SASKATCHEWAN POWER CORPORATION, Applicant v JOEL ZAND, Respondent

LRB File No. 011-20; May 27, 2020
Vice-Chairperson, Gerald Tegart; Board Members: Michael Wainwright and John McCormick

Counsel for the Applicant: Susan Barber

The Respondent: Joel Zand

Standing – Individual employee lacks standing to bring Unfair Labour Practice application based on employer's duty to engage in collective bargaining.

Summary Dismissal – Employer requests summary dismissal of Unfair Labour Practice Application based on applicant employee's lack of standing – Application summarily dismissed.

REASONS FOR DECISION

Background:

[1] Gerald Tegart, Vice-Chairperson: Joel Zand, the respondent in this matter, filed an unfair labour practice application ("the original application") on January 10, 2020 (LRB File No. 002-20). That application named Catharine Yates, an employee of Saskatchewan Power Corporation ("SaskPower"), as the respondent.

[2] SaskPower brings this present application to intervene in the original application and asks the board to summarily dismiss that original application.

[3] This matter was determined by the Board *in camera* based on filed submissions.

[4] Mr. Zand is employed by SaskPower as a mailroom clerk. He is a member of a bargaining unit represented by Unifor Local 649.

[5] The unfair labour practice alleged by Mr. Zand in para. 3 of his application is as follows: "SaskPower is intentionally delaying the process (Duty to accommodate) and is not mediating/bargaining in good faith."

[6] Para. 4 of the application states:

> *The applicant submits that by reason of the facts set forth in paragraph 3 the respondent has been or is engaging in an unfair labour practice (or a contravention of the Act) within the meaning of section 6.7 of The Saskatchewan Employment Act.*

[7] The reference to "section 6.7" of *The Saskatchewan Employment Act* ("the Act") is presumably intended as a reference to s. 6-7 of the Act. That section provides:

> *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.*

[8] SaskPower's application states that Mr. Zand has filed a human rights complaint against SaskPower that alleges SaskPower has failed to accommodate his disability to the point of undue hardship. SaskPower is presently engaged in a process with the Saskatchewan Human Rights Commission in relation to that complaint.

Analysis and Decision:

Application to Summarily Dismiss

[9] The Board has the authority, pursuant to s. 6-111(1)(o) and (p) of the Act:

> *. . .*
>
> *(o) to summarily refuse to hear a matter that is not within the jurisdiction of the board; [and]*
>
> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case….*

[10] S. 32 of *The Saskatchewan Employment (Labour Relations Board) Regulations* ("the Regulations") addresses applications for summary dismissal, and provides in part:

> *32(1) In this section:*
>
> > *(a) "application to summarily dismiss" means an application pursuant to subsection (2);*

> *(b) "original application" means, with respect to an application to summarily dismiss, the application filed with the board pursuant to the Act that is the subject of the application to summarily dismiss;*
>
> *(c) "party" means an employer, union or other person directly affected by an original application.*
>
> *(2) A party may apply to the board to summarily dismiss an original application.*
> *…*
>
> *(4) In an application to summarily dismiss, a party shall specify whether the party requests the board to consider the application for summary dismissal by an in camera panel of the board or as a preliminary matter at the outset of the hearing of the matter that is the subject of the original application.*

[11] SaskPower is directly affected by the original application and therefore qualifies as a party within the meaning of this section and can bring this application for summary dismissal.

[12] SaskPower's position is that Mr. Zand's application, on its face, reveals no arguable case and that the board has no jurisdiction to entertain it. This position is based primarily on Mr. Zand's status as an employee and member of the union that represents employees in his bargaining unit. The Board was referred to two earlier cases of this Board - *Metz v SGEU* (2003) Sask LRBR 28; LRB File No. 164-00, February 6, 2003, ("*Metz*") and *Wees v Saskatchewan Insurance* (2005) CanLII 63094 (SK LRB) ("*Wees*"). Those cases involved employees or former employees alleging unfair labour practices based on the employer's failure or refusal to bargain collectively with representatives of the union.

[13] In dismissing the unfair labour practice application against the employer, the Board in *Metz* stated (at paras. 66 and 67):

> *We find that the Applicant lacks standing to bring the [unfair labour practice] complaint against the Employer. The Employer owes a duty to bargain in good faith to the Union selected by the employees to be their exclusive representative. Once employees select a union to represent them in collective bargaining, the Employer must negotiate work place disputes exclusively with the Union.*
>
> *…*
>
> *For these reasons, the unfair labour practice application brought by the Applicant against the Employer is dismissed for lack of standing.*

[14] The Board in *Wees* reached the same conclusion, relying on the decision in *Metz*.

[15] For those same reasons, the Board finds that Mr. Zand lacks standing to make the unfair labour practice application he filed with the Board on January 10, 2020. In these circumstances, the union has the exclusive authority to bring an application alleging an unfair labour practice based on an allegation of a breach of s. 6-7 of the Act.

[16] There remains the question of whether the Board has the authority to refuse to hear that application pursuant to s. 6-111(o) or to summarily dismiss it pursuant to s. 6-111(1)(p). The authority to summarily refuse to hear a matter depends on the Board determining that it is not within the jurisdiction of the Board. In order to summarily dismiss a matter, the Board must form the opinion there is a lack of evidence or no arguable case.

[17] In *International Brotherhood of Electrical Workers, Local 529, et. al. v. KBR Wabi Ltd., et. al.*, (2013) 226 C.L.R.B.R. (2d) 48, 2013 CanLII 73114 (SK LRB) ("*KBR Wabi*"), the Board considered the history of the summary dismissal power and set out a test for its application (at para. 79):

> *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant proves everything alleged in his claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
>
> *2. In making its determination, the Board may consider only the application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim.*

[18] In reaching this characterization of the test, the Board considered the approach taken by Saskatchewan courts in exercising the courts' inherent authority to strike out a claim for disclosing no reasonable cause of action. The Court of Appeal was called upon to consider this in *Sagon v. Royal Bank of Canada*, 1992 CanLII 8287, [1992] S.J. No. 197, 105 Sask. R. 133 ("*Sagon*"). Sherstobitoff, J.A. set out a test in these terms (at para. 16):

> *In determining whether a claim should be struck as disclosing no reasonable cause of action, the test is whether, assuming the plaintiff proves everything alleged in his claim, there is nevertheless no reasonable chance of success, or to put it another way, no arguable case.*

[19] For there to be an arguable case, there must be a party with standing who can advance the argument and the case. Since Mr. Zand lacks standing, and there is no other party to the original application other than the named respondent, there is no one to advance the argument and there can be no reasonable chance of success and no arguable case.

[20] Consequently, summary dismissal is available in these circumstances and the original application should be dismissed.

[21] Having made this determination, the Board finds it unnecessary to consider whether the original application is within the jurisdiction of the Board within the meaning of s. 6-111(1)(o).

[22] SaskPower also argued that the Board must defer to the process underway under *The Saskatchewan Human Rights Code, 2018*. Again, having determined that the original application should be dismissed for the reasons set out above, the Board finds it unnecessary to consider the impact of the human rights complaint on that application.

Application to Intervene

[23] Given the Board's determination that the original application is to be dismissed, it is not necessary to consider SaskPower's application to intervene in that application.

Order:

[24] The unfair labour practice application LRB File No. 002-20 brought by Joel Zand (the original application) is summarily dismissed.

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

DATED at Regina, Saskatchewan, this 27th day of May, 2020.

LABOUR RELATIONS BOARD

Gerald Tegart
Vice-Chairperson