CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v REUBEN ROSOM, Respondent and PRAIRIE SPIRIT SCHOOL DIVISION #206, Respondent

LRB File Nos. 132-22 and 095-22; October 28, 2022
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Applicant, Canadian Union of Public Employees:	Andrew Restall
The Respondent, Reuben Rosom:	Self-Represented
Counsel for the Respondent, Prairie Spirit School Division #206:	Kit McGuinness

Application for Summary Dismissal – Clause 6-111(1)(p) of *The Saskatchewan Employment Act* – Underlying Employee-Union Dispute – Sections 6-58 and 6-59 of the Act.

Allegation of Delay – Review of Summary Dismissal Test – Weighing Evidence and Assessing Credibility – Whether Justice Can Be Done – Summary Dismissal Not Granted.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an application for summary dismissal filed by CUPE [Union] on August 5, 2022. The Union asks the Board to dismiss an employee-union dispute that was filed by Reuben Rosom [Employee] on June 15, 2022.[1] The Employee is a member of the Union. The Employer is the Prairie Spirit School Division No. 206.

[2] The sole reason for this application is the Employee's delay in filing the employee-union dispute. The Union says that the original application was filed approximately 17 months late and, in it, there are no reasons given for the delay.

[3] In the original application, the Employee alleges that the Union contravened its duties as set out in sections 6-58 and 6-59 of *The Saskatchewan Employment Act* [Act]. According to the

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Employee, after receiving a warning letter from his Employer, he called his shop steward, who advised him that his interpretation of the collective agreement was wrong, informed him that he was facing a suspension as a result of his conduct, and instructed him to apologize so as to prevent this from happening. The Employee disagreed with the Union's advice, believed that he had done nothing wrong, and refused to apologize. Another meeting was held on January 15, 2021 at which the Employee was given the same advice.

[4] The Employee claims that he sought Union representation but did not receive it. On November 3, 2021, he sent a letter to the Union seeking details as to why the Union was or was not representing him and received no reply. On January 19, 2022, he again sent a letter seeking Union representation and received no reply.

[5] The Union replies that it decided not to grieve the two-day suspension that was issued to the Employee. This decision was made on or about January 15, 2021 and conveyed to him shortly thereafter. The appeal from this decision was heard on or about March 9, 2021.

[6] For its part, the Employer takes the position that, given the content of the pleadings, the dispute rests primarily between CUPE and the Employee.

[7] The Union seeks summary dismissal of the original application without an oral hearing. Consistent with past practice, the Board set deadlines for the filing of written submissions. All of the parties opted not to file further submissions but instead to rely on their pleadings. The Board has reviewed these materials and wishes to extend its gratitude to the parties for their practical and expeditious approach to this matter.

Analysis and Decision:

[8] In arguing for summary dismissal, the Union relies on case law that confirms the maxim that time is of the essence in labour relations matters. It relies, in particular, on *Dishaw v Canadian Office & Professional Employees Union, Local 397*, 2009 CanLII 507 (SK LRB) [*Dishaw*] and *Prebushewski v Canadian Union of Public Employees, Local No. 4777*, 2010 CanLII 20515 (SK LRB) [*Prebushewski*].

[9] In *Dishaw*, the Board decided to summarily dismiss an employee-union dispute after what was found to be an excessive delay. The original application was a duty of fair representation application that was filed over 23 months after the actions or circumstances giving rise to the application had occurred. The Board found that the delay was excessive.

[10] The Board also found that the union had suffered prejudice from the delay, including through the "recognized corrosive effect on the memories of witnesses"[2] and through the fact that the union was no longer the bargaining agent for the workplace. Both of these issues made it more difficult for the union to respond to the application and to further prosecute any grievance on the applicant's behalf. The Board observed, in particular, that the bargaining agent had changed approximately eight months after the applicant knew or ought to have known of the relevant actions or circumstances.[3]

[11] The applicant had explained that he had struggled with the prospect of filing an application, given the potential impact on his search for employment in the labour movement. The Board was not satisfied that the applicant's explanation for the delay was sufficient to overcome either the presumption of prejudice or the actual prejudice.

[12] The Board also made the following statement:

> *[36] Finally, while the Board has indicated that it has declined to rule as to whether or not s. 12.1 has application in the present case, the Board notes that the addition of this new provision to the Act, together with s. 21.1 (which was added at the same time) signals an intent by the authors of the legislation; that time is of the essence in dealing with disputes in a labour relations context; that the timely commencement and resolution of outstanding grievances is an important component in maintaining amicable labour relations in this Province; and that parties have the right to expect that claims, which are not asserted within a reasonable period of time, or which involve matters which appear to have been satisfactorily settled, will not later re-emerge.*

[13] It may be helpful to provide some clarification in relation to this statement. While time is of the essence in labour relations, the current 90-day timeline set out in subsection 6-111(3) of the Act pertains to unfair labour practice applications. This is explained in *Coppins v USW, Local 7689, Re*, 2016 CarswellSask 703:

> *19 Firstly, section 6-111(3) deals specifically with unfair labour practices. While it may be said that the duty of fair representation initially was processed by this Board as a form of unfair labour practice, prior to the inclusion of the statutory duty within the legislation, its genesis is the decision of the Supreme Court of Canada in C.M.S.G. v. Gagnon.*
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> *20 At the time of the Supreme Court decision, there was no statutory duty of fair representation as there is now in the SEA and which was inserted into The Trade Union Act following the Supreme Court decision in Gagnon. In that decision, the Court determined that duty arose out of an equitable duty owed to members by their collective bargaining*

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[2] *Dishaw v Canadian Office & Professional Employees Union, Local 397*, 2009 CanLII 507 (SK LRB) at para 33 [*Dishaw*].
[3] *Ibid* at para 33.

> *representative to represent them in a fair manner as a trade-off for their ability to exclusively represent those employees, not as an unfair labour practice.*
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> *21 If the legislature had wanted to preclude applications under the duty of fair representation provisions of the SEA being filed outside of a ninety (90) day window, section 6-111(3) would have included a specific reference to those provisions. It did not. As such, the interdiction provided for filing of unfair labour practice applications outside of that ninety (90) day window cannot, in my opinion, be extended to include duty of fair representation applications.* [4]
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> *[footnotes removed]*

[14] Thus, there can be no doubt that the 90-day timeline does not apply to employee-union disputes. The absence of a timeline is consistent with the many cases, filed pursuant to sections 6-58 and 6-59 of the Act, that involve self-represented or late-represented applicants; the relative balance of power between those applicants and their unions; and the potential consequences for their representative interests arising from the proceedings before the Board.

[15] The next case that the Union relies upon is *Prebushewski*. This matter involved a delay of two years in filing a duty of fair representation application. That application was ultimately upheld. After finding that the Union had failed to fulfill its duty, the Board assessed the appropriate remedy. Although it called for caution in granting a remedy after such a lengthy delay, it concluded that it was not prevented from doing so. It noted, in particular, that the Employer and the Union had prior knowledge of the underlying allegations:

> *[75] This Board has previously stated that the timely resolution of outstanding grievances is an important component of maintaining amicable labour relations in the workplace and that the parties (that are the subject matter of outstanding grievance and claims) have the right to expect that claims, that are not advanced and prosecuted on a timely basis, have been abandoned. See: Dishaw v. Canadian Office & Professional Employees Union, Local 397, 2009 CanLII 507 (Sk. L.R.B.), LRB File No. 164-08. It is generally accepted that the scale of delay that the Board will find acceptable is measured in months; not years. Simply put, this Board must approach with caution the granting of a remedy affecting labour relations in a workplace (such as, waiving the time restrictions in a collective agreement) following a delay of the magnitude present in this case.*
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> *[76] In this regard, the Board accepts that both the Union and the Employer would have been/should have been aware that Applicant disputed her dismissal and the Union's decision to abandon her grievance upon the filing of her Statement of Claim in the Court of Queen's Bench. In addition, the Employer elected not to participate in these proceedings and, thus, the Board must be [cautious] not to infer injurious consequences (ie. to labour relations in the workplace) if the parties elect not to advance that issue.*
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> *[77] As a consequence, I am satisfied that the delay of two (2) years in bringing her application to this Board (while excessive) does not impair the authority of this Board to*

