Saskatchewan
Labour Relations Board

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v ATHANAS NJERU, Respondent and CITY OF SASKATOON, Respondent

LRB File Nos. 133-22, 005-22 and 179-22; May 4, 2023
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, Athanas Njeru:	Self-Represented
Counsel for the Respondent, City of Saskatoon:	No Submissions Made

Application for Summary Dismissal – Clauses 6-111(1)(p) and (q) of *The Saskatchewan Employment Act* – Underlying Employee-Union Dispute – Section 6-59 of the Act – Duty of Fair Representation.

Allegations – Original Application not Sufficiently Particularized – Failure to Disclose an Arguable Case – No Material Facts Plead to Support Claim.

Disposition – Application for Summary Dismissal Granted – Employee-Union Dispute Dismissed – Plain and Obvious that No Arguable Case.

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] pursuant to clauses 6-111(1)(p) and (q) of *The Saskatchewan Employment Act* [Act]. The Union asks the Board to dismiss an employee-union dispute that was filed by Athanas Njeru [Njeru] on January 18, 2022.[1] The Union says that the original application is not sufficiently particularized and fails to disclose an arguable case.

[2] Njeru was hired into a temporary full-time position as a Local Immigration Partnership Coordinator [LIP] with the City of Saskatoon, commencing on or about September 25, 2017. Until the date of his termination on January 12, 2021 he was a member of the Union. In the original

[1] LRB File No. 005-22.

application, he alleges that the Union contravened its duties as set out in section 6-59 of the Act. He also alleges fraudulent representation with respect to his wrongful termination grievance; discrimination; harassment; and withholding of information and assistance.

[3] After receiving the original application, the Union wrote to Njeru to ask for further particulars of dates, times, and people, explaining that it was having a "great deal of difficulty understanding parts of" the complaint. At the time, the Union was preparing to reply to the application. Njeru did not provide the particulars that the Union requested and the Union did not file a Reply to his application.

[4] For its part, the Employer states in Reply to the original application that no employee, agent, or representative of the Employer engaged in fraudulent representation or harassment. The Employer also denies that Njeru was wrongfully terminated, offering that he had been employed on a temporary basis and was not the senior most qualified applicant for the permanent posting. The Employer offers that Njeru had made harassment complaints against his supervisor and manager, which complaints were determined to be unfounded.

[5] In the application for summary dismissal, the Union states that Njeru was employed as a temporary full-time contract employee. On January 11, 2021, he tendered a resignation letter, effective January 26, 2021. On January 12, 2021, the Employer informed Njeru that his temporary employment was ending effective immediately. Njeru made requests of the Union to explore a grievance on his behalf. The Union sought additional information from him for the purpose of considering his request. He provided no new information. When the Grievance Committee met, it decided not to file a grievance on his behalf. When Njeru was informed of that decision, he was also informed of his right to appeal. He did not appeal and did not make any further requests of the Union.

[6] In support of its request for summary dismissal, the Union notes that, upon receipt of the duty of fair representation complaint, the Union asked Njeru to provide further particulars, which he refused to do. The Union states that Njeru has not pleaded "any material facts to show that the union has engaged in any arbitrary, bad faith, or discriminatory representation in respect of his employment" and has provided no supporting documentation.

[7] In attempting to reply to the summary dismissal application, Njeru emailed the Board a large number of documents and other items, inclusive of a Form 21 Reply, sworn on August 18, 2022 and received by the Board on the same date. The Reply refers to 15 appendices. These

appendices each consist of a separate zip folder containing additional file folders and multiple documents and other items, many of which include another level or two of additional documents. Some of the documents and items are unreadable or inaccessible.

[8] Due to the significant issues with the quantity, organization, and accessibility of the documents and items contained in the appendices, the Board Registrar advised Njeru that he was required to file his Reply in a physical form by a specific date, being Friday, September 9, 2022. On September 8, 2022, Njeru reached out to the Board to request an extension of the deadline by one day. He was granted an extension to Monday, September 12, 2022. No physical Reply was filed.

[9] After the deadlines for the filing of the pleadings had passed, the Board set deadlines for the filing of written submissions in respect of the application for summary dismissal.

[10] After setting these dates, Njeru filed an application for pre-hearing production of particulars or documents.[2] The application does not seek any specific documents from the parties. Instead, it provides a description of various interactions between himself and the Board's staff.

[11] The Union and the Employer each filed Replies to that application. The Union replied that pre-hearing production was not necessary because the summary dismissal application was before the Board. Both the Union and the Employer asserted that the pre-hearing production application was deficient in that it provided insufficient information for a response.

[12] After filing the production application, Njeru asked the Board to confirm that the submission dates for the summary dismissal application were removed to provide the respondents an opportunity to reply to the new application. The Board responded that the submission dates remained set down and unchanged.

[13] The Board has now had an opportunity to review all of the materials put before the Board in relation to the summary dismissal application. For the following reasons, the Board has decided to grant the application for summary dismissal and dismiss the employee-union dispute. Although it was an error for the Union not to file a Reply to the original application, the Union has made its position clear, and Njeru has had a fair and ample opportunity to reply to the application for summary dismissal. Therefore, the Board has found it appropriate to proceed without the Reply.

---

[2] LRB File No. 179-22.

Analysis and Decision:

[14] 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.

[15] In support of its application for summary dismissal, the Union's primary argument is that Njeru has not plead or provided any material facts showing that the Union engaged in action that could be found to be arbitrary, in bad faith, or discriminatory. The Union relies on *Zalopski v Canadian Union of Public Employees, Local 21*, 2017 CanLII 68784 (SK LRB) [*Zalopski*]; *Hernandez v Teamsters Local Union 395*, 2015 CanLII 50198 (SK LRB) [*Hernandez*]; *Rousseau v International Brotherhood of Locomotive Engineers et al*., 95 CLLC 220-064 [*Rousseau*]; *R.R. v Canadian Union of Public Employees, Local 4777*, 2011 CanLII 100994 (SK LRB) [*R.R. v CUPE*]; *United Steel v Jason Rattray*, 2017 CanLII 68782 (SK LRB) [*Rattray*]; *McRaeJackson v CAW-Canada*, 2004 CIRB 290, 2004 CarswellNat 6044 [*McRaeJackson*]; and *Prebushewski v Canadian Union of Public Employees, Local No. 4777*, 2010 CanLII 20515 (SK LRB) [*Prebushewski*].

[16] 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:*
>
> > *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.*
>
> *[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.*

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

[18] 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, whether it is plain and obvious that the original application should be dismissed as disclosing no arguable case. The Union bears the onus on the present application.

[19] On the question of whether an original application is sufficiently particularized to sustain a complaint, the Board takes guidance from the decision of the Canada Industrial Relations Board in *McRaeJackson*:

> *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 that violation must present cogent and persuasive grounds to sustain a complaint.*
>
> *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 the 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.*

[20] To be sure, in a given case the Board uses its discretion to determine the extent of particularization that is required to sustain a complaint. Particularization of each of the categories of “events, times, dates, and any witnesses” will not be necessary in every case.

[21] 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. In assessing the sustainability of the claim, 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 right to proceed with an existing claim. When taking this step, the Board must be satisfied that the original application is patently defective.

[22] In the present case, the original application alleges that the Union breached its duty of fair representation pursuant to section 6-59 of the Act. The nature and scope of a union’s duty of fair representation are well established. In considering whether to represent or in representing an employee or former employee a union is prohibited, pursuant to subsection 6-59(2), from acting

in a manner that is arbitrary, discriminatory or in bad faith. The Board in *Berry v SGEU*, 1993 CarswellSask 518 provided helpful guidance as to the meaning of the terms “arbitrary”, “discriminatory” and “bad faith”:

> *21 This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:*
>
> > *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favouritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*
>
> *22 In the case of Gilbert Radke v. Canadian Paperworkers Union, LRB File No. 262-92, this Board observed that, unlike the question of whether there has been bad faith or discrimination, the concept of arbitrariness connotes an inquiry into the quality of union representation. The Board also alluded to a number of decisions from other jurisdictions which suggest that the expectations with respect to the quality of the representation which will be provided may vary with the seriousness of the interest of the employee which is at stake. They went on to make this comment:*
>
> > *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*
>
> *. . .*

[23] The Board also relies on the following succinct descriptions cited by the Ontario Board in *Toronto Transit Commission*, [1997] OLRD No 3148, at paragraph 9:

> *. . . a complainant must demonstrate that the union’s actions were:*
>
> > *(1) “Arbitrary” – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
> >
> > *(2) “Discriminatory – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*

(3) "in Bad Faith" – that is, motivated by ill-will, malice[,] hostility or dishonesty.

[24] The allegations contained in the original application are brief. Njeru has suggested that the Union has committed fraudulent misrepresentation with respect to his wrongful termination grievance (which can be assumed to mean his *request* for a grievance). He also alleges "multiple events" of discrimination, harassment, and withholding of information and assistance. He provides no additional clarification of the nature of his allegations. There are no dates, times, locations, names of individuals, or descriptions of events. Nor does he explain his perception or interpretation of the terms "fraudulent misrepresentation", discrimination, or harassment.

[25] As explained in *McRaeJackson*, a complaint must provide more than a bare assertion of a perceived injustice. It must set out the facts upon which the applicant relies to prove the alleged violations of the Act. Just as it is not enough to simply allege that the Union acted in a manner that was arbitrary, discriminatory, or in bad faith, nor is it enough to allege that the Union fraudulently misrepresented, discriminated, or harassed. Although Njeru's allegation that the Union withheld information or assistance is marginally more descriptive than his use of bare legal terms, he provides no description of the context within which the information or assistance was alleged to have been withheld. In summary, the allegations of fraudulent misrepresentation, discrimination, and harassment do not disclose an arguable case.

[26] Also, these very general and basic allegations provide almost no information to the respondents to allow them to know the case they must meet.

[27] In terms of concrete allegations, the most the Board can gather from the application is an indirect suggestion that the Union refused to file a grievance upon request. Of the existing categories of prohibited conduct this allegation fits most neatly within the category of arbitrariness. Arbitrary conduct may be found to have occurred if a union representative has failed to direct one's mind to the merits of the matter, to inquire into or to act on available evidence, or to conduct any meaningful investigation, or if a union representative has acted based on irrelevant factors or displayed an indifferent attitude.[3] However, there is no suggestion and there are certainly no particulars of any such allegations. At its core, Njeru's sole allegation is a complaint that the Union did not follow his direction.

[3] See, for example, *Rousseau* as cited in *Owl v Saskatchewan Government and General Employees' Unio*n, 2014 CanLII 42401 (SK LRB) and *McRaeJackson*.

[28] In reviewing a complaint pursuant to section 6-59, it is not the Board's role to sit in general appeal of each and every decision made by a union.[4] A union assumes carriage of a grievance as the exclusive bargaining agent on behalf of its employees. As the exclusive bargaining agent, it is afforded a certain latitude in its handling of a grievance.[5] It is entitled to make a wrong decision as long as it fairly and reasonably investigates the grievance and comes to an informed decision. There is no free-standing duty to take direction from a grievor.[6] A union will not be found to have breached the duty just because it has come to a conclusion with which the grievor did not agree.

[29] Njeru also argues that he had intended to file documents and other items with his application but when he reached out to the Board he was told not to do so. He implies that those documents would have provided the context for the allegations, which context is absent from the application. He suggests, therefore, that he was precluded from sufficiently particularizing his application.

[30] To be clear, it is common for applicants to include exhibits that are properly marked and appended to their sworn or affirmed applications as context for the allegations contained in the applications. Question # 4 in Form 10,[7] while directing an applicant to "state clearly and concisely all relevant facts indicating the exact nature of the practice or contravention" also states that "[a]dditional material in the form of exhibits properly marked and attached to this sworn or affirmed application may also be included".

[31] To remedy the issue, Njeru took the opportunity to attempt to file his documents after the summary dismissal application was filed. To this end, he sent multiple emails to the Board consisting of a Form 21 Reply to the summary dismissal application, and appended materials. Upon receipt of these emails, the Board Registrar emailed him to advise that the filing was not in a format satisfactory to the Board pursuant to subsection 3(2) of the Regulations. The Registrar advised Njeru to file his complete Reply in a physical form by mail or in-person at the Board office. As mentioned, no Reply was filed.

[32] Subsection 3(2) of the Regulations states:

> *(2) A Form or other document may be filed with the board by electronic means, but only if the electronic copy of the Form or other document is in a format satisfactory to the board.*

---

[4] *Prebushewski*, at para 55.
[5] *Hargrave v Canadian Union of Public Employees, Local 3833*, 2003 CanLII 62883 (SK LRB), at para 42.
[6] *Ibid*.
[7] *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021*.

