DLR (4th) 541, 1992 CanLII 8286 [*Westfair Foods*]. See also: *PCL Intracon*, *supra*, at paras. 26-30. The *Westfair Foods* test asks:

1. *Is the dispute the same dispute?*
2. *Can the grievance process resolve the dispute?*
3. *Can the grievance process provide a suitable remedy?*

[11] We apply this analytical framework for purposes of deciding this deferral application.

1. Is the Dispute the Same Dispute?

[12] To begin, it appears that both the Union and the Employer agree that the factual underpinnings of this dispute are the same or, at least, very similar. At paragraph 2 of her helpful Brief of Law, counsel for FCL stated: "Contemporaneously with the LRB Applications the Union also filed seven grievances on essentially the same issue and grounds as the LRB Applications, three of which have been referred to Arbitrator Daniel Ish, QC".

[13] After reviewing the Union's formal Applications, FCL's Replies and those three (3) grievances, the Board agrees with the parties' conclusion on this particular question. At bottom, the unfair labour practice applications and the grievances are concerned with whether the positions in dispute fall within or outside of the bargaining unit. Consequently, the Board is of the view that, for all intents and purposes, the disputes are essentially the same, a factor which militates against us exercising our discretion to proceed with the unfair labour practice application at this time.

2. Can the Grievance Process Resolve the Dispute?

[14] The Board acknowledges that in *Westfair Foods*, *supra*, the Court of Appeal stated that this particular question only requires a consideration of whether an arbitrator is empowered to take up the dispute in question and attempt to resolve it. It is not necessary for an applicant to demonstrate that an arbitrator will resolve the dispute entirely.

[15] In the Board's view, should Arbitrator Ish determine that the various positions in question fall outside the scope of the bargaining unit, much of the Union's unfair labour practice applications will fall away. Conversely, should he decide that those positions fall within the bargaining unit, the unfair labour practice applications remain very much alive. Either way, it will be of great assistance to the Board to receive Arbitrator Ish's decision respecting issues that are central to the applications before us. As a consequence, it is possible that Arbitrator Ish's considered interpretation of the collective agreement could resolve this dispute entirely.

3. Can the Grievance Process Provide a Suitable Remedy?

[16] Finally, on this aspect of the *Westfair Foods* inquiry, it is important to remember that "the remedies available need not be the same in both forums [*sic*] but the remedies available through the grievance and arbitration process must be a suitable alternative to those the Union could obtain before the Board". See: *Administrative and Supervisory Personnel Association v University of Saskatchewan*, 2005 CanLII 63020, [2005] Sask LRBR 541 [*ASPA, 2005*], at paragraph 40(3). This leaves open the possibility that should the remedy granted at arbitration not address all issues, a union is free to return to this Board seeking resolution of the outstanding issues in relation to the collective bargaining relationship.

[17] At the hearing of this application, the parties appeared to agree that Arbitrator Ish enjoyed a remedial menu similar to the one available to this Board. Counsel for FCL stated that the arbitrator also has jurisdiction to address compensation issues should they arise, a remedy outside the jurisdiction of this Board. On the arguments before us, it would seem that the arbitrator can provide an appropriate remedy should he determine that the positions in question fall within the bargaining unit. As a result, this fact also supports our decision to defer these unfair labour practice applications until the arbitration process is concluded one way or another.

[18] Depending on the final result of that arbitration, counsel for the Union indicated it might then pursue the unfair labour practice applications. As noted above, the Board will then have to decide to whether it will entertain those applications. That possibility forces this Board to determine what it should do with the outstanding preliminary objections to those unfair labour practice applications.

[19] At the hearing, counsel for FCL submitted that at the very least the Board should proceed to address its preliminary objections. At paragraph 50 of her Brief of Law, counsel for FCL wrote:

> *50. The parties have already committed seven days of hearing time to the LRB Applications with another day scheduled for argument having*

> *completed the evidentiary portion of the preliminary matters. The parties are very close to getting a decision from this Board on the preliminary matters that all have invested so much time and effort in presenting and hearing. In the interim, the Employer has seen the departure of two significant witnesses/contributors to this case (namely Mr. Boyko and Mr. Rans).*

[20] The Board agrees with counsel for FCL that the resources already expended by all participants in this matter, including this Board, should not be squandered. We also accept FCL's submission that any further delay in rendering a decision on its preliminary objection to the Union's unfair labour practice applications will prejudice it.

[21] So as to avoid either of these undesirable consequences, the Board will retain jurisdiction in relation to FCL's preliminary objections to the Union's unfair labour practice applications. August 13, 2018 has been set as the date for final argument in respect of those issues. Final arguments will proceed on that date and at their conclusion, the Board will deliberate and, ultimately, render a decision.

[22] In addition to avoiding the undesirable consequences noted above, this approach will determine the appropriate scope of the unfair labour practice applications should the Union decide to return here to prosecute them.

ORDER

[23] Accordingly, for the foregoing reasons the Board makes the following Order pursuant to section 6-45(1), clauses 6-103(2)(c), and 6-111(1)(k) and (l) of the *SEA*:

1. **THAT** the Union's unfair labour practice applications designated LRB File Nos. 171-17 and 232-17 should be deferred until the grievance process is concluded. The hearing of these applications is adjourned *sine die* with the proviso that they may be renewed before the Board by either party on notice to the other side should there be outstanding issues remaining between them that were not resolved by the grievance process.

2. **THAT** full argument respecting FCL's preliminary objections to those two (2) unfair labour practice applications as well as the remainder of the Union's two (2) applications entitled "Request for Orders for Disclosure and Production of Documents and Things and Particulars", each dated January 18, 2018 shall proceed on August 13, 2018 as scheduled. Thereafter, the Board will issue a final decision on the merits of those matters following that hearing.

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

Yours very truly,

Susan Ashmead

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