



September 11, 2020

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Dear Mr. Barth and Mr. McCreary,

**Re: LRB File No. 062-19: Appeal of Adjudicator's Decision
David Lapchuk v Government of Saskatchewan**

Background:

[1] David Lapchuk made a complaint against his former employer, the Government of Saskatchewan ["Employer"] pursuant to section 27 of *The Occupational Health and Safety Act, 1993*¹ alleging discrimination on the basis that his Employer terminated his employment because he had raised a health and safety concern. His complaint was dismissed by the investigating Occupational Health Officer on January 22, 2013. On March 26, 2014, the Director of Occupational Health and Safety dismissed Lapchuk's appeal of that decision. Next Lapchuk appealed that decision to an Adjudicator. The Employer made an application to the Adjudicator to dismiss the appeal on the basis of issue estoppel or abuse of process. The Adjudicator dismissed the appeal on that basis on February 28, 2019. Lapchuk filed an appeal of that decision with the Board on March 18, 2019 ["Appeal"].

[2] Lapchuk has another matter pending before the Board in LRB Files No. 353-13 and 263-16. That matter is an application alleging that his union, Saskatchewan Government and General Employees' Union ["SGEU"] breached the duty of fair representation it owed to him in challenging the termination of his employment ["DFR application"].

¹ Now s. 3-35 of *The Saskatchewan Employment Act*.

[3] Lapchuk has made two preliminary applications to the Board with respect to the Appeal:

- (a) That the Appeal not be heard by the Board until after a decision is made by the Board respecting the DFR application.
- (b) If the hearing of the Appeal is to proceed, that it be conducted as an in-person hearing.

Application for Deferral of Hearing of Appeal:

[4] After the termination of Lapchuk’s employment, SGEU filed a grievance that was ultimately dismissed after an arbitration hearing. In support of his request for deferral of the hearing of the Appeal, Lapchuk’s counsel argued “It is my understanding that if David Lapchuk is successful in his DFR application that the Arbitrator Denysiuk’s decision will be set aside, and a new arbitration ordered”. He states that the Arbitrator’s decision is also the basis of the Appeal.

[5] The Government opposes the deferral request. It argues that the Board has recently held that it has no jurisdiction to quash an arbitrator’s decision². It also argues that the issue on the Appeal is whether the Adjudicator properly applied the doctrines of issue estoppel and abuse of process, and that a review of that issue does not depend on the decision in the DFR application.

[6] The Board denies the request for a deferral of the hearing of the Appeal. The Appeal to the Board from the Adjudicator’s decision is on a question of law.³ The question of law to be determined is whether the Adjudicator properly applied the doctrines of issue estoppel and abuse of process in coming to a determination that Lapchuk’s appeal should be dismissed. As the Adjudicator noted in paragraph [1] of her decision, this was a decision on an interim issue. If Lapchuk is successful in his Appeal of that decision, then the appeal to the Adjudicator will proceed; it has not yet been heard.

[7] Both parties raise the issue of the Board quashing the Arbitrator’s decision as part of the remedy it provides if Lapchuk’s DFR application is granted. As not all of the parties

² *Strohan v SGEU*, 2019 CanLII 43222 (SK LRB).

³ *The Saskatchewan Employment Act*, s. 4-8.

to the DFR application are before the Board on this application, it would not be appropriate for the Board to make a finding on whether it would have jurisdiction to make that Order.

Application for In-person Hearing:

[8] The Board has recently released a decision with respect to the issue of in-person hearings, with respect to Lapchuk's DFR application⁴. Lapchuk relied on the same grounds in his request for an in-person hearing of the Appeal. The Government opposes the application, and refers to the Board's directives in this regard.

[9] The Board denies the request for an in-person hearing of the Appeal. There are two significant differences between the Appeal and the DFR application that lead to that conclusion:

- (a) In the Appeal, Lapchuk is represented by counsel; in the DFR application, he is self-represented.
- (b) The Board has established different procedures for hearing appeals.

[10] The Board's website sets out a COVID-19 Notice. It provides that for matters with contested evidence (like the DFR application), video hearings will be the default procedure, but if a party believes that a video hearing would not be procedurally fair in a particular case, they can submit a plan, for the review of the Board, for conducting an in-person hearing.

[11] However, with respect to appeals, the Board's COVID-19 Notice provides:

***Appeals** – All appeals will proceed by video, or if video is not practicable, by phone, unless otherwise notified. Where applicable, applications for fresh evidence must be filed 14 days in advance of the appeal hearing. Proposed fresh evidence must be attached to an affidavit.*

In other words, for appeals, the Board's COVID-19 Notice does not contemplate in-person hearings.

[12] Lapchuk states that his home internet does not have sufficient bandwidth for a video hearing. He and his counsel, accordingly, have two options. His counsel can make

⁴ *Lapchuk v SGEU and Government of Saskatchewan*, LRB Files No. 353-13 & 263-16, September 9, 2020.

arrangements for Lapchuk to observe the hearing in a different location. Alternatively, his counsel can request that the hearing proceed by phone. (The Government does not object to the hearing proceeding by phone.) Since Lapchuk is represented by counsel in this matter, he will not be making submissions to the Board, and his only role will be to listen and to provide instructions to his counsel. His counsel is responsible to ensure that he has access to the necessary technology to participate in the hearing to that extent. As the Board noted in *Lapchuk v SGEU and Government of Saskatchewan*⁵:

If he was represented by counsel, the Board's Guidelines for Video Hearings provide:

Counsel will be responsible to ensure that clients and witnesses have appropriate technology to allow for viewing of all participants and exhibits, that is compatible with WebEx, that internet bandwidth is adequate, and that they are capable and adept at using the technology in advance of the test run and the hearing.

Counsel are expected and required to be proficient at using technology and to ensure that arrangements are made for their clients and witnesses to use it effectively.

Decision:

[13] Both preliminary applications are dismissed.

Yours truly,

Susan C. Amrud, Q.C., Chairperson
Labour Relations Board

⁵ At para 18.