

JASON G. RATTRAY, Applicant v UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS), LOCAL 9841, Respondent

LRB Files No. 012-17 and 022-17; July 16, 2021

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

For Jason G. Rattray:

Larry Dawson

For United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied Industrial and
Service Workers International Union (United
Steelworkers), Local 9841

Heather M. Jensen

Remedy for breach of duty of fair representation – Expenses granted for moving to Edmonton to obtain new employment and for travelling from Edmonton to Regina for Board hearings – No other expenses were proven – Purpose of award is compensation not deterrence.

REASONS FOR DECISION

Background:

[1] **Susan C. Amrud, Q.C., Chairperson:** On January 24, 2020, this Board issued a decision¹ finding that the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 9841 [“Union”] had contravened the duty of fair representation that it owed to Jason Rattray pursuant to section 6-59 of *The Saskatchewan Employment Act* [“Act”]. With respect to remedy, the Board made the following comments that are relevant to the current matter:

[109] When the Board is considering an appropriate remedy, its goal is to place Rattray as far as possible in the same position he would be in if Local 9841 had not contravened its duty of fair representation. Remedies are to be compensatory, not punitive. Usually, in a matter such as his, that would mean directing Local 9841 to properly process his grievance or referring the grievance directly to arbitration. This is one of those unusual cases where reference to Local 9841 or arbitration is no longer an appropriate remedy. Too much time has passed for that to be a reasonable outcome in this matter. Rattray is no longer asking for reinstatement. Rattray suggested that, at this point, a reasonable remedy would be an award of damages or a negotiated settlement. The Board agrees that would be part of a reasonable remedy in this matter. The money paid to him under the Settlement Agreement is a good start.

¹ *Jason G. Rattray v Unifor National*, 2020 CanLII 6405 (SK LRB).

[2] The decision went on to urge the parties to try to resolve the issue of an appropriate remedy. However, even with the assistance of a mediator they were unable to do so, and have requested the Board make this determination.

[3] The Board reconvened and heard a day of evidence from Rattray on June 8, 2021 respecting the monetary compensation that he proposed that the Union be ordered to pay to him, in the total amount of \$192,305.92². Surprisingly, when the hearing reconvened on June 9, 2021, Rattray withdrew that request in favour of a new proposal that the Union pay him \$52,988.43:

<u>Part I – Loss of Vacation</u>		
SGEU Member Service – June 1994 – April 2008 =	14 years	
Unifor Seniority – April 2008 to April 2016 =	8 years	
<i>Total Service</i>	22 years	
22 years service entitles Mr. Rattray to 6 weeks of vacation with SGEU		
Mr. Rattray is currently earning only three weeks of vacation with AUPE		
Loss of 3 weeks vacation (2% per week):		
SGEU 6 weeks vacation – AUPE 3 weeks vacation = 3 week loss		\$15,258.00
AUPE CA: Requires 20 years service to attain 6 weeks		
3 years vacation loss at SGEU/Steelworker's rate @ 42.39		
<u>Overtime</u>		
60 hours x \$60/hr = \$3,600 (yearly) divided by 1/3		\$1,200.00
Part I Sub Total		\$16,458.00

<u>Part 2: Costs of Living in Edmonton from July 2016 to August 2017</u>		
<u>Travel from Edmonton to Regina from July 2016 to August 2017</u>		
(As per Article 29.1 of the 2016-2020 Collective Agreement (page 47))		
18 trips home		
18 x 1,400 km = 25,200 km		
25,200 km x .5025/km / .5		\$6,331.50
<u>Rent Edmonton</u> 13 Months x \$600/mo		\$7,800.00
<u>Sustenance (no receipt required)</u>		
(As per Article 30.1.3 of the 2016-2020 Collective Agreement (page 48))		
300 days x \$51/day		\$15,300.00
Part 2 Sub Total:		\$29,431.50

² Exhibit A-77.

<u>Part 3: Family Move to Edmonton August 2017</u>		
<u>Moving Costs</u>		
<u>Storage Fees Cubeit</u>		
1 Month x \$231.38		\$231.38
3 Months x \$462.76		\$1,388.28
<u>Storage Unit Move to Edmonton</u>		\$1,995.00
<u>Less 33% Income tax Deduction</u>		-\$1,192.83
Sub Total		\$2,614.66 ³
<u>Real Estate Fees \$349,900.00 x 3.5%</u>		\$12,246.50
Part 3 Sub Total		
		\$14,861.16

<u>Part 4 – Labour Relations Board Hearing Costs</u>		
<u>Travel to Regina for LRB Hearing</u>		
5 x 1,400 km = 7,000km		
7,000 x .5025/km =		\$3,517.50
<u>Parking for Hearing Days (no receipts required)</u>		
<i>(As per Article 29.1.5 of the 2016-2020 Collective Agreement (page 48))</i>		
15 days x \$16/day =		\$240.00
<u>Sustenance (no receipt required)</u>		
<i>(As per Article 30.1.3 of the 2016-2020 Collective Agreement (page 48))</i>		
15 days x \$51/day =		\$765.00
<u>Private Accommodation (no receipt required)</u>		
<i>(As per Article 30.2 of the 2016-2020 Collective Agreement (page 48))</i>		
15 days x \$35/day =		\$525.00
<u>Incidental Expenses</u>		
<i>(As per Article 30.3 of the 2016-2020 Collective Agreement (page 48))</i>		
15 days x \$8/day =		\$120.00
<u>Counsel Advocacy Costs</u>		\$22,312.50
Part 4 Sub Total		
		\$27,480.00

<u>PART 1 Sub Total</u>	\$16,458.00	
<u>PART 2 Sub Total</u>	\$29,431.50	
<u>PART 3 Sub Total</u>	\$14,861.16	
<u>PART 4 Sub Total</u>	\$27,480.00	
	Total	\$88,230.66
	Less Paid by SGEU:	-\$35,242.23
	TOTAL (1/2 to be paid out as “damages”)	\$52,988.43

³ The sub-total for the moving costs actually amounts to \$2,421.83. The Part 3 Sub Total and Total are accordingly affected.

[4] Rattray's evidence indicated that after his employment with Saskatchewan Government and General Employees' Union ["SGEU"] was terminated on April 13, 2016, he was unemployed until July 16, 2016 when he commenced work with the Alberta Union of Public Employees ["AUPE"]. In 2015 Rattray's salary from SGEU was \$86,397.44⁴. In 2017 his salary from AUPE was \$150,024.09⁵. Not all of this information was in evidence when the Board issued the decision on January 24, 2020.

Argument on behalf of Rattray:

[5] Rattray states that the amount now claimed represents compensation for his expenses and a deterrence payment. He argues:

*The fact that Mr. Rattray was able to mitigate his losses in a short period of time should not be held against him to allow the Union to skate off scot-free. There must be an element of deterrence in this.*⁶

[6] Rattray relied on *Burns et al. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada, Local 219 et al.)*⁷ to argue that the Board has the discretionary power to order the Union to pay the advocate expenses he claims. In that case the New Brunswick Court of Appeal held that the trial judge had erred in not awarding costs and, considering the complexity of the case, the importance of the issues and amounts involved, awarded the respondent trial costs of \$26,375.00.

[7] He referred to *Dezentje v Bendfeld*⁸ in which the complainants were compensated for one-third of their financial losses as a result of their lost opportunity to arbitrate their grievances. Two other cases were relied on by Rattray, *CB, HK & RD v Canadian Union of Public Employees, Local No. 21*⁹ and *Brian Cadieux v Amalgamated Transit Union, Local 1415*¹⁰, in neither of which remedial issues were addressed.

Argument on behalf of the Union:

[8] The Union argues that Rattray has the onus of proving the facts necessary for his claim. He has the onus of establishing a loss that flows from the Union's breach of its duty.

⁴ Exhibit U-12.

⁵ Exhibit U-14.

⁶ Closing Arguments on behalf of Jason Rattray, at page 21.

⁷ 2012 NBCA 13 (CanLII).

⁸ 1999 CarswellAlta 808; [1999] Alta. L.R.B.R. 267; [1999] A.L.R.B.D. No. 12; 99 C.L.L.C. 220-063.

⁹ 2017 CanLII 68786 (SK LRB).

¹⁰ 2016 CIRB 809 (CanLII).

[9] The goal is to place Rattray in the position he would have been in, but for the breach. Remedies are compensatory, not punitive.

[10] The Union argues that there is not a sufficient nexus between the mitigation expenses claimed by Rattray for the cost of living in Edmonton and the cost of the family's move and the conduct of the Union. These expenses, it argues, were caused by SGEU's termination of Rattray's employment and not by the Union's breach of the Act.

[11] The Union relies on sections 29.1 and 30 of *The Legal Profession Act, 1990* to argue that the fee described as Counsel Advocacy Costs should not be granted because Mr. Dawson is not a lawyer. These costs, it says, are not legally recoverable in Saskatchewan. Further, there is no evidence that Rattray did not have the skill or ability to bring his application without assistance. This is not one of those rare cases in which compensation for legal expenses is justified, taking into account Rattray's experience and skills and the fact that he did not hire a lawyer but instead hired a non-legal representative with experience and skills similar to his own. Further, in the unusual case where legal expenses are granted by the Board, it has not awarded the full amount of solicitor-client costs.

Relevant Statutory Provisions:

[12] The Union relied on two sections of *The Legal Profession Act, 1990*:

Practice of law

29.1 The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person that require the knowledge and skill of a person trained in the law, and includes the following:

- (a) giving advice or counsel to others with respect to their legal rights or responsibilities or the legal rights or responsibilities of others;*
- (b) drafting or completing legal documents or agreements that affect the legal rights of an entity or person;*
- (c) representing another entity or person in any of the following:*
 - (i) a court;*
 - (ii) a formal administrative adjudicative proceeding;*
 - (iii) a formal dispute resolution process;*
 - (iv) any other administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review;*
- (d) negotiating legal rights or responsibilities on behalf of another entity or person.*

Authority to practise law

30(1) Subject to section 31, no persons other than members who hold a licence shall:

- (a) practise law in Saskatchewan; or*
 - (b) hold themselves out as, or represent themselves to be, persons who may practise law in Saskatchewan.*
- (2) Subject to section 31, a person, other than a member who holds a licence, who commences, prosecutes or defends an action or proceeding in a court of civil or criminal jurisdiction or acts as counsel or a lawyer in an action or proceeding is:*

- (a) incapable of recovering any fee, reward or disbursement on that account; and
 (b) deemed to be guilty of a contempt of the court in which the proceeding has been commenced, carried on, defended or prosecuted, and may be proceeded against for contempt before the Court of Appeal or a judge of the court sitting in chambers.
 (3) Nothing in this section affects the ability of a person or entity to provide members of the public with information of a general nature about the law and legal procedures or any other legal information as defined in the rules.

[13] The following provision of the Act is applicable in this matter:

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.

Analysis and Decision:

[14] The Board has jurisdiction pursuant to clause 6-104(2)(e) of the Act to order the payment of damages to compensate for the monetary loss suffered by Rattray as a result of the Union's contravention of section 6-59 of the Act. As the Board stated in *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*¹¹ [*"Hartmier"*], the purpose of the damages award is to place Rattray in the position in which he would have been, but for the breach. However, for the Board to be able to award such damages, Rattray was required to provide the Board with evidence of the losses he incurred and how those losses resulted from the Union's breach.¹² With respect to many of the heads of damages claimed, such evidence was lacking.

Loss of vacation and overtime:

[15] Rattray had an obligation to attempt to mitigate his damages. He did that, by obtaining an equivalent position with AUPE, after approximately three months, that paid significantly more than the salary he was previously receiving at SGEU. As a result, no loss occurred; the amounts Rattray claimed for loss of vacation time and overtime are more than made up by this mitigation.

¹¹ 2017 CanLII 20060 (SK LRB).

¹² *Amalgamated Transit Union, Local 615 v Saskatoon (City)*, 2014 CanLII 76049 (SK LRB).

Costs of living in Edmonton from July 2016 to August 2017:

[16] Rattray chose to maintain two households during this time period, one in Edmonton and one in Regina. He provided no evidence with respect to why he chose to do so. Without that evidence, he, not the Union, is responsible for the additional cost that ensued.

Family move to Edmonton August 2017:

[17] Rattray incurred expenses to move to Edmonton to take up his new employment there. The Union is responsible for reimbursing him for this cost. Their actions led to there being no opportunity for Rattray to be reinstated in his former position with SGEU, and to the requirement for him to mitigate his damages by obtaining new employment. These expenses arose from his efforts to mitigate his losses. Rattray's claim indicated that these expenses amounted to \$2,614.99. However, they actually amounted to \$1,955.87. The expenses claimed in Exhibits A79, A81, A82, A83, A86 and A87 total \$3148.70; from that is subtracted the income tax deduction of \$1192.83, which Rattray admitted to in his submissions. He testified that he paid for storage of his personal belongings pending his move for four months, however the invoices filed as Exhibits only reflected three months of expenses.

[18] With respect to real estate fees, Exhibit A80 is a copy of a brokerage contract pursuant to which Rattray's house in Regina was listed for sale. No evidence was provided of the price at which the house was sold or the amount of fees actually paid. The real estate fees are not proven.

Labour Relations Board hearing costs:

[19] Rattray asks to be reimbursed for travel from Edmonton to Regina for the hearing of his claim. With respect to parking, sustenance, accommodation and incidental expenses, he indicates that no evidence is required. He asks to be reimbursed at the rates set out in the collective agreement that applied to him when he was employed at SGEU. The Board finds that the rates set out in the collective agreement are inapplicable to this situation. Evidence should have been provided.

[20] The request for reimbursement for the cost of accommodation is denied; Rattray's testimony indicated that he incurred no expense for accommodation. The request for reimbursement for incidental expenses is denied; he provided no evidence of incurring any incidental expenses.

[21] While Rattray provided no evidence to prove the amount of the expenses he incurred in driving from Edmonton to Regina for hearings, and for parking and sustenance during the days he was attending the hearings, he testified that he incurred such costs. However, he claimed expenses for 15 days of hearings. According to the Board's records, there were ten days of hearings.¹³ The amounts claimed of \$240.00 for parking (15 days x \$16/day) and \$765.00 for sustenance (15 days x \$51/day) are based on reasonable daily rates, but will be reduced to \$160.00 (10 days x \$16/day) and \$510.00 (10 days x \$51/day), respectively. The rate claimed for mileage, of \$.5025/km, for a total of \$3,517.50, is excessive. The Board will arbitrarily award half that amount, or \$1,758.75.

Counsel advocacy costs:

[22] Although Rattray described this expense as Counsel Advocacy Costs, his advocate is not a lawyer. The Union asked the Board to disallow this expense on the basis of sections 29.1 and 30 of *The Legal Profession Act, 1990*. It is unnecessary for the Board to consider this argument, as those provisions did not come into force until January 1, 2020, after the services had been provided.

[23] In *Hartmier*, the Board awarded monetary compensation of \$1,000.00 per sitting day to compensate the applicant for some of her legal expenses, relying, at paragraph 240, on the rationale set out in *Gordon Johnson v Amalgamated Transit Union, Local 588 and City of Regina*¹⁴:

With respect to the claim for monetary loss related to legal fees incurred by Mr. Johnson in bringing this application for an unfair labour practice under section 25.1 of [The Trade Union Act, RSS 1978, cT-17], the Board addressed this issue in [K.H. v Communications, Energy and Paperworkers Union, Local 1-S et al., LRB File No. 015-97] and held that in exceptional circumstances such claims will be allowed. In that instance, the applicant was suffering from a mental illness which impaired his ability to represent himself in relation to his employment problems. However, the Board generally adopts a cautious approach to claims for damages of this nature. In Stewart v Saskatchewan Brewers' Bottle & Keg Workers, Local Union No. 340, [1996] Sask LRBR 386, LRB File No. 025-95, the Board reviewed the practice in other jurisdictions and concluded as follows, at 395:

We are of the view that, like the legislation which is the basis of the decisions of the Canada Labour Relations Board and the British Columbia Labour Relations Board, [The Trade Union Act] confers upon this Board broad powers to fashion remedies like the "make whole" remedies described in those decisions. The powers granted to the Board in ss. 5(e) and (g) of the Act, along with the general remedial power under s. 42 of the Act, permit us a wide latitude in devising

¹³ Exhibit A78, the invoice provided by Dawson to Rattray for his services, also indicates ten days of hearings. Exhibit A77 referred to 10 days of hearings and Rattray admitted in his testimony that there were 10 hearing days.

¹⁴ LRB File No. 091-96 dated February 17, 1998.

remedies which will address the losses suffered by applicants in the context of the objectives of the Act.

In this connection, it is perhaps helpful to think of legal expenses in terms other than the notion of "costs" as it is understood in connection with proceedings in civil courts. For reasons which have been alluded to earlier, this Board has never considered it appropriate to award costs in that sense of the term as part of the determination of applications under the Act. This does not mean that there are not circumstances in which the expense of obtaining legal advice might not be part of an extraordinary "make-whole" remedy. In some cases, the essence of the infraction which is alleged by an applicant concerns the representation to which an employee is entitled under the Act. In this sense, granting some compensation for the use by an application of the services of a solicitor is more akin to compensation for a breach of fiduciary duty than to costs in their traditional sense. [Emphasis added in *Hartmier*]

[24] Rattray did not provide the Board with any evidence respecting why it was necessary for him to have the services of an advocate. To the contrary, throughout the hearing of the original application, and the hearing with respect to the issue of remedy, Rattray made it clear that he would have been fully capable of representing himself. He has not proven that this is a case in which compensation for this expense should be granted as part of an extraordinary make-whole remedy. The request for reimbursement of this expense is denied.

Summary:

[25] The Board determines it to be appropriate that the Union pay Rattray \$4,384.62. This amount compensates him for expenses that he reasonably incurred as a result of the Union's breach of section 6-59 of the Act and for which he provided the Board with evidence.

[26] There is no reason to take into consideration the amount paid to Rattray by SGEU. That amount was paid for "severance or payment for loss of employment" and "damages for relinquishment of any rights to reinstatement"¹⁵. The amounts awarded here are to repay Rattray for expenses incurred as a result of the Union's breach of its duty of fair representation.

[27] The Union is fortunate that Rattray took seriously his duty to mitigate his damages, and quickly found employment that pays more than what he was earning from his employment at SGEU. This eliminated any requirement for the Union to pay him any further compensation for the loss of his employment than he received from SGEU. While Rattray may consider this unfair, it is consistent with the Board's longstanding position that the purpose of damages is not deterrence, but compensation. It is consistent with the Board's direction in the earlier Reasons

¹⁵ Exhibit A31, Settlement Agreement and Release.

that remedies are to be compensatory, not punitive. Throughout Rattray's submissions with respect to an appropriate remedy, he emphasized that a fair and equitable amount of damages would not just compensate him but also punish the Union, for example, "It is our firm belief that without a substantial penalty imposed upon the Local as a deterrent, there will be no recognition of the offences committed by the Local, and certainly no deterrence imposed on the Local, to not engage in this type of misconduct again."¹⁶ In taking this approach, he lost sight of the purpose of the remedy that the Board would grant, and misinterpreted the direction provided to the parties when the Board urged the parties to attempt to resolve the issue of compensation on their own.

[28] With these Reasons, the Board will issue an Order fixing the monetary loss suffered by Rattray as \$4,384.62, and requiring the Union to pay him that amount. This Order is in addition to the remedies ordered in the January 24, 2020 Reasons and Order.

DATED at Regina, Saskatchewan, this **16th** day of **July, 2021**.

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson

¹⁶ At page 12.