**SEIU-WEST, Applicant v ALISON DECK and SASKATCHEWAN HEALTH AUTHORITY, Respondents**

LRB File No. 251-18; May 27, 2019

Chairperson, Susan C. Amrud, Q.C., sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act*

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| For the Applicant: | Heather M. Jensen |
| For the Respondent, Alison Deck | Self-represented |
| For the Respondent, Saskatchewan Health Authority: | Paul Clemens |

**Application for Reconsideration – Union granted leave to file application seven days late since reason for late filing was incorrect information provided to Union by Board Registrar.**

**Application for Reconsideration – Application granted to amend Order to remove requirement for Union to file grievance on behalf of second employee – That requirement was breach of natural justice since Union was denied the opportunity to be heard on that issue – Union filed evidence that second employee did not want grievance filed on her behalf.**

## REASONS FOR DECISION

**Background:**

**[1] Susan C. Amrud, Q.C, Chairperson:** On November 13, 2018, in an application brought by Alison Deck ["Ms. Deck"] against SEIU-West ["Union"] and Saskatchewan Health Authority ["Employer"], pursuant to sections 6-59 and 6-60 of *The Saskatchewan Employment Act* ["Act"][1], the Board found that the Union had breached the duty of fair representation it owed to Ms. Deck ["Board's Decision"]. The Board issued the following Order ["Board Order"]:

1. That the Union shall prepare and file on behalf of the Applicant and the other effected employee, a grievance or grievances (the "grievanace") under Articles 12 and 21 of the CBA.

[1] LRB File No. 073-18.

2. That the grievance shall be processed pursuant to Article 7 of the CBA in the normal manner. Any timelines in the CBA related to the filing of such grievances are hereby waived and extended pursuant to section 6-60(1) of the *SEA*.
3. The Union shall follow its normal process for dealing with grievance, in accordance with the standards set out by this Board in *Lucyshen v. Amalgamated Transit Union*, (2015 CanLII 15756), including, but not limited to the referral of the grievance to arbitration, if warranted. The Applicant is granted the right to file a further complaint under sections 6-59 and 6-60 related to such process, if necessary.
4. The Applicant is also granted leave to continue her complaint regarding a respectful workplace should the applications filed with the Saskatchewan Human Rights Commission and the Occupational Health and Safety Division of the Ministry of Labour Relations and Workplace Safety not fully resolve her issue. However, the Union shall also be permitted to seek a preliminary determination as to whether or not the Board has any remaining jurisdiction regarding such complaints. I will not be seized with any such further proceedings.
5. No Order is made under section 6-50(1)(c) at this time. Should the parties not be able to resolve the grievance, and the matter proceeds to arbitration, the SHA may, at that time, request the Board to make an Order under section 6-50(1)(c).

**[2]** On December 10, 2018 the Union filed an Application for Reconsideration of certain portions of the Board Order. It did not apply for reconsideration of the finding that it had breached its duty of fair representation. In particular, the Union sought the following relief:

1. That the remedies ordered by the original panel be set aside.
2. That the Board conduct a new hearing to determine what remedies are appropriate, after the union has full notice of the remedies sought.
3. That the Board delete any requirement or order to file a grievance on behalf of members not seeking grievances on their behalf.
4. That any orders not conflict with the provisions of the collective agreement regarding filing of grievances and grievance processes.
5. Such further and other relief as counsel may advise and this Honourable Board sees as just.

**[3]** The Board held a hearing to consider this application on May 13, 2019. At the hearing the Union clarified that the specific changes to the Board Order it was seeking were:

- Removal of the reference to the other affected employee in paragraph #1;
- Removal of the reference to Articles 12 and 21 of the collective agreement in paragraph #1; and
- Confirmation that the reference to *Lucyshyn v Amalgamated Transit Union, Local 615*[2] ["*Lucyshyn*"] in paragraph #3 does not contradict the direction in paragraph #2 that the grievance be processed pursuant to Article 7 of the collective agreement in the normal manner or the direction in paragraph #3 that the Union follow its normal process for dealing with the grievance.

**[4]** The Union also requested that the Board remove the comments from the Board's Decision respecting the Employer's conduct or provide clarification that those comments are not binding on an arbitrator who may potentially consider the grievance.

**[5]** The first issue that the Board asked the Union to address was the timeliness of the filing of its application. Section 33 of *The Saskatchewan Employment (Labour Relations Board) Regulations* ["Regulations"] requires an application for reconsideration to be filed within 20 days after the date of the decision or order with respect to which reconsideration is sought:

> ***Application for reconsideration***
> *33(1) In this section, **"application for reconsideration"** means an application pursuant to subsection (2).*
> *(2) An employer, union or other person directly affected by a decision or order of the board may apply to the board to reconsider that decision or order.*
> *(3) An application for reconsideration must:*
> *(a) be in writing; and*
> *(b) be filed and served within 20 days after the date of the decision or order with respect to which reconsideration is sought.*
> *(4) An application for reconsideration must contain the following information:*
> *(a) the full name and address for service of the party making the application for reconsideration;*
> *(b) the file number assigned by the registrar for the decision or order of the board with respect to which reconsideration is sought;*
> *(c) the reasons the applicant believes the board ought to reconsider its decision or order;*
> *(d) a summary of the law on which the applicant intends to rely.*
> *(5) An application for reconsideration must be served by the applicant on any other parties named in the decision or order with respect to which reconsideration is sought.*

**[6]** This application was filed 27 days after the date of the Board Order. The Union's counsel explained that the Board Registrar advised her office that the timeline in section 33 of the

[2] 2010 CanLII 15756 (SK LRB).

Regulations for filing an application for reconsideration is interpreted to mean 20 business days, rather than 20 calendar days. Unfortunately, this information was incorrect: the deadline for filing an application for reconsideration is 20 calendar days.

**[7]** The Union suggested that the Registrar has authority under the Regulations to extend this time period and asked that his advice be interpreted as granting the Union an extension. The Registrar does not have that power. It is the Executive Officer who has that power, pursuant to section 27 of the Regulations, which provides as follows:

> ***Authority of executive officer to vary time***
> *27(1) On the request of any employer, other person, union or labour organization, the executive officer may, by order, set a further or other time than the time prescribed in these regulations for filing any Form or document or doing any other thing authorized or required by these regulations.*
> *(2) The executive officer may issue an order pursuant to subsection (1) whether or not the period at or within which a matter mentioned in that order ought to have been done has expired.*
> *(3) The executive officer may impose any terms and conditions on an order issued pursuant to subsection (1) that the executive officer considers appropriate.*
> *(4) Anything done at or within the time specified in an order pursuant to subsection (1) is as valid as if it had been done at or within the time fixed by or pursuant to these regulations.*

**[8]** Section 6-97 of the Act provides that the Chairperson of the Board is the executive officer:

> ***Executive officer***
> *6-97(1) The chairperson is to be the executive officer of the board.*

**[9]** The Union also referred the Board to section 30 of the Regulations:

> ***Non-compliance***
> *30 Non-compliance with these regulations does not render any proceeding void unless the board directs otherwise.*

**[10]** Given that the non-compliance with section 33 of the Regulations resulted from inaccurate information provided to the Union by the Board Registrar, an Order will be issued with these Reasons, pursuant to section 27 of the Regulations, setting December 10, 2018 as the date for filing this application.

**[11]** Turning next to the application for reconsideration, the Union acknowledged that the Board has a well-established approach to such applications. There is a two stage process for review. First, an applicant needs to satisfy the Board that its decision should be reconsidered because one or more of the applicable grounds have been established. If the applicant makes out a case

for reconsideration, then the Board undertakes a review of the decision on those grounds. The six grounds were first articulated by the Board in *Remai Investment Corporation (o/a Imperial 400 Motel) v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union & Sharon Ruff*, [1993] 3rd Quarter Sask. Labour Rep.103 as follows:

1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence.*
2. *If a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons.*
3. *If the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application.*
4. *If the original decision turned on a conclusion of law of (sic) general policy under the code which law or policy was not properly interpreted by the original panel.*
5. *If the original decision is tainted by a breach of natural justice.*
6. *If the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

**[12]** The Union argues that the second, third and fifth grounds apply here.

**[13]** With respect to the fifth ground, the Union states that a breach of natural justice occurred when the Board made a decision on two issues that were not argued before it. The issues that it says it did not have an opportunity to address were the application to this situation of the Technological Change provisions in Article 21 of the collective agreement and the appropriateness of filing a grievance on behalf of Emily Retzlaff (the other affected employee referred to in paragraph #1 of the Board Order).

**[14]** With respect to the second ground, the Union argues that because of the lack of notice on these issues, it did not have an opportunity to adduce evidence regarding them.

**[15]** With respect to the third ground, the Union raised three issues. Firstly, it says, the Board Order has the unintended effect of affecting the rights of Ms. Retzlaff, a Union member who was not a party to the proceedings. Secondly, the Board's Decision seems to suggest that the Board found a violation of the collective agreement by the Employer, but then stated it did not have jurisdiction to make such a finding, so the Board's Decision may have the unintended consequence of supplanting arbitration by prejudging the proper interpretation of the collective agreement without hearing evidence on that issue. Finally, it argues, the Board ordered the Union to file a grievance without first following its normal pre-grievance process and practices, thus putting the Union in conflict with the requirement in Article 7 of the collective agreement that it

only file a grievance where it has a dispute with the Employer[3]. Without conducting a pre-grievance investigation, it would not know whether there was a dispute.

**[16]** The Employer appeared at the hearing, and made just one submission. Paragraph #5 of the Board Order states that, if the grievance proceeds to arbitration, the Employer may, at that time, request the Board to make an Order under section 6-50(1)(c) of the Act. The Employer submitted that a typographical error had occurred, and paragraph #5 should actually refer to clause 6-60(1)(c) of the Act.

**[17]** Ms. Deck made no submissions with respect to the reconsideration issues.

**[18]** Appendix 1 to the Application for Reconsideration filed by the Union is a "Member Request not to File Grievance", dated December 3, 2018, that referred to the Board Order and was signed by Emily Retzlaff.

**Analysis and Decision:**

**[19]** The first ground on which the Union relies in its Application for Reconsideration is that a breach of natural justice occurred when the Board included a direction in paragraph #1 of the Board Order that the Union file a grievance on behalf of Emily Retzlaff. Ms. Retzlaff was not a party to the original application. She did not give evidence at the hearing. She had no notice of a potential remedy requiring that a grievance be filed on her behalf. She is affected without having had a right to be heard with respect to whether she wanted a grievance to be filed on her behalf. As part of the Union's Application for Reconsideration, it provided the Board with evidence that she does not want a grievance to be filed on her behalf.

**[20]** The Union referred the Board to *Canadian Linen and Uniform Service Co. v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [2005] S.J. No. 380 (SKQB), which established that, in assessing whether a breach of natural justice has occurred, the Court will consider whether a party was denied a fair opportunity to be heard. The Board is satisfied that, with respect to this issue, the Union was denied a fair opportunity to be heard. Further, the Board

[3] Article 7.01 a) of the collective agreement states: "A grievance shall be defined as any difference or dispute between the Employer and any employee(s), or the Union."

is satisfied that no further evidence is required on this issue. An Order will issue removing the reference to Emily Retzlaff from paragraph #1 of the Board Order.

**[21]** The Union also argued that a breach of natural justice occurred when paragraph #1 of the Board Order made reference to Article 21 of the collective agreement, Technological Change, without providing it with an opportunity to provide evidence on that issue. However, the Board's Decision indicates that this was an issue that arose during the hearing[4]. The Union tied this argument to its argument that crucial evidence was not led during the original hearing, for good and sufficient reason. The Board is not satisfied that crucial evidence was not led, or that if such evidence existed, there was good and sufficient reason for not providing it during the hearing, or that it would have changed the outcome. Accordingly, the Board does not agree that a breach of natural justice occurred with respect to this issue.

**[22]** With respect to unintended consequences, the first issue is whether the Board's Decision has somehow tainted a potential arbitration hearing by making findings of misconduct by the Employer. The Board does not accept this submission. The Board's Decision was very clear that it was not making any findings on that issue:

> *However the Board cannot presume to engage in a determination as to the meaning of the words of the CBA. That role is reserved to an arbitrator appointed by the parties pursuant to the CBA.*[5]

**[23]** The other unintended consequence the Union refers to is with respect to the reference to *Lucyshyn* in paragraph #3 of the Board Order. The Union characterized the Board's direction as requiring the Union to follow the steps set out in *Lucyshyn*, in the order they are set out in *Lucyshyn*. A careful reading of the direction in paragraph #3 indicates that is not the case. It says that the Union is to deal with the grievance in accordance with the standards set out in *Lucyshyn*. In *Lucyshyn*, the Board stated:

> ***[32]*** *However, the Board's reluctance to interfere in decisions made by a trade union in the processing of grievances is based upon an objective standard. That is, the Board must be shown that the Union has taken steps to investigate a potential grievance and has taken a measured view of that grievance and made a reasoned decision in respect thereof.*
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> ***[33]*** *The standard required by this Board in respect of s. 25.1 was referenced in Leblanc v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and*

[4] At paras 54 to 57.
[5] At para 58.

> *Helpers, Local 555 and Lloydminster Maintenance Ltd., [2007] Sask. L.R.B.R. 648, LRB File No. 028-07. In that case, the Union took significant steps to investigate the layoff of Mr. Leblanc by his Employer.*
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> ***[34]*** *Following the investigation by Mr. Zimmerman, the Union filed a grievance on the Applicant's behalf. They also consulted with a representative of the International Union and sought legal advice concerning the grievance. They communicated with the Applicant throughout the process. Ultimately, however, it was determined that the grievance would not succeed and the grievance was abandoned.*
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> ***[35]*** *The Union's approach in the present case differed markedly from what occurred in the Leblanc case, supra. The question that the Board must determine is whether or not, on an objective standard, the Union has taken steps to investigate a potential grievance and has taken a measured view of that grievance and made a reasoned decision in respect thereof.*

**[24]** The Board then outlined, in paragraph 36, steps that "could" be included by a union in its "clearly defined process" to ensure it is meeting the "minimum standard of conduct" outlined in paragraph 32, and reiterated in paragraph 35. Those steps were not referred to by the Board in paragraph #3 of the Board Order. What the Board Order requires the Union to do is comply with the standards referred to in *Lucyshyn*: take steps to investigate the potential grievance; take a measured view of the grievance; and make a reasoned decision respecting the grievance. The Board does not accept the submission that this direction has the effect of putting the Union in breach of the collective agreement. Accordingly, the Board does not accept the submission that this direction should be removed from the Board Order.

**[25]** The Board acknowledges the typographical error pointed out by the Employer. The other typographical errors in the Board Order will also be corrected.

**[26]** An Order will issue with these Reasons, pursuant to subsection 6-115(3) of the Act, amending the Board Order dated November 13, 2018 by striking out paragraphs #1 to #5 and substituting the following:

> "1. That the Union shall prepare and file on behalf of the Applicant a grievance or grievances (the "grievance") under Articles 12 and 21 of the CBA.
>
> 2. That the grievance shall be processed pursuant to Article 7 of the CBA in the normal manner. Any timelines in the CBA related to the filing of such grievances are hereby waived and extended pursuant to section 6-60(1) of the *SEA*.
>
> 3. The Union shall follow its normal process for dealing with grievances, in accordance with the standards set out by this Board in *Lucyshyn v. Amalgamated Transit Union, Local 615*, 2010 CanLII 15756 (SK LRB), including, but not limited to

the referral of the grievance to arbitration, if warranted. The Applicant is granted the right to file a further complaint under sections 6-59 and 6-60 related to such process, if necessary.

4. The Applicant is also granted leave to continue her complaint regarding a respectful workplace should the applications filed with the Saskatchewan Human Rights Commission and the Occupational Health and Safety Division of the Ministry of Labour Relations and Workplace Safety not fully resolve her issue. However, the Union shall also be permitted to seek a preliminary determination as to whether or not the Board has any remaining jurisdiction regarding such complaints. I will not be seized with any such further proceedings.

5. No Order is made under section 6-60(1)(c) at this time. Should the parties not be able to resolve the grievance, and the matter proceeds to arbitration, the SHA may, at that time, request the Board to make an Order under section 6-60(1)(c).”

**DATED** at Regina, Saskatchewan, this **27th** day of **May, 2019.**

**LABOUR RELATIONS BOARD**

Susan C. Amrud, Q.C.
Chairperson