[33] According to this provision, the Board has broad discretion to find that a document is not in a satisfactory electronic format and to require that it be filed by other means.

[34] The Board has reviewed the Form 21 document, as well as the other documents and items (which were accessible and readable) that Njeru attempted to file electronically with the Board. The decision not to allow these items to be filed electronically was not only reasonable but was the most appropriate decision under the circumstances. The appendices and file folders disclose no apparent organizational system. Some of the file folders are empty. Numerous documents, including emails, are entirely inaccessible. There is extensive duplication.

[35] It was not unfair to require Njeru to file the documents in person or by mail. The requirement provided an opportunity for Njeru to re-organize these items and to re-file in a more comprehensible format. In effect, he was given a renewed opportunity to present his best case to the Board. He requested an extension, and it was granted.

[36] Moreover, these documents and other items do not clarify the allegations, and do not remedy the deficiencies in the particulars. Collectively they comprise a massive document dump. They consist of documents from Njeru's personnel file including a letter of offer, termination documents, and a performance evaluation; payroll and tax documents; leave reports and leave-related correspondence; staffing action forms; job posting documentation for the LIP position; correspondence with other City employees and management; documents related to projects in which Njeru was involved including costs and receipts; audio recordings of meetings with management and the Union, and transcripts of same; disclosure requests by Njeru to various individuals including Union representatives, managers, and employees; personal emails from individuals with unknown connection to these matters; documentation of possible job search efforts; harassment complaint documents including final reports and related correspondence; City policies and newsletters; correspondence from the Saskatchewan Human Rights Commission; multiple email "message read" receipts; duplicative pleadings filed in this matter, an email about the contract ratification; and emails with the Board in this matter including scheduling emails; among other documents and items.

[37] There are also emails between the Union representatives and Njeru. These include emails containing the Union's requests for additional documentation, the Grievance Committee's decision not to proceed with a grievance, and email exchanges in which Njeru discusses concerns with and makes requests of the Union representatives, including a harassment grievance request

against 16 individuals. None of these documents clarify the facts which are alleged to support the violations that are claimed.

[38] To be sure, the documents may be roughly divided into two categories: documents relating to interactions with management and employees and documents relating to interactions directly with the Union. Arguably, the latter category is marginally more relevant to an alleged violation of section 6-59. However, Njeru has provided no explanation for why he has provided these documents, what they are intended to prove, or what are the actions of the Union disclosed by the documents that form the basis of his complaints.

[39] To the extent that it is reviewable,[8] the Form 21 document provides no greater assistance in clarifying the allegations. In it, Njeru makes repeated allegations of "fraudulent misrepresentation". He suggests that there was an issue due solely to the fact that the LIP position was not posted earlier and that he worked past the term of his contract. He also suggests that he was terminated for submitting harassment complaints against City managers and/or employees. Lastly, he asserts that he requested that a grievance be submitted but the Union representative refused to honor his disclosure requests and fraudulently misrepresented him in deciding not to file a grievance.

[40] In considering whether there has been a breach of section 6-59, the Board's focus is not on the merits of the grievance request but on the process used by the Union in respect of the request.[9] Njeru provides no information as to why the Union was required to provide information to him for the purpose of the Union making a decision about his grievance request or how that information could possibly relate to the Union's assessment of his request. Nor does he explain what he means when he alleges that the Union fraudulently misrepresented him.

[41] In summary, Njeru has flooded the Board with documents but provided no indication of their relevance or materiality. Not only is this approach inappropriate; it is not helpful. After having reviewed all of the documents, the Board is no closer to understanding the allegations that Njeru is making against the Union than it was in the absence of these documents. As asserted in *McRaeJackson*, the Board is not required to go on a fact-finding mission on behalf of an applicant; nor is the Board required to go to extensive and likely unproductive lengths to understand the

[8] Taking into account the usual rule restricting the Board's review to the subject application, any particulars furnished pursuant to demand and any document referred to in the application.
[9] *Rattray*, at para 30.

basis for and nature of an applicant's complaint, especially when the applicant has not attempted to communicate same to the Board.

[42] For the foregoing reasons, the application for summary dismissal is granted and the employee-union dispute is dismissed. The related application for production, which is necessarily moot due to the dismissal of the employee-union dispute, is also dismissed.

[43] An appropriate Order will accompany these Reasons.

DATED at Regina, Saskatchewan, this **4th** day of May, 2023.

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson