Government
of
Saskatchewan

Saskatchewan Labour Relations Board
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March 22, 2021

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Dear Mr. McRorie, Mr. Bergbusch and Mr. Wang:

Re: LRB File No. 184-20; Appeal of Adjudicator
Janet Clarke v AgraCity Crop & Nutrition Ltd. and Government of Saskatchewan, Occupational Health & Safety Division

Background:

[1] Janet Clarke was terminated from her employment with AgraCity Crop & Nutrition Ltd. ["Employer"] on July 16, 2018. As a result, she filed a complaint of discriminatory action contrary to sections 3-35 and 3-36 of *The Saskatchewan Employment Act* ["Act"]. On October 19, 2018, Occupational Health Officer Mike Luciak issued a Notice of Contravention that concluded:

> *On August 7th, 2018 The Harassment Prevention Unit of Occupational Health and Safety in Saskatoon received a formal complaint of Discriminatory Action from Ms. Janet Clarke. Through the investigation process it has been determined that this employer did take discriminatory action against Janet Clarke pursuant to Section 3-35 of the Saskatchewan Employment Act. The employer shall re-instate the worker pursuant to section 3-36(2)(a)(b)(c)(d). The employer is required to make the necessary arrangements for the worker's re-instatement.*

[2] That decision was appealed by the Employer, and on November 30, 2020, a decision was issued by an Adjudicator allowing the appeal and setting aside the decision of the Occupational Health Officer.

[3] Clarke filed a Notice of Appeal to the Board from that decision on December 9, 2020. On December 9, 2020 the Board Registrar sent a notice to the Director of Occupational Health and Safety and the Employer's counsel, by email, advising that "The Respondents are provided ten (10) business days to file a Reply – Form 18 to respond to the application". A blank Form 18 was attached, as was the Notice of Appeal and the Adjudicator's Decision. On January 4, 2021, counsel for Clarke emailed the Board Registrar, copying counsel for the Employer, noting that the

Employer had not filed a Reply within the required timeline and asking for the matter to be placed on Motions Day for scheduling of the appeal. The Employer filed a Reply to the Appeal on February 1, 2021. At Motions Day on February 2, 2021, Clarke raised a preliminary issue on the appeal. She asks that the Employer's Reply be struck, and that this matter proceed without its participation, because of the late filing of the Reply. These Reasons address this preliminary issue.

Relevant Legislative Provisions:

[4] The following provisions of *The Saskatchewan Employment Act* ["Act"] are relevant in this matter:

> ***Right to appeal adjudicator's decision to board***
> *4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.*
> *(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III or Part V may appeal the decision to the board on a question of law.*
> *(3) A person who intends to appeal pursuant to this section shall:*
> *(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and*
> *(b) serve the notice of appeal on all parties to the appeal.*
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> ***Powers re hearings and proceedings***
> *6-111(1) With respect to any matter before it, the board has the power:*
> *(g) subject to the regulations made pursuant to this Part by the Lieutenant Governor in Council:*
> *(i) to determine the time within which any party to a hearing or proceeding before the board must file or present any thing, document or information and the form in which that thing, document or information must be filed; and*
> *(ii) to refuse to accept any thing, document or information that is not filed or presented within the time or in the form determined pursuant to subclause (i).*
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> ***Proceedings not invalidated by irregularities***
> *6-112(3) At any time and on any terms that the board considers just, the board may amend any defect or error in any proceedings, and all necessary amendments must be made for the purpose of determining the real question or issue raised by or depending on the proceedings.*
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> ***Service***
> *9-9(1) In this section, "director" means the director of employment standards appointed pursuant to Part II, the director of occupational health and safety appointed pursuant to Part III or the director of labour relations appointed pursuant to Part VI.*
> *(2) Unless otherwise provided in this Act, any document or notice required by this Act or the regulations to be served on any person other than the director may be served:*
> *(a) by personal service on the person by delivery of a copy of the document or notice;*
> *(b) by sending a copy of the document or notice by registered or certified mail to the last known address of the person or to the address of the person as shown in the records of the ministry;*

(c) by personal service at a place of employment on the person's manager, agent, representative, officer, director or supervisor;
(d) by any method set out in The Queen's Bench Rules for the service of documents;
(e) by delivering a copy to the person's lawyer if the lawyer accepts service by endorsing his or her name on a true copy of the document or notice indicating that he or she is the lawyer for that person; or
(f) by sending a copy of the document or notice by electronic transmission if an address for service in a proceeding has been filed respecting the person to be served.

[5] The following provisions of *The Saskatchewan Employment (Labour Relations Board) Regulations* ["Regulations"] are also applicable:

Notice of appeal, re Parts II and III of the Act
4(1) An employer, employee or corporate director who intends to appeal a decision of an adjudicator on an appeal or hearing pursuant to Part II of the Act or a person who intends to appeal a decision of an adjudicator pursuant to Part III of the Act shall:
(a) file a notice of appeal in Form 1; and
(b) serve a copy of Form 1 on the persons mentioned in clause 4-8(3)(b) of the Act and on the adjudicator.

Registrar to provide copies of applications
19 On the filing of an application mentioned in Part II, the registrar shall:
(a) make efforts that the registrar considers reasonable to determine the identity of any employer, other person, union and labour organization that is referred to in the application or has a direct interest in the application; and
(b) provide a copy of the application to the employers, other persons, unions and labour organizations identified pursuant to clause (a).

Intervention
20(1) In this section:
(a) "application to intervene" means an application in Form 17 (Application to Intervene);
(b) "original application" means an application made to the board pursuant to the Act and these regulations that is the subject of an application to intervene.
(2) An employer, other person, union or labour organization that is served with a copy of an application pursuant to section 19 and intends to intervene in the proceedings before the board shall file a reply in Form 18 (Reply).
. . .
(4) All replies and applications to intervene must be filed within 10 business days after the date a copy of the original application was given to the employer, person, union or labour organization by the registrar.

Hearings
24(1) On an application being filed pursuant to the Act and these regulations, the registrar shall give the parties to the application, including any employer, other person, union or labour organization that filed a reply pursuant to subsection 20(2), an application to intervene pursuant to subsection 20(3) or a notice of intervention pursuant to subsection 21(2), notice of the date, place and time for hearing the application.

(2) If an employer, other person, union or labour organization that is given a copy of the application by the registrar does not file a reply pursuant to subsection 20(2):

(a) unless the employer, other person, union or labour organization has made a request to the registrar to receive notices respecting the hearing and provided an address for service, the employer, other person, union or labour organization is not entitled to any notice by the registrar respecting the hearing of the application; and

(b) the board may hear and determine the application notwithstanding that the employer, other person, union or labour organization has not filed a reply pursuant to subsection 20(2) or received any further notice respecting the hearing of the application.

Service

26(1) Any Form or other document required by these regulations to be given or served is to be given or served:

(a) personally;

(b) by being mailed by ordinary or registered mail; or

(c) by electronic means if the person, union or labour organization to be served has provided the board with an address for service that authorizes service by those electronic means.

. . .

(3) A Form or other document served by electronic means is deemed to have been received on the day on which the person being served receives the Form or document unless it is received after 5 p.m., in which case the date of service is deemed to be the next business day.

(4) Irregularity in the giving or service of a Form or other document does not affect the validity of an otherwise valid Form or document.

Authority of executive officer to vary time

27(1) On the request of any employer, other person, union or labour organization, the executive officer may, by order, set a further or other time than the time prescribed in these regulations for filing any Form or document or doing any other thing authorized or required by these regulations.

(2) The executive officer may issue an order pursuant to subsection (1) whether or not the period at or within which a matter mentioned in that order ought to have been done has expired.

(3) The executive officer may impose any terms and conditions on an order issued pursuant to subsection (1) that the executive officer considers appropriate.

(4) Anything done at or within the time specified in an order pursuant to subsection (1) is as valid as if it had been done at or within the time fixed by or pursuant to these regulations.

Non-compliance

30 Non-compliance with these regulations does not render any proceeding void unless the board directs otherwise.

Argument on behalf of Clarke:

[6] Clarke argues that the Employer is not entitled to file its Reply outside of the required timelines set out in the Regulations: the requirements in section 20 of the Regulations are

mandatory. Clarke further argues that this is not an appropriate case for the Executive Officer to exercise the discretion provided in section 27 of the Regulations because the Employer has not actually made an application or request for an extension of time. Further, the exercise of that power would be subject to the reasons provided by the Employer for failure to comply. In this regard, Clarke referred to *SEIU-West v Deck*[1], where the Executive Officer extended the deadline for filing an application for reconsideration because the non-compliance with the deadline resulted from inaccurate information provided to the applicant by the Board Registrar.

[7] Clarke also relies on *Saskatchewan Joint Board, Retail, Wholesale v Broadway Lodge Ltd.*[2] ["*Broadway Lodge*"], a matter in which the Board struck a Reply that was filed late:

> *[9] At the outset of the first day of this hearing, the Respondent, John Kim appeared on behalf of the Numbered Company. Counsel for the Union, Mr. Larry Kowalchuk applied to have the Reply that Mr. Kim had filed on behalf of the Numbered Company struck on the basis that it failed to comply with Rule 20 of The Saskatchewan Employment (Labour Relations Board) Regulations [the "Regulations"]. Rule 20(4), in particular, stipulates that a formal Reply must be filed with the Board no later than "10 business days after the date a copy of the original application was given to the employer, person, union or labour organization by the registrar." Mr. Kowalchuk objected to the Board allowing the Numbered Company's Reply to be admitted because not only was it filed out of time, it also lacked sufficient particulars for purposes of these applications.*
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> *[10] The Board determined that although the Numbered Company was a party having "a direct interest in the application" per Rule 19 of the Regulations, it had failed to file its Reply in accordance with the Regulations. In United Food and Commercial Workers, Local 1400 v Wal-Mart Canada Corp. o/a Wal-Mart, Wal-Mart Canada, Sam's Club and Sam's Club Canada, LRB File No. 172-04, 2004 CanLII 65601 (SK LRB) the Board described what transpired from a failure to comply with section 18 of Saskatchewan Regulations 163/72 ["Regulations 163/72"], the precursor to Rule 20 of the Regulations. At paragraphs 16 and 17, the Board stated:*
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>> *[16] While s. 18 of [Regulations 163/72] is permissive, the consequences to a person directly affected by an application that is entitled to file a reply but elects not to do so, lies within the discretion of the Board. Such person is not entitled to any further notice of the proceedings and the Board may dispose of the application notwithstanding such failure to reply. However, in its discretion [under section 22 of Regulations 163/72], which is unfettered, the Board may allow such person to submit evidence and make representations.*
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>> *[17] The purpose of [Regulations 163/72] in this regard is clear: while the Board's process is to allow for the expeditious disposition of disputes, it does not countenance "trial by ambush". The filing of an application and reply in the forms mandated by [Regulations 163/72] ensures that each party must state the basis of its application or defence thereto. As both the application and reply are in the form of a statutory declaration, they form the basis for the entitlement by the*

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[1] 2019 CanLII 57387 (SK LRB).

[2] 2017 CanLII 6029 (SK LRB).

> > *party opposite to cross-examine the declarant in a process that does not allow for pre-hearing examinations or interrogatories.*
>
> *[11] After deliberating, the Board agreed with the Union that the Numbered Company's Reply must be struck. However, because neither of the other parties objected to Mr. Kim's continued participation in the hearing, the Board exercised its discretion under Rule 24(2) of the Regulations and allowed him to testify at the hearing with the assistance of a Chinese interpreter.*

[8] Clarke is of the view that the Board should similarly strike the Reply the Employer purported to file in this matter.

Argument on behalf of Employer:

[9] In its written argument, the Employer requested leave to file its Reply, effective February 1, 2021, on the basis that Clarke will suffer no prejudice if the Employer is permitted to file its Reply, and principles of equity and fairness justify leave being granted.

[10] The Employer referred the Board *to CWS Logistics Limited v United Food and Commercial Workers, Local 1400*[3] ["*CWS Logistics*"]:

> *[13] In Application to Extend the time for filing of an Objection to the Conduct of a Vote, LRB File No. 112-11, August 26, 2011 (unreported) the Executive Officer stated that the criteria outlined by the Court of Appeal in Dutchak v. Dutchak, [2009] SKCA 89 (CanLII), para 12 should be adopted as the standard by which the Executive Officer considers the exercise of the discretion to extend time limits pursuant to section 34 of the Regulations:*
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> > *According to these decisions, in determining whether leave should be granted the applicant must persuade the Court that: (i) there is a reasonable explanation for the delay; (ii) he or she possessed a bona fide intention to appeal within the time limited for appeal; (iii) there is an arguable case to be made to a panel of the Court; and (iv) there will be no prejudice to the respondent, if leave is granted beyond what would be incurred in the usual appeal process. In any given case, one or more factors may be more important than another.*
>
> *[14] After considering those criteria, the Executive Officer found that even though they had not all been satisfied, weighing them against the equitable principles of fairness and justice, the application was allowed: "Of principle importance is that no additional prejudice will be placed upon the respondent union given the short period of delay and the arguable case presented".*
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> *[15] The case now before the Board is very similar to Application to Extend the time for filing of an Objection to the Conduct of a Vote (unreported), noted above. Since this application was filed just two business days late, the Board had not yet issued an order regarding the Application for Bargaining Rights. The filing delay was attributable to an oversight by the Employer's counsel. Allowing late filing will allow the issue in dispute between the parties to be determined on its merits. No comment was provided with*

[3] 2018 CanLII 68439 (SK LRB).

> *respect to whether the Employer possessed a bona fide intention to appeal within the time limit. No prejudice to the Union has been proven.*
>
> *[16] Therefore, as Executive Officer, I order, pursuant to section 27 of the Regulations, that the time for filing of the Objection to Conduct of the Vote is set at February 26, 2018, the day it was filed.*

[11] The Employer's explanation for the delay in filing its Reply is that it was not immediately apparent that a Reply was required in the circumstances of a statutory appeal. It suggests that given the history of this proceeding, "it cannot be seriously suggested" that the Employer did not form a timely intention to reply to the appeal. It argues that it "obviously" has an arguable case to make, given it is the respondent to the appeal. Finally, it argues that Clarke can show no prejudice if the Employer is permitted to file a Reply and make submissions in response to the appeal. It is of the view that the delay was short. The Employer argues that the equitable principles of fairness and justice strongly favour the Board exercising its discretion and granting the extension of time.

[12] The Employer argues that *Broadway Lodge* is distinguishable for two reasons. First, in that case the request to strike the Reply was not made until the first day of the hearing. Second, the Board was considering an original application in that matter, not an appeal where the facts are already before the Board. There is no issue here of "trial by ambush". The Employer also noted that in *Broadway Lodge* the applicant did not object to the respondent participating in the hearing, unlike the remedy requested here.

Argument on behalf of Director of Occupational Health and Safety:

[13] The Director of Occupational Health and Safety has advised the Board that he is not taking a position on this preliminary issue.

Service of Notice of Appeal:

[14] The Employer questions whether Clarke's Notice of Appeal was served on it in compliance with section 26 of the Regulations. It argues that service by electronic means was not authorized service because the Employer had not provided the Board with an address for service at that time, as required by clause 26(1)(c) of the Regulations. However, it acknowledges that it received the Notice of Appeal.

[15] Clarke argues that service by electronic means was an authorized means of service. Clarke served the Notice of Appeal on the address for service provided by the Employer to the Adjudicator, therefore service was effected in accordance with the Regulations. Service was also effected in accordance with section 9-9 of the Act. Clarke argues further that, given the current pandemic, service by electronic means was the most prudent method for service.

Analysis and Decision:

[16] The Board is troubled by the disrespect shown by counsel for the Employer to the Board and its processes. There is no excuse for the late filing of the Reply. Any uncertainty that counsel may have had about whether a Reply was required was answered in the email he received from the Board Registrar. There is also no uncertainty about when the time for filing the Reply commenced to run: subsection 20(4) of the Regulations indicates that the reply must be filed within 10 business days after the date the appeal was given to the Employer by the Board Registrar.

[17] The first issue is whether the Notice of Appeal was properly provided to the Employer. The issue is not whether the Notice of Appeal was properly served by Clarke, but whether it was given to the Employer by the Board Registrar in accordance with the Act and the Regulations. Clause 9-9(2)(d) of the Act authorizes sending a copy of the document or notice by electronic transmission if an address for service in a proceeding has been filed respecting the person to be served. In this proceeding, the Employer had provided an electronic address for service to the Adjudicator, and was therefore properly provided with a copy of the Notice of Appeal by the Board Registrar at that address.

[18] Turning to the main issue before the Board, Clarke is correct when she says the Employer is not entitled to file a late Reply. The issue is whether this is an appropriate case for the Executive Officer to exercise the discretion provided by section 27 of the Regulations.

[19] The Board set out the grounds for consideration of an application for an extension of time in *CWS Logistics*. Four factors are to be considered by the Executive Officer.

[20] The first consideration is whether there is a reasonable explanation for the delay. As noted above, there is no reasonable explanation for the delay.

[21] The second consideration is whether the Employer possessed a *bona fide* intention to file a Reply within the time limited for filing the Reply. The Employer did not actually answer this question. It leaves it to the Board to assume that is what is meant when the Employer indicated in its argument that “it cannot be seriously suggested” that it did not form a timely intention to reply to the appeal.

[22] The third consideration is whether the Employer has an arguable case to make. The Board agrees with the Employer that, given it is the respondent in the appeal, this factor weighs in favor of granting the order requested.

[23] The final consideration is whether there will be any prejudice to Clarke if the time for filing the Reply is extended. The type of prejudice that is relevant is that which would result from a delay of the appeal, rather than that which would result from the filing of the Reply. Clarke has not argued that she would suffer any prejudice if the time for filing the Reply is extended as requested.

[24] The length of the delay is to be considered in determining prejudice. Despite the Employer's protestations to the contrary, the delay in filing the Reply in this matter was not short. The Notice of Appeal was given to the Employer by the Board Registrar on December 9, 2020. That means the Reply was to be filed by December 23, 2020. While the Employer purported to file its Reply on February 1, 2021 (25 business days after the filing deadline), it did not actually make a request for an extension of time to file it until March 3, 2021 (46 business days after the filing deadline). However, while the delay was not short, no steps had been taken in the interim to schedule or address the appeal before the Employer purported to file its Reply.

[25] In order to succeed in its application, the Employer does not need to satisfy each of the factors. Rather, the Employer must demonstrate that, taking those factors into account, it is just and equitable to extend the time for filing the Reply.

[26] Given the similarities between this matter and *CWS Logistics*, the Executive Officer has determined that the request to extend the date for filing the Reply will be granted. Clarke will suffer no prejudice from the granting of the extension. Fairness and equity lead to a conclusion that the Employer should not suffer the consequences of its counsel's actions. Granting the request for late filing will allow the appeal to be determined on its merits.

[27] Therefore, as Executive Officer, I order, pursuant to section 27 of the Regulations, that the time for the filing of the Reply by the Employer is set at February 1, 2021, the day it was filed.

Yours truly,

Susan C. Amrud, Q.C.
Chairperson and Executive Officer
Labour Relations Board