[4] An example of a duty of fair representation complaint processed as a form of unfair labour practice: *Soles v Canadian Union of Public Employees, Local 4777*, 2006 CanLII 62947 (SK LRB)

> *grant the remedy set forth herein. In coming to this conclusion, the Board is satisfied that both the Employer and the Union had prior knowledge of the Applicant's allegations.*

[16] While *Prebushewski* confirms that time is of the essence in labour relations matters, it underscores the importance of assessing delay on a contextual, case-by-case basis.

[17] Next, the Union has made this application pursuant to clause 6-111(1)(p) of the Act, seeking that the Board invoke its summary procedure in determining whether the original application can be dismissed for late filing. It is well established that the Board has authority to summarily dismiss an application, and that it may do so without holding an oral hearing. The source of this authority is found in clauses 6-111(1)(p) and (q) of the Act.[5]

[18] In *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB), the Board summarized the test to be applied in an application for summary dismissal:

> *[8] The Board recently[5] adopted the following as the test to be applied by the Board in respect of its authority to summarily dismiss an application (with or without an oral hearing) as being:*
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> > *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant is able to prove everything alleged in his/her 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 subject application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his/her claim.*
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> *[9] 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.*

[19] The foregoing test has been consistently and repeatedly relied upon by the Board.

[20] In applying this test, the question for the Board to consider is whether, assuming the Employee proves the allegations, the claim has no reasonable chance of success, in other words,

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[5] See, also, *Siekawitch v Canadian Union of Public Employees, Local 21*, 2008 CanLII 47029 (SK LRB).

whether it is plain and obvious that the original application should be dismissed as disclosing no arguable case or a lack of evidence. The Union bears the onus on the present application.

[21] In *SEIU-WEST v Alison Deck*, 2021 CanLII 23381 (SK LRB) [*Deck*], the Board observed that "[s]ummary 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".[6] The Board observed, however, that summary dismissal applications had previously been granted on the basis of delay. Nonetheless, the Board found, in the case before it, that it was necessary to consider the impact of the alleged delay within a broader factual context. It dismissed the application for summary dismissal.

[22] As will be explained, the Board has decided to refuse the request for summary dismissal for reasons unrelated to a lack of authority. It is, therefore, not necessary for the Board to decide the question raised in *Deck*. However, it is necessary to address certain incongruities that exist between the test that is to be applied on a summary dismissal application and the underlying reasons for the application.

[23] First, the usual rule is that the Board must consider only the subject application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish the claim. However, in an employee-union dispute, it is not uncommon for an employee to provide reasons for delay in the reply to the application for summary dismissal, as was done in this case.

[24] In these proceedings, the application for summary dismissal operates in a manner that is comparable to (but not the same as) a request for particulars. The parties have had a further opportunity to file submissions. As such, there is no unfairness in considering the Employee's reasons as set out in his reply to the application. It is appropriate for the Board to exercise some flexibility in considering the submissions made by self-represented parties.

[25] Second, in applying the summary dismissal test, the Board must avoid weighing evidence, assessing credibility, or evaluating novel statutory interpretations. Summary dismissal has the effect of conclusively dispensing with an applicant's rights to proceed with an existing claim. When taking this step, the Board must be satisfied that the original application is patently defective. These parameters, while critical, mean that the Board does not have the necessary information to support dismissing the original application at this stage.

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[6] *SEIU-WEST v Alison Deck*, 2021 CanLII 23381 (SK LRB) at para 23.

[26] In this application, the Union asks the Board to apply the considerations set out in *Hartmier v SJRWDSU, Local 955*, 2017 CanLII 20060 (SK LRB) [*Hartmier*]. These are:

> 1. *Length of delay;*
> 2. *Prejudice;*
> 3. *Sophistication of Applicant;*
> 4. *Nature of the Claim;*
> 5. *The Applicable Standard - Can justice be achieved in the matter despite a lengthy delay in commencing it?*[7]

[27] The first consideration is the length of the delay. As in every case in which late filing is alleged, it is necessary for the Board to consider when the applicant knew or ought to have known of the action or circumstances giving rise to the alleged contravention. The Union claims that this occurred when it made its final decision about whether to proceed with a grievance. This date was January 15, 2021. However, one could also argue that the delay began to run when the appeal was decided. The Union states that the appeal was heard on March 9, 2021. Assuming that the appeal was also decided on that date, then it could be said that the delay began to run on March 9, 2021. If this were the case, then the relevant delay could be said to be 15, rather than 17, months.

[28] It has been said that the longer the delay in filing, the stronger must be the countervailing considerations to justify "permitting" the application to proceed. It is therefore necessary to determine the length of the delay, and then assess the remaining countervailing considerations against the length of the delay, to decide whether the application will proceed. To determine the length of the delay, the Board is required to assess the evidence.

[29] As for the remaining countervailing considerations, the Union provides its own assessment.

[30] First, it relies on the presumption of prejudice in cases of delay. As such, this issue is relatively straightforward. Second, it says that the Employee is not entirely unsophisticated. It relies for this proposition on the Employee's own communications which purportedly demonstrate that he was aware of the possibility of an application but chose not to file it.

[31] Third, it says that a large part of the delay is related to a complaint that the Employee made to the Occupational Health and Safety Division on March 5, 2021. The Union says that this

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[7] *Hartmier v SJRWDSU, Local 955*, 2017 CanLII 20060 (SK LRB) at para 120.

complaint was outside the ambit of the collective agreement, was pursued by the Employee of his own accord, and does not explain the delay. Lastly, it argues that the subject matter of the current application, being a two-day suspension that occurred in 2020, does not justify the extent of the delay. To counteract the delay, the subject matter should concern a critical job interest, which it does not.

[32] In *Hartmier*, the Board found that a delay of 13 months, "while not so excessive or inordinate as occurred in other cases, still requires a satisfactory explanation from the Applicant as to why she postponed filing her formal application for so many months." The Board assessed the applicant's explanation for the delay in a full hearing on the underlying matter. The findings were that the applicant was sophisticated but had made a reasonable decision to wait for her grievances to be resolved; that the union would not have been "wholly taken by surprise" and had not suffered any "actual prejudice". The Board concluded that the delay was satisfactorily explained by the applicant and proceeded to consider the merits of the underlying application.

[33] In the current case, the Employee's explanation is found in the pleadings. In his application, the Employee explains that, in 2021, he continued to seek Union representation, or at least, continued to seek the reasons for the Union's decision not to represent him. In his reply to the present application, he provides additional reasons for the delay: the timing of the suspension, his complaint to the Occupational Health and Safety Division, and various personal matters that impacted him during the material times.

[34] Even if one or more of these specific justifications is not clearly meritorious, it remains necessary for the Board to weigh and assess the evidence in relation to the reasons that have been given. This should be done in a hearing in which *viva voce* evidence is presented.

[35] Furthermore, the Union asks the Board, in its assessment of the countervailing considerations, to make findings of fact that cannot be made on an assessment of the affidavit evidence. First, the Union asks the Board to accept, based on the documents before it, that the Employee is not overly "unsophisticated". Second, the Union says that the matter in issue is not sufficiently critical to justify the delay. The Board cannot, based solely on the materials before it, draw a conclusion in relation to either of these issues.

[36] Finally, and perhaps most significantly, the Board cannot, in the absence of a hearing of the matter, adequately answer the question as to whether justice can be done despite the delay.

[37] For the foregoing reasons, the Board will not grant the request to summarily dismiss the original application due to the delay in filing. However, the Union has pleaded delay in its reply to the original application at paragraph 4(b) and may proceed to make that argument at a hearing on the substantive matter.

[38] An appropriate Order will accompany these Reasons.

DATED at Regina, Saskatchewan, this **28th** day of **October, 2022.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson