Saskatchewan
Labour Relations Board

MOOSE JAW FIREFIGHTERS ASSOCIATION, IAFF LOCAL 553, Applicant v DALE G. HALL, Respondent and CITY OF MOOSE JAW, Respondent

LRB File Nos. 090-23 and 121-07; September 27, 2023

Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Applicant, Moose Jaw Fire Fighter Association, IAFF Local 553:	Sean McManus
The Respondent, Dale G. Hall:	Self-Represented
The Respondent, City of Moose Jaw:	Did Not Participate

Summary Dismissal Application – Underlying Duty of Fair Representation – Application Filed but Adjourned – 15 Year Delay – Dismissal for Delay – Dismissal Application Well Founded – Justice Cannot be Done – Application to Dismiss Granted.

REASONS FOR DECISION

Background and Argument:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an application to summarily dismiss a duty of fair representation application. Dale Hall is a former employee of the City of Moose Jaw's Fire Service [Employer]. On October 9, 2007, he filed an application alleging that the Moose Jaw Firefighters Association [Union] had failed to fairly represent him, pursuant to section 25.1 of *The Trade Union Act*. In that application, Hall alleged that the Union had not filed a grievance due to his sexual orientation. In its reply, the Union acknowledged that it investigated the grievances, sought legal advice, gave thoughtful consideration to the merits, and then withdrew the grievances on the basis that they would not likely be successful at arbitration.

[2] In October 2007, the duty of fair representation application was adjourned *sine die*, at Hall's request. In 2008, Hall went on long term disability which lasted until his retirement in December of 2016. The application was dormant from October 2007 to December 2022 (over 15 years). On December 2, 2022, the Board emailed the parties seeking an update in relation to the complaint. After no update was provided, on March 20, 2023, the Board again emailed the parties

seeking an update. On April 6, 2023, Hall emailed the Board indicating that he planned to proceed with his application.

[3] The Board placed the matter on the appearance day docket and, on June 23, 2023, the Union filed the summary dismissal application. The Union has sought that its application be determined by written submissions. The Board set deadlines for the filing of written submissions - July 25 for the Union, August 1 for Hall, and August 3 for the Union's sur-reply, if any. The Board received brief written submissions from both the Union and Hall.

[4] In the summary dismissal application, the Union submits that due to the significant passage of time between the initial adjournment and Hall's engagement, he should be considered to have abandoned his complaint. Alternatively, the Union claims that the delay in proceeding with the complaint is so excessive that it would be a denial of procedural fairness to continue with the complaint. In the further alternative, the Union argues that the underlying duty of fair representation application was not sufficiently particularized.

[5] Hall filed a reply to the application for summary dismissal. In his reply, he attaches a number of documents that pre-date his filing of the duty of fair representation application, including timelines relating to the grievance requests and proceedings. He also includes a number of newspaper articles providing some historical background relevant to the time period - the introduction of legislation to legalize same sex marriage - highlighting his role in the public debate.

[6] The Employer filed a reply to the duty of fair representation application but did not file a reply to the application for summary dismissal.

[7] On July 31, 2023, after the deadline had passed for the Union's written submissions, Hall wrote to the Board to request leave to apply to the Board to amend his reply to the Union's application. Hall's request stated:

> *(h)Timeline - Grievance for Lieutenants Position June 25th 2004 to February 7th 2005 is missing part 1 of the 3 parts and I mistakenly sent two PDF's of (i)Timeline – Grievance for Suspension without pay May 10th, 2007 part 1. All other parts of these two timelines are intact. (i)Timeline – Grievance for Suspension without pay May 10th, 2007 has 4 parts.*
>
> *Without this change the timeline will be incomplete.*

[8] With respect to the application for leave, the Union's position was as follows:

> *Since Mr. Hall's proposed amendments are not responsive to the Union's Summary Dismissal application but instead support the merits of his duty of fair representation complaint, his request to amend should be denied.*

[9] Given the conclusions the Board has reached on the question of delay, Hall's application to amend his reply is now moot. The amendments he requests relate either to the merits of the underlying application or to the particularization of his application. Even if they fall into the latter category, the submission deadlines mean that they could be fairly considered only after giving the Union an opportunity to respond to their substance. In any event, granting Hall's application for leave would make no difference to the disposition of the matter because the allegations of undue delay are entirely dispositive.

[10] The Union states in its application that Hall has provided no explanation for his delay. In his reply, Hall provides the following reasons: he filed complaints with multiple bodies and came to believe that each proceeding had to run its course before another could be pursued; after filing the application with the Board he came to experience significant stress in the workplace and was advised by a doctor to remove himself from the workplace; with the grievance process and the advice he received about a harassment investigation, there was too much happening for him to manage the matter. As a result he sought to adjourn the application. He also lists a number of life events that occurred over the intervening years that created time pressures and stress and suggests that, like everyone else, he lost a lot of time due to the pandemic.

[11] Hall asks that the Board proceed with his complaint, taking into account the subtle reality of discrimination. He points, in particular, to what he says was the analysis performed by the Union's own lawyer, which recognized that discrimination need not be found on the basis of overt acts but instead may be found in circumstances where the "subtle scent" of discrimination is detected.

[12] Finally, he states that he did not attempt to revive the application because he did not know that it was still "alive".

[13] The Union relies for its argument on *Baranowski v Teamsters Union Local 938*, 1985 CanLII 975 (ON LRB), *Dishaw v Canadian Office & Professional Employees Union, Local 397*, 2009 CanLII 507 (SK LRB) [*Dishaw*], *Peterson v Canadian Union of Public Employees, Local 1975-01*, 2009 CanLII 13052 (SK LRB), and *Hartmier v SJRWDSU, Local 955*, 2017 CanLII 20060 (SK LRB) [*Hartmier*].

[14] The Union also states that it is unreasonable for an applicant to interpret an adjournment to mean that an application is no longer "alive". Moreover, Hall's belief that the matter was not active is not consistent with his claim to have forgotten about the complaint.

Analysis:

[15] For ease of understanding, the Board in these Reasons will use the term "want of prosecution". This term refers to a failure to take sufficient steps to proceed to a hearing or other avenue for the determination of the application.

[16] Next, the Board has authority, pursuant to clauses 6-111(1)(p) and (q) of the Act, to proceed in appropriate circumstances to dismiss an application without an oral hearing. The Board in *Siekawitch v Canadian Union of Public Employees, Local 21*, 2008 CanLII 47029 (SK LRB), at pages 4-5, explained:

> *The above provisions, which came in to force in Saskatchewan in 2005, originated in The Canada Labour Code, Part I, have been considered by several cases in the Federal jurisdiction. Those cases are clear authority for the proposition that the Board may proceed, in appropriate circumstances, to dismiss an application without an oral hearing where the documents provided on the application show there is either a lack of evidence or no arguable case. Those documents, which form a part of the record such as the Application and Reply, can be supplemented by reports of investigations conducted by the Board or written submissions of the parties.*

[17] An application should be summarily dismissed only when it is patently defective, or in a clear and obvious case: *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB).

[18] In *SJRWDSU, Local 568 v Off the Wall Productions Ltd.*, 2009 CanLII 2603 (SK LRB) [*Off the Wall*], the Board found that it has authority to summarily dismiss for want of prosecution, without an oral hearing, on the basis that there is no arguable case, pursuant to clauses 6-111(1)(p) and (q) of the Act. In *Off the Wall*, the Union had not responded to the Board's many inquiries seeking updates on the status of the matter.

[19] In *SGEU v Gail Lockstead and Government of Saskatchewan*, 2021 CanLII 43555 (SK LRB) [*Lockstead*], the Board confirmed that clauses 6-111(1)(p) and (q) of the Act give the Board authority to dismiss for want of prosecution. The Board outlined the principles to consider in deciding whether to dismiss for want of prosecution:

> *[14] The Board adopts the determination in Off the Wall Productions that clauses 6-111(1)(p) and (q) of the Act[9] provide the Board with authority to dismiss an application for want of prosecution. In deciding whether it is appropriate to grant such an order in this*

> *matter, the Board took into consideration that Lockstead should not see her application dismissed except in a clear and obvious case and in accordance with due process. SGEU, on the other hand, has the right to expect that a claim that is not advanced within a reasonable time, or that involves issues that appear to have been satisfactorily settled, will not later re-emerge.*

[20] In *Lockstead*, the Board had received no response to its numerous inquiries and the former employee had not participated in the application for summary dismissal. The Board found that it was appropriate to dismiss the application for want of prosecution.

[21] In *Saskatchewan Government and General Employees' Union v Dylon James Caissie*, 2022 CanLII 21731 (SK LRB), the Board relied on the foregoing cases to dismiss the underlying application for want of prosecution. There, the former employee had not appeared at the scheduled motions day appearances to schedule the matter for a hearing and had not participated in the application for summary dismissal.

[22] To be sure, the present file is different from the foregoing cases in the following ways. Hall replied to the Board's recent inquiry and participated in the application for summary dismissal. While it could be said that the applicants in the foregoing cases failed to put evidence before the Board (lack of evidence), the present case does not fit as easily within this characterization.

[23] However, the Board has the power, pursuant to section 6-103 and clause 6-111(1)(q), to dismiss an application based on undue delay. Section 6-103 permits the Board to decline to hear an employee-union dispute if a hearing would be unable to achieve justice because of undue delay.[1] Clause 6-111(1)(q) provides the Board with the power to decide any matter before it without holding an oral hearing and, therefore, to adjudicate allegations of undue delay before proceeding to a hearing on the merits of an application.

[24] The Board in *Hartmier* outlined the factors it considers in deciding an application that alleges that an employee-union dispute should be dismissed for undue delay:

> *[120] This survey of relevant Board Decisions reveals that while each decision turned on the particular facts of the case, nevertheless a number of factors figure prominently in the Board's analysis of undue delay applications in duty of fair representation claims. The more prominent factors include:*
>
> > • *Length of Delay: The length of delay is critical. An applicant will bear the burden to explain the reasons for any delay and the longer the delay, the more compelling must be the reasons for the delay in filing the application. Now that the Legislature has mandated a statutorily prescribed time limit for the filing of unfair labour*

[1] *Saskatchewan Government and General Employees' Union, Local 1105 v Darryl Upper*, 2023 CanLII 10506 (SK LRB), at paras 62-66.

> *practice applications, the Board's tolerance for exceptionally long delays has decreased significantly.*
>
> • *Prejudice: Labour relations prejudice is presumed in cases of delay; however, if the delay is extensive or inordinate this factor will weigh more heavily in the analysis. The longer the delay, the greater the prejudice to a respondent. Evidence of actual prejudice to a respondent likely will result in the main application being dismissed.*
>
> • *Sophistication of Applicant: An applicant's knowledge of labour law and labour relations matters, generally is an important consideration when assessing the veracity of the reasons for the delay.*
>
> • *The Nature of the Claim: The issues at stake for an applicant will be weighed in the balance. If the consequences of dismissing an application for reasons of delay are significant to an applicant, this will weigh in favour of permitting the application to proceed despite a lengthy delay in its initiation.*
>
> • *The Applicable Standard: When adjudicating delay applications, the standard which has been applied consistently is: can justice be achieved in the matter despite a lengthy delay in commencing it?[36]*

[25] The central question on an application to dismiss due to delay is: can justice can be achieved in the matter despite the delay?[2]

[26] There are strong points of comparison between the present case and the cases alleging delay in the filing of an application. To be sure, the delay in the present case was occasioned when Hall stopped pursuing his application, which was already filed. In many cases, the prejudice is connected to the respondents' reasonable expectation that an issue or a dispute will not coalesce into a formal complaint if sufficient time has passed. Here, although the Union was aware of the existence of the application, the application was adjourned *sine die* in 2007, very shortly after it was filed. The Union had a reasonable expectation that, had Hall wanted to pursue the application, he would have sought to revive the adjourned application within a reasonable period of time.

[27] Given these circumstances, it is appropriate to apply the *Hartmier* factors to the current case.

[28] The Board's assessment of the *Hartmier* factors leads to the following conclusions. First, the length of the delay is inordinate. In fact, it is among the lengthiest delay on the Board's record of summary dismissal matters. The length of the delay, alone, provides a very compelling reason to dismiss the underlying application. It is well established that prejudice to a respondent is

---

[2] *Saskatchewan Government and General Employees' Union, Local 1105 v Darryl Upper*, 2023 CanLII 10506 (SK LRB), at para 59.

presumed in labour relations matters involving delay. Due to the length of the delay, the presumed prejudice weighs very heavily against proceeding with the application and no evidence of actual prejudice is necessary. The likely corrosion of evidence, both oral and documentary, is glaringly obvious.

[29] Hall has described his personal circumstances during the intervening years and relied on these circumstances to justify the inordinate delay. Frankly, it is difficult to imagine personal circumstances that would overcome the prejudice that is presumed as a result of the inordinate delay in this case. Hall's circumstances do not. While the Board recognizes that Hall has experienced challenges since filing his application, proceeding with the application would be procedurally unfair to the Union.

[30] Although the Union does not claim that Hall has any special expertise in labour relations, this changes nothing.

[31] Obviously, the issues raised by Hall are very significant to him. Again, however, the significance of his concerns does not outweigh the prejudice that is presumed.

[32] The reality is that justice cannot be achieved in the matter despite the lengthy delay. To the contrary, an injustice would be caused by proceeding with the matter at this stage. This is a clear and obvious case for dismissal.

[33] Given the foregoing, the application for summary dismissal is granted and the duty of fair representation application is dismissed. An appropriate Order will be issued with these Reasons.

DATED at Regina, Saskatchewan, this **27th** day of **September, 2023.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson