SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 568, Applicant v SIGNAL INDUSTRIES (1998) SASKATCHEWAN LTD., Respondent

LRB File No. 199-18; February 7, 2020
Chairperson, Susan C. Amrud, Q.C.; Board Members: Mike Wainwright and Aina Kagis

For Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 568: Larry Kowalchuk
For Signal Industries (1998) Saskatchewan Ltd.: Larry Seiferling, Q.C.

Remedy for breach of section 6-56 of *The Saskatchewan Employment Act* – Purpose of remedy is to put employees in position they would have been in but for the breach – Employer ordered to pay each terminated employee two days' pay.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 568 v Signal Industries (1998) Saskatchewan Ltd*.[1] ["Original Decision"], the Board found that Signal Industries (1998) Saskatchewan Ltd. ["Employer"] committed an unfair labour practice by closing its plant four days before subsection 6-56(6) of *The Saskatchewan Employment Act* ["Act"] allowed for its closure. Pursuant to the Order made at the commencement of that hearing, that liability and remedy would be bifurcated, this panel remained seized to determine an appropriate remedy if the Employer and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 568 ["Union"] were unable to agree. The parties were unable to agree and have come back to the Board for an Order determining an appropriate remedy. The parties agreed that this issue would be determined on the basis of written submissions.

Relevant Statutory Provisions:

[2] The following provisions of the Act are applicable to this matter:

> ***Workplace adjustment plans***
> *6-56(1) If a union receives notice of a technological change or organizational change given, or deemed to have been given, by an employer pursuant to section 6-54 or 6-55, the union may serve notice on the employer in writing to commence collective bargaining for the purpose of developing a workplace adjustment plan.*

[1] 2019 CanLII 98498 (SK LRB).

(2) The written notice mentioned in subsection (1) must be served within 30 days after the date on which the union received or was deemed to have received the notice.

(3) On receipt of a notice pursuant to subsection (1), the employer and the union shall meet for the purpose of collective bargaining with respect to a workplace adjustment plan.

(4) A workplace adjustment plan may include provisions with respect to any of the following:

(a) consideration of alternatives to the proposed technological change or organizational change, including amendment of provisions in the collective agreement;

(b) human resource planning and employee counselling and retraining;

(c) notice of termination;

(d) severance pay;

(e) entitlement to pension and other benefits, including early retirement benefits;

(f) a bipartite process for overseeing the implementation of the workplace adjustment plan.

(5) Not later than 45 days after the union received a notice of technological change or organizational change pursuant to section 6-54, the employer or the union may request the director of labour relations to direct a labour relations officer to assist the parties in collective bargaining with respect to a workplace adjustment plan.

(6) If a union has served notice to commence collective bargaining pursuant to subsection (1), the employer shall not effect the technological change or organizational change with respect to which the notice has been served unless:

(a) a workplace adjustment plan has been developed as a result of collective bargaining;

(b) the minister has been served with a notice in writing informing the minister that the parties have engaged in collective bargaining and have failed to develop a workplace adjustment plan; or

(c) a period of 90 days has elapsed since the notice pursuant to subsection (1) has been served.

Unfair labour practices – employers
6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:

. . .

(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.

Board powers
6-104(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:

. . .

> *(e) fixing and determining the monetary loss suffered by an employee, an employer or a union as a result of a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate.*

Argument on behalf of Union:

[3] In its Written Submission, the Union asked the Board for the following remedies:

> *(a) A declaration that the **'change' was illegal** in breach of 6-56(6) (which has been determined unanimously by the Board) = pursuant to its specific power in s. 6-104(2)(b)*
>
> *(b) An Order reinstating all employees terminated **contrary to the SEA** 6-56(6) and 6-62(1)(r) (which has been determined unanimously by the Board) = pursuant to its specific power in s.6-104(2)(d). We note as well that the Respondent is in contravention of 6-123(f) which essentially repeats the general violation/contravention provisions relied upon by the Board.*
>
> *(c) An Order providing monetary loss to employees terminated **contrary to the SEA** (which has been determined unanimously by the Board) for the period from date of termination to date of reinstatement = pursuant to its specific power in s. 6-104(2)(e). If the Board decides not to order reinstatement then we seek an order providing severance pay of one month per year of service for each employee in lieu of reinstatement.*
>
> *(d) An Order for the re-opening of the plant (as the previous Board unanimously raised as a possible remedial option at para. 39) We rely upon s. 6-103(1) + s. 6-103(1) + s. 6-103(2)(c) + 6-104(2)(ii) collectively as giving the Board jurisdiction to do so.*
>
> *(e) That the Board recommend the maximum fine be prosecuted in writing to the Attorney General against all persons and officers etc. who were involved in making decisions to authorize/implement the 'change' which the Board has unanimously determined were in violation of the SEA = pursuant to the specific remedies in s. 6-123(f) + 6-123(2)(c)(i)(ii) and s. 9-6.* (emphasis in original)

[4] The Union argues that section 6-56 does not, like section 6-55, place limits on the remedies that the Board can order for its contravention. Therefore, all general remedial powers are available to the Board in this matter. Adopting the remedy proposed by the Employer (two days' additional pay for each employee) would deprive section 6-56 of any effect.

[5] The Union argues that subsection 6-56(6) is mandatory in its wording, "the employer shall not effect the…change…unless". Therefore, awarding a nominal monetary amount for failure to comply would not provide an appropriate deterrent to other employers interpreting this provision.

[6] The Union argues that given the broad wording of section 6-103 of the Act, the Board has the power to make the requested Orders. It argues that decisions such as *Kindersley and District Co-operative Ltd. v Retail, Wholesale and Department Store Union*[2], made pursuant to *The Trade Union Act*, that narrowed the Board's remedial powers, are no longer binding, given the broader wording of section 6-103 of the Act.

[7] In support of its application, the Union also referred the Board to *Royal Oak Mines Inc. v Canada (Labour Relations Board)*, 1996 CanLII 220 (SCC), [1996] 1 SCR 369 and *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45 (CanLII), [2014] 2 SCR 323.[3]

[8] In its Reply Submission, the Union referred the Board to *United Food and Commercial Workers, Local 1400 v Affinity Credit Union*, 2019 SKQB 236 (CanLII), in support of its argument that the use of "shall" in subsection 6-56(6) means the requirement in that provision is mandatory, not directory.

Argument on behalf of Employer:

[9] The Employer argues that the purpose of a remedy is to put the parties in the same position they would have been in had the Employer complied with the Act. In support of this argument, it cited three decisions.

[10] In *Miramar Giant Mine Ltd v CAW-Canada, Local 2304*,[4] the arbitrator ordered that the employer pay the employees the wages and benefits they would have earned during the notice period:

> *It is apparent from the foregoing, that if the Employer had fulfilled its obligations and given proper notice, the affected employees would have had the opportunity to work throughout the notice period and earn their regular wages and benefits.*

[11] *I.U.E.C., Local 50 v. Otis Canada Inc.*[5] held:

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[2] 1998 CanLII 12406 (SK CA).
[3] *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.* addressed the issue of an appropriate remedy where the Employer closed its store while it was subject to a freeze on conditions of employment during negotiation of a first collective agreement. It does not provide the Board with helpful guidance in this matter.
[4] 2004 CarswellNat 4981, 135 L.A.C. (4th) 439, 80 C.L.A.S. 107 at para 21.
[5] 2004 CarswellOnt 6340, [2004] O.L.R.B. Rep. 1174, [2004] O.L.R.D. No. 5110, 112 C.L.R.B.R. (2d) 252, 135 L.A.C. (4th) 193, 79 C.L.A.S. 503 (ON LRB) at para 88.

> *The issue of the appropriate remedy in the present case is a difficult one. The goal is to put Mr. Stratton in the position he would have been in had his rights not been violated, subject to mitigation.*

[12] In considering the issue of mitigation (which the Employer did not raise in this matter) *Toronto (City) v. Toronto Civic Employees Union, Local 416*[6] relied on the following principle:

> *The general rule relating to compensation in cases such as this is that the aggrieved person is to be placed, as nearly as possible, in the, position he would have been in, had it not been for the wrong done to him.*

[13] The Employer argues that, at most, the Board should order two more days of wages for each employee. Although the Board held that the workplace closed four days early (on November 30, 2017), December 2nd and 3rd were Saturday and Sunday, non-workdays in this workplace, meaning that the employees would have only worked two more days.

Analysis and Decision:

[14] Part VI, Division 10 of the Act addresses the issue of "Technological Change and Organizational Change". In the Original Decision, the Board held that an organizational change occurred in this workplace. In crafting an appropriate remedy, the Board must be guided by the fact that Division 10 does not prohibit the Employer from implementing an organizational change, in this case, the closure of the plant. All that sections 6-54 to 6-56 provide for is a delay and an opportunity for collective bargaining. Accordingly, an Order by this Board effectively prohibiting the closure, by ordering that the plant be reopened, would be unreasonable and inconsistent with the Act. In compliance with section 6-54, the Employer provided the Union and its employees with over 100 days' notice of the closure. In the Original Decision, the Board held that the Employer complied with section 6-54.

[15] The Board found in the Original Decision that section 6-56 restarted the clock, when the Union gave notice to commence collective bargaining for the purpose of developing a workplace adjustment plan. After unsuccessful bargaining, the Employer proceeded with its original planned closure date, resulting in a contravention of section 6-56, by closing four days earlier than that provision allowed. As the Union points out, the Employer could have entirely avoided this result by giving notice to the Minister that the parties had failed to develop a workplace adjustment plan. The failure to adopt this alternative approach was not explained. However, the Board finds that

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[6] 2004 CarswellOnt 9946, [2004] O.L.A.A. No. 967, 135 L.A.C. (4th) 140, 79 C.L.A.S. 520 at p. 4.

the existence of this alternative is further support for its interpretation of section 6-56 as existing only for the purpose of providing time for collective bargaining, not for the purpose of prohibiting the Employer from proceeding with its planned organizational change.

[16] In *Royal Oak Mines Inc. v Canada (Labour Relations Board)*, *supra*, the Supreme Court made the following comments respecting the responsibility of the Board in crafting an appropriate remedy:

> *The requirement that the Board's order must remedy or counteract any consequence of a contravention or failure to comply with the Code imposes the condition that the Board's remedy must be rationally connected or related to the breach and its consequences. This requirement is also consistent with the test established in National Bank of Canada v. Retail Clerks' International Union, 1984 CanLII 2 (SCC), [1984] 1 S.C.R. 269, which required that there be a relation between the breach, its consequences and the remedy. Section 99 also provides that the Board may remedy breaches which are adverse to the fulfilment of the objectives of the Code. This empowers the Board to fashion remedies which are consistent with the Code's policy considerations. Therefore, if the Board imposes a remedy which is not rationally connected to the breach and its consequences or is inconsistent with the policy objectives of the statute then it will be exceeding its jurisdiction. Its decision will in those circumstances be patently unreasonable.*[7]

[17] The Court went on to determine four situations in which a remedial order will be subject to review by the courts: (1) if the remedy is punitive in nature; (2) if the remedy infringes the *Canadian Charter of Rights and Freedoms*; (3) if there is no rational connection between the breach, its consequences, and the remedy; and (4) if the remedy contradicts the objects and purposes of the Act.

[18] Once the Union served notice under section 6-56 of the Act, and the required collective bargaining failed, the Employer had two choices: it could have provided notice to the Minister under clause (6)(b) that the collective bargaining had failed, or it could have extended the closure date to December 4, 2017. It did neither, and that is the reason that the Board found in the Original Decision that the Employer had committed an unfair labour practice.

[19] If the Employer had served the Minister with a notice in writing that collective bargaining had failed, it would have fully complied with section 6-56, no unfair labour practice would have been committed, and no remedy would be due to the employees. It did not do that. The other alternative available to the Employer would have been to adjust its closing date to December 4, 2017. If that had occurred, the employees would have each received two additional days' pay. The Board agrees that, to place the employees in the position they would have been in if the

[7] At para 56.

Employer had complied with the Act, the most due to these employees is two additional days' pay.

[20] In the Original Decision, the Board reached the conclusion that the Employer contravened section 6-56. The issue currently before the Board is what is the appropriate remedy for that breach. The Employer made arguments suggesting the Board should reconsider the decision that it failed to comply with subsection 6-56(6). These arguments were ignored. The purpose of this decision is to determine an appropriate remedy for the breach found in the Original Decision. It is not a reconsideration of the Original Decision.

[21] The Employer suggests that since it was a technical breach, no remedy is required. The Board disagrees. However, to put the employees in the position they would have been in but for this breach does not require the Employer to reopen the plant for two days. That would be an unreasonable Order, with no rational connection to the breach or the purpose of section 6-56. To put the employees in the position they would have been in but for this breach does, however, require the Employer to pay the employees for those two additional days. Mitigation was not raised as an issue and, given the short period of time in issue, will not be considered.

[22] None of the other remedies requested by the Union will be granted. The Board has no role under section 6-123 of the Act. While the Board has a wide range of remedies available to it under the Act, they must be applied in a manner that is consistent with the policy objectives of section 6-56 and consistent with the over-riding goal of putting the employees in the position they would have been in but for the breach.

[23] With these Reasons the Board will issue an Order requiring the Employer to pay each of the affected employees two additional days' pay, to make up for them not working on December 1 and 4, 2017.

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

DATED at Regina, Saskatchewan, this **7th** day of **February, 2020.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson