November 4, 2019

Mr. Kevin Wilson, Q.C. and Mr. Tom Richards
MLT AIKINS
1500 – 410 22nd Street East
SASKATOON SK S7L 6M7

Mr. Greg Fingas
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Dear Mr. Wilson, Mr. Richards and Mr. Fingas:

RE: LRB File No. 142-19; Application for Disclosure and Production of Documents and Things United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Association Limited

Background:

[1] The United Food and Commercial Workers, Local 1400 ["Union"] filed a Notice of Application for Disclosure and Production of Documents and Things[1] ["Disclosure Application"] on June 19, 2019 in support of the Unfair Labour Practice Application it filed on February 12, 2019[2] ["ULP Application"]. The Disclosure Application requests an Order that Saskatoon Co-operative Association Limited ["Employer"] disclose the following:

1. A copy of the Policy referred to at paragraph 5(h) of the Reply.
2. All documents held by the Employer, as well as records of communications between the Employer and the third-party insurer The Co-operators, forming the basis for the Employer's position (see e.g. Exhibit "I" to the ULP Application) that:

   > The Co-operators, our third-party insurer, has indicated that employees losing coverage are unable to personally pay the benefits premiums to continue coverage during a strike, and employees losing coverage can only be re-instated for benefit coverage once they have already returned to work.

3. In light of the Employer's position as reproduced in point 2 above, all documents held by the Employer, as well as records of communications between the Employer and the third-party insurer The Co-operators, forming the basis for:
   a. The extension of the timeline for the termination of benefits in light of the "back and forth" as to the employee list: Exhibit "K" to the ULP Application;
   b. The correction of the administrative error which had resulted in Jaime Guadalupe's benefits being inactive: Exhibit "Q" to the ULP application;

[1] LRB File No. 142-19.
[2] LRB File No. 035-19.

c. The reactivation of Patricia Snow's benefits arising out of the extension of her LTD claim: Exhibit "Q" to the ULP application.

[2] The Disclosure Application also requested an Order that the Employer pay the Union its costs of the Disclosure Application in the sum of $3,000. At the hearing, the Union withdrew that request.

[3] Between the date of the Disclosure Application and the date of the hearing, some disclosure was provided by the Employer to the Union. Accordingly, at the hearing, the Union refined its Disclosure Application to request an Order that the Employer disclose the following:

(a) The Plan Text in full, with redactions only of any monetary terms which are not relevant to the interpretation of the balance of the text; and
(b) Unredacted versions of the emails already disclosed to the Union, as well as the communications between the Employer and The Co-operators referenced therein (as well as any notes or other materials documenting same).

[4] The Union argues that the documents requested are relevant to the ULP Application. The Union states that it requires the requested disclosure to properly prepare for and receive a fair hearing. The Employer has raised the Policy as a defence to the ULP Application, therefore a review of the Policy is required. The Reply also puts in issue the communications between the Employer and The Co-operators.

[5] The Union also objected to the Employer failing and refusing to provide the requested disclosure notwithstanding its express acknowledgement that most of the requested disclosure was relevant and properly subject to disclosure. The Employer indicated that it was withholding disclosure in order to pressure the Union to disclose information in an unrelated matter in which the Union is represented by different counsel. The Board notes that this line of argument was not pursued at the hearing in light of the disclosure provided after the Disclosure Application was filed. However, the Board notes its agreement that this was an inappropriate position for the Employer to take, and not one that it would want to see replicated in the future.

[6] The Employer argues that it has already provided the requested disclosure to the Union. It provided what it says are the relevant excerpts from the Policy. The Employer argues that the portions of the Policy that are relevant to the narrow issue disputed by the Union have been provided to the Union. It objects to the production of portions of the Policy that relate to other employers and confidential business information.

[7] With respect to the requested emails, the Employer says it also provided them, with what it considers to be appropriate redactions. It argues that its small redaction to the emails is related to benefit information of employees unrelated to the request by the Union, and was done to protect their privacy. The redacted information is irrelevant to the ULP Application.

Relevant statutory provisions:

[8] Section 6-111 of *The Saskatchewan Employment Act* set out the powers of the Board to order pre-hearing disclosure:

> ***Powers re hearings and proceedings***
> *6-111(1) With respect to any matter before it, the board has the power:*
>
> *(a) to require any party to provide particulars before or during a hearing or proceeding;*
>
> *(b) to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing or proceeding;*
>
> *(c) to do all or any of the following to the same extent as those powers are vested in the Court of Queen's Bench for the trial of civil actions:*
>
> *(i) to summon and enforce the attendance of witnesses;*
>
> *(ii) to compel witnesses to give evidence on oath or otherwise; and*
>
> *(iii) to compel witnesses to produce documents or things;*

Analysis and Decision:

[9] The Board has confirmed on numerous occasions[3] that on production applications, it will apply the criteria established by the Canada Industrial Relations Board in *Air Canada*, 1999 CIRB 3 (CanLII). Both parties agree that the *Air Canada* criteria should be applied to the Union's Disclosure Application:

1. *Requests for production are not automatic and must be assessed in each case;*
2. *The information requested must be arguably relevant to the issue to be decided;*
3. *The request must be sufficiently particularized so that the person on whom it is served can readily determine the nature of the request, the documents sought, the relevant time-frame and the content;*
4. *The production must not be in the nature of a fishing expedition; that is, the production must assist a complainant in uncovering something to support its existing case;*

[3] See, for example, *SEIU-West v Voyager Retirement V Genpar Inc.*, 2016 CanLII 79627 (SK LRB); *IBEW, Local 529 v Sun Electric (1975) Ltd.*, [2002] Sask LRBR 362 (SK LRB); *Edgewood Forest Products Inc. v IWA-Canada, Local 1-184*, 2012 CanLII 51715 (SK LRB); *Service Employees International Union (West) v Saskatchewan Association of Health Organizations*, 2012 CanLII 18139 (SK LRB); *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Brand Energy Solutions (Canada) Ltd.*, 2018 CanLII 127660 (SK LRB).

5. *The applicant must demonstrate a probative nexus between its positions in the dispute and the material being requested;*
6. *The prejudicial aspect of introducing the evidence must not outweigh the probative value of the evidence itself, regardless of any possible "confidential" aspect of the document.*

[10] The Board elaborated on the rules that apply to the pre-hearing production of documents, in *Service Employees International Union (West) v Saskatchewan Association of Health Organizations* ["*SAHO*"]:

> ***Pre-hearing production****: A party to proceedings before the Board can now seek production of documents prior to the commencement of the hearing. Such applications are typically heard by the Board's Executive Officer. The Board's Executive Officer has delegated authority to grant Orders of production and typically does so based on broad and general principles of relevancy. Generally speaking, an applicant seeking pre-hearing production of documents must merely satisfy the Board's Executive Officer that the desired documents are arguably relevant and/or that there is some probative nexus between the documents or information sought and the matters in issue arising out of proceedings before the Board. However, the greater the number of documents sought, the stronger the probative nexus expected by the Board's Executive Officer, particularly so if considerable expense, time and effort is required to locate and produce the desired documents. In this regard, it is important to note that labour relations boards were established to provide an alternative to the formalistic procedures of courts of competent jurisdiction. While pre-hearing discovery and production of documents may be the norm in civil litigation, such procedures are not the norm in proceedings before tribunals, such as this Board. To which end, while a certain degree of "fishing" is permissible in a request for pre-hearing production of documents (i.e.: to seek out evidence in support of an allegation under the Act), it has not been the practice of this Board to grant broad-spectrum, non-specific or infinite production Orders to in essence, compel the kind of pre-hearing discovery of documents that occurs in civil courts. Similarly, s. 18(b) of the Act (as was the case with its predecessor provision) does not include authority to compel a party to "create" documents or things in response to a production request, such as a statement as to documents. See: Pyramid Electric Corporation v. International Brotherhood of Electrical Workers, Local 529, 2001 SKQB 216 (CanLII), 208 Sask. R. 118 (Q.B.). Simply put, the Board does not have the authority to invoke, nor does it desire to replicate, the kind of discovery procedures or production of documents obligation commonly seen in a judicial setting.*
>
> *It should also be noted that in a pre-hearing request for the production of documents, the Board's Executive Officer does not generally concern him/herself with issues of confidentiality or privilege; as the more common practice has been for disputes as the production of documents upon which a privilege is claimed to be resolved by a panel of the Board (either prior to or at the commencement of the hearing). In other words, parties are expected to locate and produce the documents set forth in any production Order of the Board's Executive Officer, save any documents upon which privilege may be claimed. Responsive documents upon which privilege are claimed are delivered to the Board (either the panel seized to hearing the proceedings or another) to determine whether or not production of the disputed documents is appropriate. This practice enables the parties to*

> *make representations to the Board on the claims asserted and enables the Board to have the benefit of viewing the disputed documents in rendering its decision. This practice was employed by the parties and the Board in International Brotherhood of Electrical Workers, Local 529 v. Sun Electric (1975) Ltd., et. al., [2002] Sask. L.R.B.R. 362, LRB File No. 216-01, and in subsequent proceedings, [2002] Sask. L.R.B.R. 698, LRB File No. 216-01.*[4]

[11] Applying the *Air Canada* criteria in this matter leads the Board to the following findings.

[12] The Board finds that the Union has established that the information requested is arguably relevant to the issue to be decided in the ULP Application. The Employer relies, in its Reply, on the Policy and its communications with The Co-operators. For example:

> *5(i) The Policy does not allow an employee to personally pay premiums to continue coverage during the strike. An employee who loses coverage during the strike can only be reinstated for benefit coverage under the Policy upon an active return to work.*
> *. . .*
> *5(m) The Employer consistently informed the Union that Employees who were included on the Employee List but who were not added by the Union to the Union List lost benefit coverage in accordance with the Policy and that the employees that lost benefit coverage were eligible for coverage upon active return to work in accordance with the Policy….*

[13] The request is sufficiently particularized. The Employer did not raise this as an issue.

[14] The Union's request cannot reasonably be characterized as a fishing expedition. The Union has not requested an extensive set of documents. The Employer did not argue that considerable expense, time or effort would be required to locate and produce the requested disclosure. Most of the requested disclosure involves the removal of redactions. This criterion is not a factor here.

[15] As noted in paragraph [12], above, there is a clear probative nexus between the allegations in the ULP Application and the Reply and the requested disclosure.

[16] The probative value of the evidence outweighs any prejudice to the Employer. The requested disclosure goes to the heart of the matter at issue in the ULP Application.

[17] The Employer is under the misapprehension that it is entitled to decide which portions of the Policy and the emails are relevant and subject to disclosure, and which are not. As the Board explained in *SAHO*, it is the Board, not the Employer, that makes that decision. The Employer did not raise an issue of privilege with respect to any of the requested disclosure, therefore, given the findings above, the Union is entitled to receive the requested disclosure.

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[4] 2012 CanLII 18139 (SK LRB) at para 37.

[18] Accordingly, the Board orders the Employer to disclose to the Union:

(a) A copy of the Policy referred to at paragraph 5(h) of the Reply, with redactions only of any monetary terms that are not relevant to the interpretation of the balance of the text; and

(b) Unredacted versions of the emails already disclosed to the Union in response to paragraphs 2 and 3 of the Disclosure Application, as well as the communications between the Employer and The Co-operators referenced in those emails and any notes or other materials documenting those communications.

Yours truly,

Susan C. Amrud, Q.C.
Chairperson