CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 777, Applicant v KEITH HARTT, Respondent

LRB File No. 070-21; October 15, 2021
Chairperson, Susan C. Amrud, Q.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

For Canadian Union of Public Employees, Local 777: Mira Lewis

For Keith Hartt: Self-represented

Application for summary dismissal granted – No arguable case that the Union failed to fairly represent Respondent.

Applicability of time limitation in s. 19(5) of the Regulations not determined – Section 35 of Regulations applied to allow consideration of application.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: On November 13, 2020, Keith Hartt filed two applications with the Board: an unfair labour practice application against his employer, the City of Melfort ["Employer"][1] and a duty of fair representation application against his union, Canadian Union of Public Employees, Local 777 ["Union"][2]. The application against his Employer was summarily dismissed by the Board on June 7, 2021[3]. At Motions Day on January 12, 2021, Hartt's application against the Union was set for hearing on July 7 and 8, 2021. At Hartt's request, and with the Union's consent, on July 5, 2021 that hearing was adjourned. The Union applied to the Board on June 4, 2021 for an order summarily dismissing Hartt's application. It requested that the application be considered without an oral hearing. These Reasons address that application.

Legislative Provisions:

[2] The following provisions of *The Saskatchewan Employment Act* ["Act"] are relevant to this application:

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[1] LRB File No. 172-20.
[2] LRB File No. 171-20.
[3] *City of Melfort v Keith Hartt*, 2021 CanLII 49275 (SK LRB).

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

Applications re breach of duty of fair representation
6-60(1) Subject to subsection (2), on an application by an employee or former employee to the board alleging that the union has breached its duty of fair representation, in addition to any other remedies the board may grant, the board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of that time, if the board is satisfied that:

(a) the denial of fair representation has resulted in loss of employment or substantial amounts of work by the employee or former employee;

(b) there are reasonable grounds for the extension; and

(c) the employer will not be substantially prejudiced by the extension, either as a result of an order that the union compensate the employer for any financial loss or otherwise.

(2) The board may impose any conditions that it considers necessary on an order made pursuant to subsection (1).

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;

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

[3] On April 1, 2021, the Board enacted *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021* ["new Regulations"]. The new Regulations repealed *The Saskatchewan Employment (Labour Relations Board) Regulations* ["old Regulations"].

[4] The old Regulations did not contain a time limitation for the filing of summary dismissal applications; a time limitation was added in the new Regulations.

Old Regulations

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;

New Regulations

Application for summary dismissal

19(1) In this section:

"application to summarily dismiss" means an application pursuant to subsection (2);

"original application" means, with respect to an application to summarily dismiss, the application filed with the board that is the subject of the application to summarily dismiss;

"party" means an employer, union or other person directly affected by an original application.

(2) A party may apply to the board for an order to summarily dismiss an original application.

(3) An application to summarily dismiss must:

(a) be in Form 18 (Application for Summary Dismissal); 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 with or without an oral hearing.

(5) The application to summarily dismiss must be filed, and a copy of it must be served on the party that made the original application and on all other parties to the original application, before the date for the hearing of the original application is set.

(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.

[5] Two other provisions of the new Regulations are relevant in this matter:

> ***Authority to vary time***
> *30(1) On the request of any employer, union, labour organization or other person, the registrar may extend the time fixed by these regulations for filing any Form or document or doing any other thing authorized or required by these regulations, if the period at or within which the matter ought to have been done has not expired.*
> *(2) On the request of any employer, union, labour organization or other person, the executive officer may by order set a further or other time than the time fixed by these regulations for filing any Form or document or doing any other thing authorized or required by these regulations.*
> *(3) The executive officer may issue an order pursuant to subsection (2) whether or not the period at or within which a matter mentioned in that order ought to have been done has expired.*
> *(4) The executive officer may impose any terms and conditions on an order issued pursuant to subsection (2) that the executive officer considers appropriate.*
> *(5) Anything done at or within the time specified by the registrar pursuant to subsection (1) or in an order pursuant to subsection (2) is as valid as if it had been done at or within the time fixed by these regulations.*
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> ***Non-compliance***
> *35 Non-compliance with these regulations does not render any proceeding void unless the board directs otherwise.*

Argument on behalf of Union:

[6] First the Union argues that Hartt's application should be summarily dismissed for delay. Hartt's application indicates that the Union's alleged contravention of the Act came to his attention on September 10, 2018. Hartt's application was filed more than 26 months later, and he provided no explanation for the delay.

[7] The Union also argues that Hartt's application should be dismissed as it raises no arguable case. He has provided no information about alleged contraventions by the Union prior to September 10, 2018. Since that date the Union has provided him with significant assistance. In 2019 the Union filed two grievances in relation to Hartt's overtime. The Union negotiated on Hartt's behalf and, with his knowledge and participation, both grievances were resolved. Hartt signed the memorandum of settlement and was paid the agreed to sum.

[8] Then, when Hartt was suspended for five days, the Union filed a grievance of the suspension on his behalf on December 4, 2019. Hartt signed the grievance before it was filed. A Union representative attended the investigation meeting respecting it with Hartt. When Hartt was terminated from his employment on May 12, 2020, the Union filed a grievance on his behalf. The suspension and termination grievances were settled after the Union met with Hartt and he agreed to the terms of the proposed settlement.

[9] In addition to the grievances, the Union also assisted Hartt with various other issues in 2019 and 2020, respecting his working conditions, benefits and working hours.

[10] The Union argues that Hartt has not raised an arguable case. It refers to *Siekawitch v. Canadian Union of Public Employees, Local 21*[4]:

> *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] The Union argues that, in this matter, Hartt has equally failed to provide a factual basis for his claim that the Union failed in its duty to fairly represent him.

[12] The Union also relies on *Soles v. Canadian Union of Public Employees, Local 4777*[5]:

> *[37] We agree with the decision of the Canada Board in McRaeJackson, supra, where it is made clear that the onus is on the applicant to provide particulars and documents to support its allegations that a union has violated the duty of fair representation. In that case, while determining that certain applications should be dismissed without an oral hearing, the Board stated at 16 and 17:*
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> > *[49] **The Board is an independent and adjudicative body** whose role is to determine whether there have been violations of the Code. Although the Code gives the Board broad powers in relation to any matters before it, **it is not an investigative body. Accordingly, it is not mandated to go on a fact-finding mission on behalf of the complainant,** to entertain complaints of poor service by the union, to investigate the union's leadership or to investigate complaints against the employer for alleged wrongs suffered in the workplace. **Employees who allege that their union has violated the Code and wish to obtain a remedy for***

[4] 2008 CanLII 47029 (SK LRB) at page 9.
[5] 2006 CanLII 62947 (SK LRB).

> ***that violation must present cogent and persuasive grounds to sustain a complaint.***
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> *[50] A complaint is not merely a perceived injustice; it must set out the facts upon which the employee relies in proving his or her case to the Board. A complaint goes beyond merely alleging that the union has acted "in a manner that is arbitrary, discriminatory or in bad faith."* ***The written complaint must allege serious facts, including a chronology of events, times, dates and any witnesses. Copies of any documents that are relevant, including letters from the union justifying its actions or decision, should be used to support the allegations.*** [emphasis added in *Soles*]

[13] The Union submits that Hartt's application does not contain information sufficient for the Union to identify what it is to respond to, and as such does not contain an arguable case that a contravention of the Act occurred. Coupled with the fact that the Applicant claims he became aware of the alleged contraventions more than 26 months before he filed the application, the Union argues that Hartt's application should be summarily dismissed.

Argument on behalf of Hartt:

[14] In his application, Hartt makes numerous allegations against the Union:

- *When called into office over any issues, no representation and after the fact they made action plans to resolve issue but never followed thru.*
- *Never followed collective agreement (no harassment, intimidation or bullying.*
- *Union never protected me from wrong doings of my employer and I pay them to do that. The union has misrepresentated me allowing my employer to harrass, and intimidate me.*
- *The union has misrepresented me, they have failed to act in good faith on my behalf causing financial loss and damage and dismissal from my job*
- *union does not follow collective agreement*
- *union fails with communication*
- *union outruns timelines* [as written]

[15] Similar themes are found in his Reply to the Union's application. He opposes the Union's application and argues that he should be given an opportunity to prove his case.

[16] Hartt also argues that the Union's application should be dismissed because of its non-compliance with subsection 19(5) of the new Regulations.

Analysis and Decision:

[17] The onus in this matter is on the Union, to satisfy the Board that Hartt has not established an arguable case. Both parties filed documentary evidence that established the following. It showed that in 2019 and 2020 the Union filed four grievances on Hartt's behalf. Two, respecting overtime, were settled with Hartt's written consent. With respect to settlement of the other two, respecting his suspension and termination, he either initially agreed to it then changed his mind (according to the Union) or never agreed to it (according to Hartt). A union does not require a grievor's consent to settle a grievance. Instead, it has to consider the grievance carefully, thoroughly, and in good faith. Both Hartt and the Union filed a seven-page letter dated August 6, 2020 that the Union sent to Hartt explaining its rationale for accepting the Employer's settlement offer for the suspension and termination grievances. It demonstrates that the Union carefully considered the situation. Hartt also filed an undated letter to him from the Union explaining why they recommended he accept the Employer's settlement offer respecting the overtime grievances. Again, it indicates a thoughtful and thorough analysis. This evidence satisfies the Board that there is no arguable case that the Union acted in a manner that was arbitrary, discriminatory or in bad faith.

[18] The Board must also consider the timing of the Union's summary dismissal application. As Hartt noted, at the time that the Union made its application for summary dismissal, a date had already been set for the hearing of his application. Subsection 19(5) of the new Regulations was not yet in force when the date was set for that hearing, but it was in force when the Union filed its summary dismissal application. Neither party was represented by counsel in this matter and, as a result, the legal implications of this timing were not addressed in the parties' submissions. Therefore, the Board is not prepared to make a determination as to whether subsection 19(5) applied to the Union when it filed its application.

[19] The Union could have made a request for an Order pursuant to subsection 30(2) of the new Regulations extending the time for the filing of its application. It did not. However, section 35 of the new Regulations[6] authorizes the Board to waive the Union's non-compliance with subsection 19(5), if that provision applies.

[20] Even if the Board is to assume that subsection 19(5) applies to the Union's application, the Board is not prepared to allow Hartt's application to proceed. The Union's non-compliance

[6] Section 30 of the old Regulations contained the same power.

with subsection 19(5) of the new Regulations does not render its application void unless the Board directs otherwise, and the Board will not direct otherwise in this matter. There is nothing in the materials filed that could lead the Board to a conclusion that Hartt has an arguable case that the Union did not fairly represent him. The documents filed by both Hartt and the Union demonstrate that the Union took significant steps to fairly represent him.

[21] In *Andritz Hydro Canada Inc. v Timothy John Lalonde and Director of Occupational Health and Safety*[7], the Board recently considered a summary dismissal application and made the following comments that are equally applicable in this matter:

> *[23] In Roy v Workers United Canada Council, the Board outlined the applicable test to apply on an application for summary dismissal:*
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> > *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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> *[24] In Lyle Brady v International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local Union 7715, the Board emphasized that it will only summarily dismiss an application if it is plain and obvious that the application cannot succeed. The test is a stringent one. If the Board concludes that the application has no reasonable prospect of success then it may dismiss the application on a summary basis, but it should do so only in plain and obvious cases, or in cases where the underlying application is patently defective.*

[22] It is plain and obvious that Hartt's application cannot succeed. Even assuming the facts alleged by Hartt are provable he has not established an arguable case that the Union acted in a manner that was arbitrary, discriminatory or in bad faith. In fact, the documentation he filed indicates exactly the opposite. His application has no reasonable prospect of success. He presented no factual basis for his allegations. He has not presented cogent and persuasive grounds to support his application.

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[7] 2021 CanLII 61031 (SK LRB).

[23] Accordingly, with these Reasons an Order will issue that the application for summary dismissal in LRB File No. 070-21 is granted and the application in LRB File No. 171-20 is dismissed.

DATED at Regina, Saskatchewan, this **15th** day of **October, 2021.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson