Saskatchewan
Labour Relations Board

SEIU-WEST, Applicant v ALISON DECK, Respondent, SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION and CANADIAN UNION OF PUBLIC EMPLOYEES, Respondent Unions, and SASKATCHEWAN HEALTH AUTHORITY, GOVERNMENT OF SASKATCHEWAN and SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS, Respondent Employers

LRB File No. 110-20; March 24, 2021
Vice-Chairperson, Gerald Tegart; Board Members: Joan White and Maurice Werezak

For the Applicant: Heather M. Jensen

For the Respondent: Alison Deck

Application for summary dismissal – Duty of fair representation – Limits of Board's authority to summarily dismiss – Issues here should be considered in the hearing of the original application – Summary dismissal denied.

REASONS FOR DECISION

Introduction

[1] Gerald Tegart, Vice-Chairperson: This is an application for summary dismissal by SEIU-West ("the union") in relation to two employee-union dispute applications numbered LRB File Nos. 066-20 and 089-20 ("the original applications") filed by Alison Deck.

[2] The two original applications are based on a mostly common set of facts. LRB File No. 066-20 was filed April 13, 2020, and names the union as the union respondent and the Saskatchewan Health Authority as the employer concerned. LRB File No. 089-20 was filed June 1, 2020. It names the union, the Saskatchewan Government and General Employees' Union ("SGEU") and the Canadian Union of Public Employees ("CUPE") as the union respondents, and the Government of Saskatchewan, the Saskatchewan Health Authority and the Saskatchewan Association of Health Organizations as the employers concerned.

[3] SGEU has also filed an application for summary dismissal in relation to LRB File No. 089-20. The Board's decision with respect to that application is dealt with separately under LRB File No. 133-20.

[4] In each of the original applications, Ms. Deck sought an order from the Board determining whether a contravention of the *Saskatchewan Employment Act* ("the Act") was being, or had been, engaged in by the union and requiring the union to refrain from engaging in the contravention.

[5] This matter was considered by the Board *in camera* based on written submissions.

Background

[6] The original applications arise from Ms. Deck's employment with the Saskatoon Health Region, which, through an amalgamation with other health regions in 2017, became the Saskatchewan Health Authority (collectively "the employer"). She worked in the area of information technology from 2001 until her departure in 2017. She was a member of the union, which was the bargaining agent for Ms. Deck's work unit.

[7] According to the facts set out in the original applications, the origins of the circumstances giving rise to the original applications were the establishment of a joint job evaluation mechanism in the late 1990s. This initiative was a joint endeavour by the Saskatchewan Association of Health Organizations, on behalf of employers, and three unions – SEIU-West, SGEU and CUPE. Its goal was to reduce the number of employee classifications and to ensure employees working in the health care sector were receiving equal pay for work of equal value.

[8] Ms. Deck became dissatisfied with the employer's application of the joint job evaluation to her circumstances and with other actions of the employer. In due course, she sought support from the union. She was dissatisfied with the union's response to her requests and maintains the union has not met its fair representation duties.

[9] The original applications are not the first time Ms. Deck has applied to the Board to enforce her rights of fair representation. In November of 2018 she filed an application (LRB File No. 073-18) against the union and the employer seeking a similar remedy based on similar facts. The Board's decision, reported at *Deck v SEIU-West*, 2018 CanLII 127658 (SK LRB), found that the union's actions had been arbitrary and had breached the duty of fair representation owed to Ms. Deck. Its consequential order was reconsidered by the Board in LRB File No. 251-18, reported at *SEIU-West v Deck*, 2019 CanLII 57387 (SK LRB), and the Board's resultant decision on May 27, 2019, directed the issuance of the following order:

> *1. That the Union shall prepare and file on behalf of the Applicant a grievance or grievances (the "grievance") under Articles 12 and 21 of the CBA.*
>
> *2. That the grievance shall be processed pursuant to Article 7 of the CBA in the normal manner. Any timelines in the CBA related to the filing of such grievances are hereby waived and extended pursuant to section 6-60(1) of the SEA.*

3. The Union shall follow its normal process for dealing with grievances, in accordance with the standards set out by this Board in Lucyshyn v. Amalgamated Transit Union, Local 615, 2010 CanLII 15756 (SK LRB), including, but not limited to the referral of the grievance to arbitration, if warranted. The Applicant is granted the right to file a further complaint under sections 6-59 and 6-60 related to such process, if necessary.

4. The Applicant is also granted leave to continue her complaint regarding a respectful workplace should the applications filed with the Saskatchewan Human Rights Commission and the Occupational Health and Safety Division of the Ministry of Labour Relations and Workplace Safety not fully resolve her issue. However, the Union shall also be permitted to seek a preliminary determination as to whether or not the Board has any remaining jurisdiction regarding such complaints. I will not be seized with any such further proceedings.

5. No Order is made under section 6-60(1)(c) at this time. Should the parties not be able to resolve the grievance, and the matter proceeds to arbitration, the SHA may, at that time, request the Board to make an Order under section 6-60(1)(c).

[10] The union has pursued a grievance as directed by the Board and that grievance is still in process.

Relevant legislation

[11] Ss. 6-59 and 6-60 of the Act deal with a union member's right to fair representation by the union. Ms. Deck's original applications alleged the union had contravened these provisions:

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.

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).

[12] The Board has the authority, pursuant to s. 6-111(1)(o) and (p) of the Act:

> *. . .*
> *(o) to summarily refuse to hear a matter that is not within the jurisdiction of the board; [and]*
>
> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case….*

[13] S. 32 of *The Saskatchewan Employment (Labour Relations Board) Regulations* ("the regulations") addresses applications for summary dismissal, and provides in part:

> *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 a n original application.*
>
> *(2) A party may apply to the board to summarily dismiss an original application.*
>
> *…*
> *(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.*

Analytical framework for summary dismissal applications

[14] The authority to summarily refuse to hear a matter pursuant to s. 6-111(o) depends on the Board determining that the matter is not within the jurisdiction of the Board. In order to summarily dismiss a matter under s. 6-111(p), the Board must form the opinion there is a lack of evidence or no arguable case.

[15] In *International Brotherhood of Electrical Workers, Local 529, et. al. v. KBR Wabi Ltd., et. al.*, (2013) 226 C.L.R.B.R. (2d) 48, 2013 CanLII 73114 (SK LRB), the Board considered the history of the summary dismissal power and set out a test for its application (at para. 79):

> *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant proves everything alleged in his 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 application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim.*

[16] In reaching this characterization of the test, the Board considered the approach taken by Saskatchewan courts in exercising the courts' inherent authority to strike out a claim for disclosing no reasonable cause of action. The Court of Appeal was called upon to consider this in *Sagon v. Royal Bank of Canada*, 1992 CanLII 8287, [1992] S.J. No. 197, 105 Sask. R. 133. Sherstobitoff, J.A. set out a test in these terms (at para. 16):

> *In determining whether a claim should be struck as disclosing no reasonable cause of action, the test is whether, assuming the plaintiff proves everything alleged in his claim, there is nevertheless no reasonable chance of success, or to put it another way, no arguable case.*

Analysis and reasons

[17] The union argues there are three general bases on which its application for summary dismissal should be granted:

> 1. The claims in the original applications should be dismissed pursuant to the doctrine of res judicata, issue estoppel and abuse of process

[18] The union's assertion that the claims advanced in the original applications have already been brought to the Board and have been the subject of a ruling may have merit. Even if the facts and issues underlying the Board's reasons and order in LRB Files No. 073-18 and 251-18 are not entirely the same as those raised by the original applications, there may be a sufficient degree of overlap to require the grievance and arbitration process to run its course before allowing a further application to the Board that would require the Board to re-till that same soil.

[19] However, the Board's authority to refuse to summarily refuse to hear or to summarily dismiss a matter is limited by the language of s. 6-111(o) and (p). It cannot be said that the claim advanced in the original applications cannot succeed when the union asserts that a claim based on allegations repeated in the original applications actually succeeded in the Board's previous ruling.

[20] What this suggests is, while the fundamental objection being advanced by the union may be sound, the summary dismissal remedy is not available to it in these circumstances. The union's objection to the original applicant's right to bring the original applications must be made

as part of the hearing of the original applications. We offer no direction on whether that should be done as a preliminary objection or after evidence is called.

2. There is no arguable case within the jurisdiction of the Board

[21] There may well be elements of the original applications that the Board should properly decline to consider because they are more properly dealt with by other adjudicative bodies. However, we must once again consider that the Board has previously determined, in a full hearing, that claims the union acknowledges are repeated in the original applications were within the Board's jurisdiction. Consequently, any further consideration of the boundaries of the Board's jurisdiction would be better considered as part of the main hearing of the original applications, and not as a matter of summary refusal or summary dismissal.

3. Delay

[22] The circumstances forming the background to the original applications go back to events occurring as early as 2003. The union argues that the delay in bringing the original applications prejudices the union and they should be summarily dismissed as a result.

[23] Summary dismissal based on delay does not fit neatly into the wording of s. 6-111(p), given the Board's authority is only available under that clause where there is a lack of evidence or no arguable case. Nonetheless, this Board has considered delay in summary dismissal cases in the past: see *Dishaw v Canadian Office & Professional Employees Union, Local 397*, 2009 CanLII 507 (SK LRB); *Brady v International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers*, 2017 CanLII 68781 (SK LRB).

[24] However, the original applications are to some degree a continuation of the application to the Board in LRB File No. 073-18 and the reasons and order that resulted from those proceedings. The Board's consideration of the original applications may appropriately involve a consideration of delay, but is more likely to be focused on whether the Board can or should delve into the substance of Ms. Deck's ongoing allegations given the earlier order made by the Board and any other ongoing proceedings involving other adjudicative bodies. The effect of the alleged delays is appropriately determined in that wider context and should be left to the main hearing of the original applications.

Conclusion

[25] The application for summary dismissal brought by SEIU-West is denied.

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

DATED at Regina, Saskatchewan, this 24th day of March, 2021.

LABOUR RELATIONS BOARD

"Gerald Tegart"
Gerald Tegart
Vice-Chairperson