UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 179, Applicant v DYLAN LUCAS, Respondent

LRB File No. 119-20; October 2, 2020
Chairperson, Susan C. Amrud, Q.C.; Board Members: Phil Polsom and Ken Ahl

For United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179	Greg Fingas
For Dylan Lucas:	Self-Represented

Application for summary dismissal – Duty of fair representation claim summarily dismissed – No evidence that Union acted in a manner that was arbitrary, discriminatory or in bad faith – No evidence that Union breached section 6-58 or 6-59 of *The Saskatchewan Employment Act*.

REASONS FOR DECISION

Background:

[1] On February 13, 2020, Dylan Lucas made an application to the Board, asking that the Board make an Order that the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179 ["Union"] had breached sections 6-58 and 6-59 of *The Saskatchewan Employment Act* ["Act"] and section 242 of *The Saskatchewan Insurance Act*.[1] In the application he did not provide any information about what action by the Union breached these provisions. He merely attached copies of a decision of the Court of Queen's Bench (referred to further in para [5], below) and sections 242 to 246 of the repealed *Saskatchewan Insurance Act*.

[2] On July 20, 2020, the Union made an application to the Board for summary dismissal of Lucas' application.[2] It requested that its application be heard by an *in camera* panel of the Board. The grounds cited by the Union in support of its application are as follows:

> *a) The Complaint does not include any sworn evidence other than bare assertions of breaches of duty.*

[1] LRB File No. 025-20.
[2] LRB File No. 119-20.

i. The Complaint includes bare assertions of "breaching the Saskatchewan Insurance Act Section 242; Misrepresentation and Non-Disclosure - Duty to Disclose". No facts are provided in support of these bare legal conclusions.

ii. The Complaint is otherwise limited to attaching - but not affirming the truth of - the contents of a Claim[3] and Fiat from a previous Court of Queen's Bench action.

b) Even if the facts asserted in the Complaint and Claim are considered, they do not raise a breach of the duty of fair representation.

i. Any allegation of a breach of duty of fair representation must be founded in factors such as arbitrariness, bad faith or gross negligence, not mere disagreement or even alleged negligence.

ii. The express claims against Local 179 are limited to breach of contract, negligence, breach of fiduciary duty and other matters, rather than any identified breach of the duty of fair representation: Claim, para. 14; Complaint, para. 8.

iii. The allegations against Local 179 are based upon "bare breaches" of these lesser standards - see in particular the allegations at para. 17 of the Claim:

1. *Falling below industry standards*
2. *Failing to adopt best practices*
3. *Not obtaining a policy suitable to the Plaintiff's needs*
4. *Failing to accurately represent the sufficiency of the coverage in place*
5. *Failing to sufficiently represent or advocate for the Plaintiff.*

iv. Even these are bare pleadings of law unsupported by specific facts, and rely on the fundamentally flawed premise that the Plaintiff was entitled to superpriority over all other UA 179 members in the development and administration of the benefit plan at issue.

v. But none of these alleged breaches, even if taken as sufficiently particularized and true, rises to the level of arbitrariness, gross negligence or bad faith,

c) As such, the Complaint is doomed to fail, and ought to be summarily dismissed without an oral hearing.

[3] In response to this application, Lucas filed notarized transcripts of four meetings between himself and the Union's business manager; two affidavits; the Union's Collective Bargaining Agreement with employers in the plumber/pipefitter trade; the Union's Constitution; Trust Agreement and Declaration of Trust respecting the Saskatchewan Piping Industry Health and Welfare Trust Fund; and various accidental death and dismemberment insurance policies applicable to other unions.

[4] The facts in this case are not disputed. Lucas injured himself while not at work, resulting in the loss of three fingers, and the loss of use of the fourth finger, on his right hand (his dominant hand). As a result, he was unable to work as a pipefitter. Unlike the dismemberment insurance policies that apply to many tradespeople, the policy applicable to Lucas did not cover loss of four fingers or the loss of "use" of one hand. Therefore, Lucas did not qualify for lump sum dismemberment insurance. Lucas is of the view that, by not providing proper dismemberment

[3] The Claim was not attached to Lucas' application.

insurance, similar to that provided to members of other Locals, the Union has breached the duty of fair representation it owed to him.

[5] In 2019 Lucas sued a number of parties, including the Union, in the Court of Queen's Bench, on the grounds of breach of contract, negligence, breach of trust, breach of fiduciary duty and negligent misrepresentation. The Court dismissed his action, finding that the question raised in his action was whether the Union failed in its duty to fairly represent him, in its acquisition of insurance and by failing to advocate for him after the denial of benefits, an issue solely within the jurisdiction of the Board. The Court found that the Board has the jurisdiction to hear his claim. The Court did not rule on the validity of his claim.[4]

Relevant Legislative Provisions:

[6] Lucas has now come to the Board. As the Union points out, for his application to succeed, Lucas must meet the criteria set out in section 6-58 or 6-59 of the Act:

> ***Internal union affairs***
> *6-58(1) Every employee who is a member of a union has a right to the application of the principles of natural justice with respect to all disputes between the employee and the union that is his or her bargaining agent relating to:*
> *(a) matters in the constitution of the union;*
> *(b) the employee's membership in the union; or*
> *(c) the employee's discipline by the union.*
> *(2) A union shall not expel, suspend or impose a penalty on a member or refuse membership in the union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the union if:*
> *(a) in doing so the union acts in a discriminatory manner; or*
> *(b) the grounds the union proposes to act on are that the member or person has refused or failed to participate in activity prohibited by this Act.*
>
> ***Fair representation***
> *6-59(1) An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.*
> *(2) Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee.*

[7] On an application for summary dismissal, the following provisions of the Act apply:

> ***Powers re hearings and proceedings***
> *6-111(1) With respect to any matter before it, the board has the power:*
> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*

[4] QBG 1415 of 2019 – JC of Regina; Fiat – January 24, 2020.

(q) to decide any matter before it without holding an oral hearing;

[8] The following provision of *The Saskatchewan Employment (Labour Relations Board) Regulations* also applies to the Union's application:

> ***Applications for summary dismissal***
> *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.*
> *(3) An application to summarily dismiss must:*
> *(a) be in writing; and*
> *(b) be filed and served in accordance with subsection (5).*
> *(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.*
> *(5) If a party requests that the application to summarily dismiss be heard:*
> *(a) by an in camera panel of the board, the application to summarily dismiss must be filed with the registrar, and a copy of it must served on the party making the original application and on all other parties named in the original application, at least 30 days before the date set for hearing the original application;*
> *(b) as a preliminary matter at the outset of the hearing of the matter that is the subject of the original application, the application to summarily dismiss must be filed with the registrar, and a copy of it served on the party making the original application and on all other parties named in the original application, at least three days before the first date set for hearing of original application.*
> *(6) An application to summarily dismiss must contain the following information:*
> *(a) the full name and address for service of the party making the application;*
> *(b) the full name and address for service of the party making the original application;*
> *(c) the file number assigned by the registrar for the original application;*
> *(d) the reasons the party making the application to summarily dismiss believes the original application ought to be summary dismissed by the board;*
> *(e) a summary of the law that the applicant believes is relevant to the board's determination.*

Arguments:

[9] The Union relied on a number of cases in support of its argument that Lucas has failed to provide an arguable case to support his claim.

[10] In the penultimate paragraph of *Siekawitch v. Canadian Union of Public Employees, Local 21*[5] ["*Siekawitch*"], before summarily dismissing a duty of fair representation application, the Board stated:

> *As a minimum, it is necessary for an applicant to identify the grievance or collective agreement provisions under which the Union has failed to fairly represent him or her. Secondarily, there must be some factual basis or claim that the Union acted in an arbitrary or discriminatory manner in its representation (or lack thereof) or had in some fashion acted in bad faith towards the Applicant. None of these elements are present in the application filed by the Applicant. As the Applicant has elected not to supplement his very general application to provide the Board with some basis for a finding that there is an arguable case under s. 25.1, his case falls to be dismissed under the provisions of s. 18(p) and (q) of the Act.*

[11] In *Roy v Workers United Canada Council*[6] ["*Roy*"], another duty of fair representation case was summarily dismissed:

> *[9] Generally speaking, summary dismissal is a vehicle for the disposition of applications that are patently defective. The defect(s) must be apparent without the need for weighing of evidence, assessment of credibility, or the evaluation of novel statutory interpretations. Simply put, in considering whether or not an impugned application ought to be summarily dismissed, the Board assumes that the facts alleged in the main application are true or, at least, provable. Having made this assumption, if the Board is not satisfied that the main application at least discloses an arguable case, and/or if there is a lack of evidence upon which an adverse finding could be made, then the main application is summarily dismissed in the interests of efficiency and the avoidance of wasted resource.*
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> *. . .*
>
> *[15] Furthermore, it is a common misconception that this Board is a governmental agency established to hear any and all complaints about or involving trade unions. However, a review of The Saskatchewan Employment Act quickly establishes that such is not the case. Numerous decisions of this Board have demonstrated that this Board's supervisory responsibility pursuant to now s. 6-59 of The Saskatchewan Employment Act (previously s. 25.1 of The Trade Union Act) is not to ensure that a particular member achieves a desired result or avoids an undesirable outcome; rather the purpose of the provision is to ensure that, in exercising its representative duty, a trade union does not act in a manner that is arbitrary, discriminatory or in bad faith. As a consequence, to sustain a violation of 6-59 of the Act, an applicant must allege and then satisfy this Board through evidence that his/her trade union has acted in a manner that is "arbitrary", "discriminatory" or in "bad faith". As this Board noted in Lorraine Prebushewski v. Canadian Union of Public Employees, Local 4777, (2010) 179 C.L.R.B.R. 2d) 104, 2010 CanLII 20515 (SK LRB), LRB File No. 108-09, these terms are not mere chalices into which applicants may pour their criticisms of their trade union for presentation to the Board. These terms have specific meanings that define the threshold for this Board to exercise its supervisory authority. Simply put, this Board does not sit on appeal of each and every decision made by a trade union; rather, very specific behavior/conduct on the part of a trade union is required to sustain a violation of the Act; that conduct being arbitrariness, discrimination or bad faith. See: Cathy Chabot v. Canadian Union of Public Employees, Local 4777, 2007 CanLII 68749 (SK LRB), [2007] Sask. L.R.B.R. 401, LRB File No. 158-06.*

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[5] 2008 CanLII 47029 (SK LRB).
[6] 2015 CanLII 885 (SK LRB).

[12] In *Beitel v Unifor, Local 1-S (Canada)*[7], the applicant claimed that he had been discriminated against when his union negotiated a new collective agreement that resulted in the elimination of bonus payments to which he thought he was entitled:

> *[54] In the conduct of collective bargaining, there are necessarily tradeoffs that occur as a part of the negotiation process. It is not the Board's position to sit in review of decisions made by Unions bargaining on behalf of their members for the best economic advantage for the collective group. There are, as noted above, policy considerations, practical considerations, bargaining strategies, as well as the normal give and take necessitated by collective bargaining.*
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> *. . .*
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> *[58] During collective bargaining, it is not always possible to get the same treatment for all employees impacted by those negotiations. Sometimes employees are red-circled, or others are provided market adjustments for retention of those employees. The results are the product of give and take with each side seeking to reach an agreement which is to its economic advantage. Individual interests cannot always be fully protected or benefited.*

[13] In *Berry v Saskatchewan Government Employees' Union*[8], the Board made the following comments in coming to the conclusion that the union had contravened its duty of fair representation:

> *20 The terms "arbitrary," "discriminatory," and "in bad faith," which are used in the legislative description of the kind of conduct on the part of a trade union which is to be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:*
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> > *... The union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*
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> *21 This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:*
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> > *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory*

[7] 2015 CanLII 886 (SK LRB).

[8] 1993 CarswellSask 518; [1993] SLRBD No 62; 1993 4th Quarter Sask Labour Rep 65.

> *means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favouritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*

22 In the case of Gilbert Radke v. Canadian Paperworkers Union, LRB File No. 262-92, this Board observed that, unlike the question of whether there has been bad faith or discrimination, the concept of arbitrariness connotes an inquiry into the quality of union representation. The Board also alluded to a number of decisions from other jurisdictions which suggest that the expectations with respect to the quality of the representation which will be provided may vary with the seriousness of the interest of the employee which is at stake. They went on to make this comment:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*

Analysis and Decision:

[14] In *Roy*, the Board cited the principles to be applied in an application for summary dismissal:

> *The Board recently adopted the following as the test to be applied by the Board in respect of its authority to summarily dismiss an application (with or without an oral hearing) as being:*
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> > *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant is able to prove everything alleged in his/her 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 subject application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his/her claim.*[9]

[9] At para 8.

[15] The issue for the Board, then, is whether Lucas' claim has no reasonable chance of success. Has he provided the Board with an arguable case that the Union acted in a manner that was arbitrary, discriminatory or in bad faith, with respect to the acquisition of dismemberment insurance or by failing to advocate for him after the denial of benefits? The answer to this question is no.

[16] As the Board noted in *Roy*, for an application pursuant to section 6-59 of the Act to succeed, the applicant must satisfy the Board that the union has acted in a manner that is arbitrary, discriminatory or in bad faith. The Board has considered these terms in numerous cases. An oft-cited interpretation of the concepts of "arbitrary, discriminatory or in bad faith" was established by the Ontario Labour Relations Board in *Toronto Transit Commission*[10]:

> *. . . a complainant must demonstrate that the union's actions are:*
> *(1) "ARBITRARY" – that is, flagrant, capricious, totally unreasonable, or grossly negligent; or*
> *(2) "DISCRIMINATORY" – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
> *(3) "in BAD FAITH" – that is motivated by ill-will, malice, hostility or dishonesty.*

[17] With respect to the acquisition of dismemberment insurance, Lucas provided no evidence that the initial decision respecting the extent of insurance coverage to be provided to the Union's members was based on arbitrary, discriminatory or bad faith motivations by the Union.

[18] Appendix A of the Collective Agreement filed by Lucas indicates the following with respect to Health & Welfare:

> *The Trustees shall have full authority by majority vote with equal representation on both sides to determine the amounts and select and enter into the forms of insurance required and shall be responsible for the administration of the Plan, increasing and decreasing of benefits payable and the eligibility of claims payable including any necessary plan adjustments to prevent duplication of contributions and coverage in the event of compulsory Government legislation.*
>
> *The terms of the Health and Welfare Plan shall not be negotiable under the terms of any collective bargaining agreement.*
>
> *The Employers and the S.P.P.T.A.* [Saskatchewan Provincial Pipe Trades Association] *shall elect an equal number of Trustees to the above mentioned Health and Welfare Trust Fund.*[11]

[19] The Trust Agreement entered into by the Union with employer representatives states:

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[10] [1997] OLRD 3148, at para 9.
[11] Paragraph 6(a).

> *20.04 The Trustees shall have full authority by majority vote with equal representation on both sides to determine the amounts and select and enter into the forms of insurance required and shall be responsible for the administration of the plan, increasing and decreasing of benefits payable, and the eligibility of claims payable.*
>
> *20.08 The terms of the Health and Welfare plan shall not be negotiable under the terms of any collective bargaining agreement.*
>
> *ARTICLE IV(e) The type and amount of insurance coverage for employees shall be determined by the Trustees from time to time.*

[20] In other words, the decision as to what dismemberment insurance was provided was not made by the Union, but by the Board of Trustees of the Health and Welfare Trust Fund. Even if the Board was to have found the Union responsible for the terms of the insurance policy, there is no evidence that the lack of coverage for Lucas's injury was a result of arbitrary, discriminatory or bad faith action.

[21] With respect to the claim that the Union failed to advocate for him, the transcripts Lucas filed of his meetings with the Union business manager indicate just the opposite. When the Union realized he did not qualify for a lump sum dismemberment payment they did their best to have that decision reversed. Their inability to do so is not evidence of arbitrary, discriminatory or bad faith action.

[22] While Lucas is dissatisfied with the lack of dismemberment insurance coverage for his injury, that is not a sufficient basis for his claim. As the Board stated in *Siekawitch*, it was incumbent on Lucas to provide some factual basis for his claim that the Union acted in an arbitrary or discriminatory manner, or had in some fashion acted in bad faith toward him.

[23] The Board reiterated this position in *Roy*, where it stated:

> *Numerous decisions of this Board have demonstrated that this Board's supervisory responsibility pursuant to now s. 6-59 of The Saskatchewan Employment Act (previously s. 25.1 of The Trade Union Act) is not to ensure that a particular member achieves a desired result or avoids an undesirable outcome; rather the purpose of the provision is to ensure that, in exercising its representative duty, a trade union does not act in a manner that is arbitrary, discriminatory or in bad faith.*[12]

[24] As Lucas has not provided evidence of arbitrary, discriminatory or bad faith conduct by the Union toward him, his application pursuant to section 6-59 of the Act must fail.

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[12] At para 15.

[25] In his application Lucas claimed that the Union breached section 6-58 of the Act. However, he did not provide any evidence of a dispute between himself and the Union relating to matters in the constitution of the Union, his membership in the Union or his discipline by the Union. Therefore, his application pursuant to section 6-58 of the Act also fails.

[26] Lucas' application states that the Union breached section 242 of *The Saskatchewan Insurance Act*. The Board has no jurisdiction to consider or rule on that issue.

[27] With these reasons the Board will issue an Order summarily dismissing the application in LRB File No. 025-20.

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

DATED at Regina, Saskatchewan, this **2nd** day of **October, 2020.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson