Saskatchewan
Labour Relations Board

LLOYDMINSTER AND DISTRICT CO-OPERATIVE LIMITED, Applicant v L.M., Respondent

LRB File Nos. 128-23 and 148-23; December 21, 2023
Chairperson, Michael J. Morris, K.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Applicant, Lloydminster and District Co-operative Limited: Shane Buchanan

The Respondent, L.M.: Self-Represented

Application under s. 4-7(2) of *The Saskatchewan Employment Act* – Adjudicator's decision on Part IV appeal over 7 years overdue – Applicant requesting that adjudicator be directed to render a decision, that Board render a decision in place of adjudicator, or that Board direct that a new adjudicator hear appeal.

Summary dismissal – Employer requesting that Board dismiss application under s. 4-7(2) and dismiss underlying appeal before adjudicator, based on undue delay.

Summary dismissal – Board does not have jurisdiction to dismiss underlying appeal – Underlying appeal remains before adjudicator.

Summary dismissal – *Pelletier* considered – Board does not have authority under s. 4-7(3) to replace adjudicator as decision-maker for underlying appeal with itself – Board summarily dismisses request to replace adjudicator with itself.

Summarily dismissal – Plain and obvious that directing the selection of a new adjudicator inappropriate due to undue delay in bringing application under s. 4-7(2) – Employer's ability to adduce evidence prejudiced – Board summarily dismisses request to direct that new adjudicator be selected.

Summary dismissal – Appropriateness of directing adjudicator to render decision in underlying appeal – Board not satisfied that plain and obvious that such relief inappropriate – Parties made limited submissions regarding this issue in summary dismissal application.

REASONS FOR DECISION

Background:

[1] Michael J. Morris, K.C., Chairperson: These are the Board's reasons with respect to a summary dismissal application [Summary Dismissal Application] brought by Lloydminster and District Co-operative Limited [Employer].

[2] L.M. was the Health Safety and Environment (HSE) Coordinator for the Employer until she was dismissed on June 25, 2015. Thereafter, she made a complaint that her dismissal constituted discriminatory action contrary to s. 3-35 of *The Saskatchewan Employment Act*[1] [Act]. More particularly, she alleged that she had been dismissed for raising health and safety concerns related to employees not wearing metal gloves while cutting meat.

[3] L.M.'s complaint was investigated by occupational health officers. In a written decision dated November 26, 2015 [OHS Decision], the officers concluded that L.M.'s dismissal was not an unlawful discriminatory action. Rather, they determined that "L.M. was terminated for not allowing others to participate or be engaged in the safety discussion and decision making process."[2]

[4] L.M. appealed the OHS Decision pursuant to s. 3-53 of the Act [Underlying Appeal]. An adjudicator, Rusti-Ann Blanke [Ms. Blanke], was selected to hear her appeal.

[5] Ms. Blanke heard evidence and submissions from L.M. and the Employer on April 25th and 26th, 2016. Ms. Blanke then reserved her decision with respect to the Underlying Appeal.

[6] On September 5, 2023, L.M. wrote to the Board, requesting that it "assist Adjudicator Rusti Ann Blanke with rendering a decision". In a follow-up communication with the Board's Registrar, L.M. confirmed that she was requesting that her letter be treated as an application pursuant to ss. 4-7(2) and (3) of the Act. These provisions empower the Board, on application, to grant certain relief when an adjudicator does not render a decision within the timelines prescribed in s. 4-7(1). Relief can include, for example, directing an adjudicator to provide a decision within a specified period, or setting aside the adjudicator's selection and directing the Registrar to select another adjudicator to hear the applicant's appeal.

[7] For convenience, L.M.'s application to the Board will be referred to as "the s. 4-7 Application".[3]

[8] The Employer filed a reply to the s. 4-7 Application. In its reply, the Employer submitted that the s. 4-7 Application should be dismissed on the basis of undue delay.

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[1] *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act], s 3-35.
[2] OHS Decision, p 4.
[3] This application is LRB File No. 128-23.

[9] In addition, the Employer filed the Summary Dismissal Application, requesting that both the s. 4-7 Application and the Underlying Appeal be summarily dismissed.[4] The Employer's position, in brief, is that it should not have to bear the consequences of L.M.'s tardiness in attempting to address Ms. Blanke's delay.

[10] Ms. Blanke was advised by the Board that the s. 4-7 Application was pending before it. In response, she indicated that she expected to have her decision completed by December 1, 2023. She also indicated that she was not interested in participating in the s. 4-7 Application.

[11] Ms. Blanke's decision remains outstanding as of today's date.

[12] The Board has reviewed the pleadings in the s. 4-7 Application and the Summary Dismissal Application. It has also reviewed the parties' written submissions.[5]

Argument on behalf of the Employer:

[13] As aforementioned, the Employer requests that both the Underlying Appeal and the s. 4-7 Application be summarily dismissed.

[14] With respect to the Underlying Appeal, the Employer submits that it should be dismissed for want of prosecution and undue delay. The Employer relies upon cases where employees filed applications with the Board and failed to advance or participate in the proceedings thereafter.[6] In those cases, the Board dismissed the applications for want of prosecution[7] or undue delay.[8] The Employer submits that it would suffer extreme prejudice if L.M. were successful in the Underlying Appeal and awarded backpay from 2015 until the decision in the Underlying Appeal.

[15] With respect to the s. 4-7 Application, the Employer submits that L.M. waited an inordinate amount of time to bring the application. In its view, granting any relief further to the s. 4-7 Application would be procedurally unfair.

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[4] This application is LRB File No. 148-23.
[5] Neither party requested an oral hearing.
[6] *Saskatchewan Joint Board Retail, Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 568 v Off the Wall Productions Ltd.*, 2009 CanLII 2603 (SK LRB) [*Off the Wall Productions*]; *Saskatchewan Government and General Employees' Union v Gail Lockstead and Government of Saskatchewan*, 2021 CanLII 43555 (SK LRB) [*Lockstead*]; *Saskatchewan Government and General Employees' Union v Dylon James Caissie*, 2022 CanLII 21731 (SK LRB) [*Caissie*]; *Moose Jaw Firefighters Association, IAFF Local 553 v Hall*, 2023 CanLII 88136 (SK LRB) [*Hall*].
[7] *Off the Wall Productions*, at para 28; *Lockstead*, at para 13; *Caissie*, at para 14.
[8] *Hall*, at para 32.

[16] The Employer notes that any new hearing with respect to the Underlying Appeal would proceed over 7 years since the hearing before Ms. Blanke concluded, and over 8 years since L.M. was dismissed. It points to it no longer having access to key witnesses and evidence,[9] the effect that the delay will have had on the memories of those witnesses that it does have access to, and the apparent loss of some documentary evidence since 2016.

Argument on behalf of L.M.:

[17] L.M. indicates that the relief she is seeking in the s. 4-7 Application is for the Board to direct Ms. Blanke to render a decision, for the Board to render a decision itself in place of Ms. Blanke, or for the Board to appoint a new adjudicator in place of Ms. Blanke.[10] L.M. submits that it was open to the Employer to bring an application to the Court of Queen's Bench (as it then was) to compel Ms. Blanke to render a decision before the 2020 amendment to s. 4-7 of the Act.[11] Since the 2020 amendment, it has been open to the Employer to apply to the Board for relief, as she has, and the Employer has chosen not to.

[18] L.M. submits that her delay in requesting an order under s. 4-7(3) has been due to her mental health, which deteriorated following her dismissal. On this point, however, the Employer notes that L.M. fully participated in the hearing before Ms. Blanke in 2016, and filed no medical evidence in her reply to the Summary Dismissal Application.

[19] L.M. states that four individuals who were either employed by the Employer or on its board and who were involved in her dismissal are no longer with the Employer. The Employer agrees with L.M. on this point, and indicates that it would be prejudiced, accordingly, if required to participate in a new hearing with respect to the Underlying Appeal.

[20] Finally, L.M. points to an Ombudsman's report in which the Ombudsman recommended that an adjudicator deliver his decision no later than December 27, 2019, following a hearing that concluded on September 9, 2016. The Board understands L.M.'s mention of the Ombudsman's (non-binding) recommendation as suggesting that, from her perspective, it is not too late for the Board to grant some form of relief in the s. 4-7 Application.

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[9] For example, the Employer states that its "main witness from the hearing in April 2016" is no longer employed by it.
[10] L.M.'s reply to the Summary Dismissal Application, final paragraph under heading "Conclusion".
[11] *The Saskatchewan Employment Amendment Act, 2020*, SS 2020, c 12, s 13 [2020 amendment]. The 2020 amendment, along with other amendments in *The Saskatchewan Employment Amendment Act, 2020*, received royal assent on March 16, 2020.

Relevant Statutory Provisions:

[21] Section 4-7 of the Act is relevant:

> ***4-7****(1) Subject to the regulations, an adjudicator shall provide the written reasons for the decision required pursuant to clause 4-6(1)(b) within the following periods:*
>
> *(a) with respect to an appeal or hearing pursuant to Part II, 60 days after the date on which the hearing of the appeal or the hearing is completed;*
>
> *(b) with respect to an appeal pursuant to Part III:*
>
> *(i) subject to subclause (ii), 60 days after the date on which the hearing of the appeal is completed; and*
>
> *(ii) with respect to an appeal pursuant to section 3-54, the earlier of:*
>
> *(A) one year after the date on which the adjudicator was selected; and*
>
> *(B) 60 days after the date on which the hearing of the appeal is completed;*
>
> *(c) with respect to an appeal pursuant to Part V, 60 days after the date on which the hearing of the appeal is completed.*
>
> *(2) If the deadline in subsection (1) has not been met, any of the following may apply to the board for an order directing the adjudicator to provide the adjudicator's decision:*
>
> *(a) any party to a proceeding before an adjudicator;*
>
> *(b) the director of employment standards or director of occupational health and safety, as the case may be.*
>
> *(3) On an application made pursuant to subsection (2), the board may do all or any of the following:*
>
> *(a) direct the adjudicator to provide the decision;*
>
> *(b) establish the period within which the decision is to be provided;*
>
> *(c) set aside the adjudicator's selection and direct the registrar to select another adjudicator to hear the appeal;*
>
> *(d) make any other order the board considers appropriate.*
>
> *(4) A failure by an adjudicator to comply with subsection (1) or with an order made pursuant to subsection (3) does not affect the validity of a decision.*
>
> *(5) As soon as is reasonably possible after receiving a decision, the board shall serve the decision on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.*
>
> *(6) This section applies to all appeals or hearings that:*

(a) were commenced before the coming into force of this section and for which written reasons have still to be provided on or after the coming into force of this section; or

(b) are commenced on or after the coming into force of this section.

[22] Before the 2020 amendment, s. 4-7 read as follows:

***4-7**(1) Subject to the regulations, an adjudicator shall deliver the written reasons for the decision required pursuant to clause 4-6(1)(b) within the following periods:*

(a) with respect to an appeal or hearing pursuant to Part II, 60 days after the date the hearing of the appeal or the hearing is completed;

(b) with respect to an appeal pursuant to Part III:

(i) subject to subclause (ii), 60 days after the date the hearing of the appeal is completed; and

(ii) with respect to an appeal pursuant to section 3-54, the earlier of:

(A) one year after the date the adjudicator was selected; and

(B) 60 days after the date the hearing of the appeal is completed.

(2) Any party to a proceeding before an adjudicator may apply to the Court of Queen's Bench for an order directing the adjudicator to provide his or her decision if the deadline in subsection (1) has not been met.

(3) A failure to comply with subsection (1) does not affect the validity of a decision.

(4) As soon as is reasonably possible after receiving a decision, the board shall serve the decision on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

Analysis and Decision:

i) Section 4-7

[23] Until the 2020 amendment, a party awaiting a decision from a tardy adjudicator could apply under s. 4-7(2) for a Court order directing the adjudicator to provide their decision.

[24] The 2020 amendment substituted the Board in place of the Court and expanded the remedies able to be ordered. More particularly, the Board may do one or more of the following, on application: (a) direct the adjudicator to provide the decision; (b) establish the period within which the decision is to be provided; (c) set aside the adjudicator's selection and direct the Registrar to select another adjudicator to hear the appeal; (d) make any other order the Board considers appropriate.

[25] During his appearance before the Standing Committee on Human Services, the Minister of Labour Relations and Workplace Safety explained:

> *Within the amendments we are also providing the Labour Relations Board with the authority to require the production of an adjudicator's decision when the statutory period is exceeded and replace the adjudicator if a decision is not provided[.]*[12]
>
> …
>
> *So what we wanted to do was bring it back so it was the same situation as it would be in court, where there would be a chief judge or a chief justice that could say, do your work, get this done, or we're taking it out of your hands to do with somebody else.*[13]

[26] Before the 2020 amendment, the Board had no authority to replace a tardy adjudicator with another adjudicator.

[27] In *K.C,*[14] the Board exercised its authority under s. 4-7(3)(c) to set aside an adjudicator's selection and to direct that an alternate adjudicator be selected to hear the applicant's appeal. The original adjudicator was Ms. Blanke.[15] The hearing before Ms. Blanke concluded in 2019, but she had not rendered her decision by July 20, 2020. In rendering its decision, the Board considered the length of the delay, prejudice arising from the delay, and the appropriateness of the requested remedy, taking into account fairness to the parties and the proper administration of justice. Ultimately, the Board was not confident that Ms. Blanke would render a decision if directed to do so, and it directed that a new adjudicator be selected.[16]

[28] Notably, the parties in *K.C.* agreed that Ms. Blanke's reasons were 11 months past due by the time of the Board's decision.[17] This is significantly less than the delay in the Underlying Appeal, here. Ms. Blanke's reasons were due in 2016 – over 7 years ago.

[29] Because the parties have both proceeded from the basis that the Board may cause itself to step into Ms. Blanke's shoes as adjudicator, whether s. 4-7 permits this must be addressed. In the Board's view, it does not.

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[12] Saskatchewan, Standing Committee on Human Services, *Debates and Proceedings (Hansard)*, 28th Leg, 4th Sess (10 March 2020) at 971 (Hon. Mr. Morgan).
[13] Saskatchewan, Standing Committee on Human Services, *Debates and Proceedings (Hansard)*, 28th Leg, 4th Sess (10 March 2020) at 974 (Hon. Mr. Morgan).
[14] *K.C. v Keewatin Yatthé Regional Health Authority*, 2020 CanLII 49267 (SK LRB) [*K.C.*].
[15] *K.C.*, at para 15.
[16] *K.C.*, at para 51.
[17] *K.C.*, at para 22.

[30] The Board begins by noting that it has recently commented with respect to its jurisdiction under Part IV of the Act in *Pelletier*.[18] In *Pelletier*, the applicant was requesting, amongst other things, that the Board render a decision in place of an adjudicator who had exceeded the statutory time limit for rendering same. As it happened, the adjudicator rendered his decision the same day the application to the Board was filed. Regardless, the Board explained its jurisdiction under s. 4-7 as follows (emphasis added):

> *[52] In addition to its appellate jurisdiction under Part IV, the Board has what might be termed limited "supervisory" jurisdiction when an adjudicator is tardy in rendering their decision on an appeal. Adjudicators must provide their decisions within specified time frames, pursuant to s. 4-7(1). When they fail to do so, under s. 4-7(2) a party to the appeal or the Director of Employment Standards or the Director of Occupational Health and Safety, as the case may be, may apply to the Board for an order directing the adjudicator to provide their decision. Pursuant to s. 4-7(3), the Board may do one or more of the following:*
>
> > *(a) direct the adjudicator to provide the decision;*
> >
> > *(b) establish the period within which the decision is to be provided;*
> >
> > *(c) set aside the adjudicator's selection and direct the registrar to select another adjudicator to hear the appeal;*
> >
> > *(d) make any other order the board considers appropriate.*
>
> *[53] The Board's remedies in this regard are akin to a superior court issuing a writ of mandamus with respect to an administrative decision-maker, and they are intended to ensure that an adjudicator's decision is rendered within a reasonable time frame. <u>Clause 4-7(3)(d) does not allow the Board to replace the adjudicator as decision-maker with itself, as doing so would conflict with the Board's role within Part IV as the next-level appellate body after an adjudicator's decision is rendered</u>.*[19]

[31] The Board's purposive interpretation in *Pelletier* conforms with the rule of statutory interpretation known as *ejusdem generis*, also known as the "limited class rule". As indicated above, the Board's authority to "make any other order [it] considers appropriate" in s. 4-7(3)(d) follows a list of specifically defined relief in ss. 4-7(3)(a) through (c).

[32] The limited class rule has been described as follows:

> *…when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it.*[20]

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[18] *Marcel Pelletier v Touchwood Agency Tribal Council*, 2023 CanLII 61388 (SK LRB) [*Pelletier*].
[19] *Pelletier*, at paras 51-52.
[20] *National Bank of Greece (Canada) v Katsikonouris*, 1990 CanLII 92 (SCC), [1990] 2 SCR 1029 at 1040, cited in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis Canada, 2014) at para 8.64.

[33] In *Rascal Trucking*,[21] the Supreme Court applied this rule to s. 936 of British Columbia's *Municipal Act*. More particularly, the question was to what extent "or other matter or thing" could extend beyond specifically described nuisances (emphasis added):

> ***936.*** *(1) The council may declare a building, structure or erection of any kind, or a drain, ditch, watercourse, pond, surface water or other matter or thing, in or on private land or a highway, or in or about a building or structure, a nuisance, and may direct and order that it be removed, pulled down, filled up or otherwise dealt with by its owner, agent, lessee or occupier, as the council may determine and within the time after service of the order that may be named in it.*[22]

[34] The Court reasoned that "or other matter or thing" could include unmentioned things in the two classes of nuisances identified before it (constructed/erected things and watercourses), but could not create a different "catch-all" additional class (emphasis added):

> *21 It is my opinion that the legislature, by including the phrase "or other matter or thing", did not intend to expand the scope of s. 936 to allow municipalities to declare almost anything to be a nuisance. I accept the respondent's submission that to construe that phrase as creating a third class of potential nuisance would effectively negate the purpose of including rather specific preceding language.*
>
> *22 The phrase "or other matter or thing" extends the two classes of nuisances outlined before it, that is constructed or erected things, and watercourses. This interpretation follows from both a purposive interpretation and the application of the ejusdem generis limited class rule. It is not reasonable to believe that the legislature intended to subscribe such importance to the missing comma, namely that such minor punctuation should render null the specific items listed before.*
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> …
>
> *24 The fact that s. 936 empowers municipalities to declare only two classes of thing to be a nuisance does not foreclose the possibility that a pile of soil may fall within one of those categories. …*[23]

[35] The Supreme Court similarly applied the limited class rule with respect to the costs awardable under Ontario's Rules of Court in *Walker v Ritchie,* whose headnote states (emphasis added):

> *Rule 57.01(1) guides a court's determination of the quantum of a costs award. While indemnification is one of the cornerstones of a costs award, the scheme in place at the relevant time was not one of full indemnity. Rather, the quantum a party would receive as an indemnity was governed by the factors set out in Rule 57.01(1) and the Tariff. Risk of non-payment to plaintiff's counsel is not an enumerated factor under that rule. While the words "any other matter relevant to the question of costs" in clause (i) of Rule 57.01(1) are broad, they are not unlimited. An examination of the factors that were expressly included in clauses (a) to (h) reveals some common features among them and provides guidance*

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[21] *Nanaimo (City) v Rascal Trucking Ltd.*, 2000 SCC 13 [*Rascal Trucking*].
[22] *Rascal Trucking*, at para 9.
[23] *Rascal Trucking*, at paras 21, 22, 24.

> *as to matters that might be considered relevant in clause (i). In that context, the application of the limited class rule would suggest that the framers of clause (i) did not intend it to include the risk of non-payment to plaintiff's counsel as a relevant factor to consider. …*[24]

[36] The Court concluded that the expressly included factors dealt with either the nature of the case or the conduct of the parties to the litigation,[25] factors which could be applied to any party and which fell within their knowledge or control.[26] The risk of non-payment to plaintiff's counsel fell outside of these parameters, at least from a defendant's perspective. For reference, and comparison to s. 4-7(3), Rule 57.01(1) read as follows (emphasis in *Walker v Ritchie*):

> ***57.01*** *(1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,*
>
> *(a) the amount claimed and the amount recovered in the proceeding;*
>
> *(b) the apportionment of liability;*
>
> *(c) the complexity of the proceeding;*
>
> *(d) the importance of the issues;*
>
> *(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;*
>
> *(f) whether any step in the proceeding was,*
>
> *(i) improper, vexatious or unnecessary, or*
>
> *(ii) taken through negligence, mistake or excessive caution;*
>
> *(g) a party's denial of or refusal to admit anything that should have been admitted;*
>
> *(h) whether it is appropriate to award any costs or more than one set of costs where a party,*
>
> *(i) commenced separate proceedings for claims that should have been made in one proceeding, or*
>
> *(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different solicitor; and*
>
> *(i) any other matter relevant to the question of costs.*[27]

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[24] *Walker v Ritchie*, 2006 SCC 45, [2006] 2 SCR 428 [*Walker v Ritchie*], at 429.
[25] *Walker v Ritchie*, at para 27.
[26] *Walker v Ritchie*, at para 26.
[27] *Walker v Richie*, at para 20.

[37] Returning to s. 4-7(3), it is clearly concerned with two principal remedies: (1) directing the original adjudicator to render a decision; and (2) directing that the original adjudicator be replaced with a new adjudicator. To state the obvious, these principal remedies contemplate an adjudicator deciding the appeal in question. Clause 4-7(3)(d), which mentions "any other order the Board considers appropriate" cannot be reasonably interpreted to permit the Board to replace an original adjudicator with itself. Doing so would conflict with a purposive interpretation of Part IV of the Act, which requires that the Board sit as an appellate body with respect to the decisions of adjudicators, as well as the limited class rule.

[38] "[A]ny other order the Board considers appropriate" contemplates relief which is ancillary to the two principal remedies contemplated in s. 4-7(3), unless it is an order dismissing requested relief. The Board's conclusion in this regard is supported by the Minister's comments before the Standing Committee on Human Resources. As previously discussed, the Minister identified the major change in the 2020 amendment as the Board's ability to replace an original adjudicator with a new adjudicator. Previously, the Court could direct an adjudicator to render a decision, but the Act did not allow for an adjudicator to be replaced by another adjudicator.

[39] To round out the discussion on s. 4-7(3)(d), it bears reminding the type of application which must be made under s. 4-7(2) to permit any of the remedies in s. 4-7(3) to be granted: an application for an order directing an adjudicator to provide the adjudicator's decision. The premise of the application is that an adjudicator should be required to provide a decision, not the Board in place of the adjudicator. Further, as will be discussed below, the premise of the application is not that the appeal awaiting a decision should be dismissed by an entity other than an adjudicator.

ii) Inability to summarily dismiss the Underlying Appeal

[40] Having set out the Board's authority under s. 4-7(3), the Board returns to the relief sought in the Summary Dismissal Application, and more particularly, whether the Board has the authority to summarily dismiss the Underlying Appeal via the Summary Dismissal Application. In the Board's view, it does not.

[41] The Board's jurisdiction under s. 6-111(1) of the Act, including its authority to summarily dismiss a matter, is only engaged "[w]ith respect to any matter before it".[28] Axiomatically, a matter must be before the Board before it can be summarily dismissed by the Board.

[28] Act, s 6-111(1).

[42] Simply put, the only applications before the Board at this time are the s. 4-7 Application and the Summary Dismissal Application. The Underlying Appeal, to L.M.'s chagrin, remains before Ms. Blanke. As explained in *Pelletier*, the Board is unable to step into her shoes. Apart from its limited authority under s. 4-7(3), which has been discussed, above, the Board's jurisdiction with respect to the Underlying Appeal is only engaged once the Underlying Appeal has been determined by an adjudicator. At that point, its jurisdiction may be engaged as a next-level appellate body.

[43] Another way of examining this issue is to ask if, in the absence of L.M.'s application, the Employer could have brought an application under s. 4-7(2) for the Underlying Appeal to be dismissed by the Board. The answer is "no". As stated earlier, to engage ss. 4-7(2) and (3) an applicant must be applying to the Board for "an order directing the adjudicator to provide the adjudicator's decision",[29] not for an order from the Board dismissing the matter before the adjudicator. The Employer cannot achieve indirectly through the summary dismissal process that which it could not achieve directly via its own application under s. 4-7(2).

[44] Accordingly, the issue before the Board is whether it should summarily dismiss the s. 4-7 Application, in whole or in part.

iii) Whether the s. 4-7 Application should be summarily dismissed, in whole or in part

[45] Having determined that s. 4-7 does not permit the Board to replace Ms. Blanke as adjudicator with itself, L.M.'s request for this relief will be summarily dismissed. The remaining relief sought by L.M. in the s. 4-7 Application is: (1) For the Board to direct the Registrar to select a different adjudicator to hear the Underlying Appeal; or (2) For the Board to direct Ms. Blanke to render a decision in the Underlying Appeal.

[46] The Board may summarily dismiss an application as disclosing no arguable case under s. 6-111(1)(p) where it is plain and obvious that the application must fail, accepting the facts pled by the applicant as true.[30] In conducting its assessment, the Board will consider the applicant's pleading (here, the s. 4-7 Application), including any particulars furnished pursuant to a demand and any document referred to in the applicant's pleading which the applicant relies upon.[31]

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[29] Act, s 4-7(2).
[30] *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB) [*Roy*], at para 9.
[31] *Roy*, at para 8.

[47] For present purposes, L.M. has an arguable case if it is not plain and obvious that directing the selection of a new adjudicator or directing Ms. Blanke to render a decision would be inappropriate. L.M.'s pleading in support of the s. 4-7 Application is sparse, being a one-page document with an attached email. However, the Board is prepared to treat her reply to the Summary Dismissal Application as particulars for the purposes of the s. 4-7 Application.[32]

[48] In applying the "plain and obvious" standard for summary dismissal, the Board must identify the considerations that govern the granting of relief under s. 4-7(3). Based on *K.C.*, these include the length of the delay, any prejudice arising from the delay, and the appropriateness of the requested remedy, taking into account fairness to the parties and the proper administration of justice.

[49] In addition to *K.C.*, the Board can look to its jurisprudence regarding applications to summarily dismiss employee-union disputes or union-employer disputes on account of undue delay. In such cases, amongst other considerations, the Board will consider the length of delay in filing the underlying application (here, the s. 4-7 Application) and any presumed or actual prejudice arising from the delay.[33] Generally, the Board has stated that tolerable delay is "measured in months, not years", and that an inordinate delay requires a satisfactory explanation from a claimant.[34] The Board infers that an inordinate delay has a corrosive effect on the memories of witnesses, a form of presumed prejudice.[35] Actual prejudice to a respondent, such as through the loss of evidence or unavailability of a witness, will likely result in an application being dismissed for undue delay.[36]

[50] L.M.'s pleadings disclose that the hearing before Ms. Blanke concluded in April of 2016, and that the s. 4-7 Application was filed on September 1, 2023. Pursuant to s. 4-7(1)(b)(ii), Ms. Blanke's decision ought to have been delivered no later than June of 2016. As of that time, s. 4-7(2) of the Act (as it then was) allowed L.M. to apply to the Court of Queen's Bench (as it then

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[32] A similar approach was taken in *Canadian Union of Public Employees v Reuben Rosom*, 2022 CanLII 100088 (SK LRB), at paras 23-24.
[33] *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*, 2017 CanLII 20060 (SK LRB) [*Hartmier*], at para 120. *Hartmier* involved an employee-union dispute. It should be noted that different considerations apply when considering delay in bringing applications alleging unfair labour practices under Part VI of the Act, due to the statutory time limit in s. 6-111(3): *Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic*, 2016 CanLII 58881 (SK LRB) [*Saskatchewan Polytechnic*], at para 18. However, the length of delay and presumed or actual prejudice arising therefrom are relevant when considering alleged undue delay in both types of dispute.
[34] *Hartmier*, at para 123.
[35] *Dishaw v Canadian Office & Professional Employees Union, Local 397*, 2009 CanLII 507 (SK LRB), at para 33; *Hall*, at para 28.
[36] *Hartmier*, at para 120; *Saskatchewan Polytechnic*, at para 18.

was) for an order directing Ms. Blanke to render her decision. What this means is that the s. 4-7 Application was brought over 7 years after it could have been. This represents an inordinate delay. Even if the Board only considers the time since the 2020 amendment, which added as potential relief the selection of a new adjudicator, this period still encompasses over 3 years, which is itself an inordinately lengthy period to sit on one's rights. The Board notes that *The Limitations Act*, which governs civil actions (including lawsuits for wrongful dismissal), has a basic limitation period of 2 years.[37] Here, it is clear, based on L.M.'s pleadings, that she knew for several years that Ms. Blanke was overdue in rendering her decision, yet she waited until September of 2023 to file the s. 4-7 Application.

[51] The potential prejudice arising from L.M.'s inordinate delay in filing the s. 4-7 Application differs depending on the relief which might be ordered pursuant to it.

[52] Selecting a new adjudicator could allow L.M. a "do-over" with respect to the Underlying Appeal.[38] The Employer resists this on the basis that its ability to defend the Underlying Appeal has been prejudiced due to the passage of time.

[53] Based on the amount of time that has elapsed, it is appropriate to infer that witness' memories will have faded. Further, L.M.'s reply to the Employer's Summary Dismissal Application acknowledges that several key witnesses are no longer employed by the Employer. In fact, L.M. suggests this is a reason she delayed bringing the s. 4-7 Application.[39]

[54] According to L.M., she can now proceed with another hearing, if one is ordered pursuant to s. 4-7, because "the above accused" are no longer employed with the Employer, and she is "prepared and fit for duty to return to her position".[40] Respectfully, L.M.'s explanation does not provide a satisfactory explanation for her delay in filing the s. 4-7 Application, and tends to suggest that the Employer may be prejudiced if required to call evidence before a newly selected adjudicator. At this point, the Board has no evidence before it indicating that the previously employed witnesses would be unable to give <u>any</u> evidence. However, at a minimum it is clear that they are not as accessible to the Employer as they were when still employed by it. Further, the evidence able to be given by the Employer's witnesses will have been negatively affected by the passage of time.

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[37] *The Limitations Act*, SS 2004, c L-16.1, s 5.
[38] In theory, the Employer might ask a newly selected adjudicator to stay or dismiss the Underlying Appeal because of undue delay.
[39] L.M.'s reply to the Summary Dismissal Application, para 12.
[40] L.M.'s reply to the Summary Dismissal Application, para 12.

[55] In the Board's view, based on L.M.'s inordinate delay in filing the s. 4-7 Application and the associated prejudice to the Employer if it were required to marshal evidence before a new adjudicator, it is plain and obvious that selecting a new adjudicator to hear the Underlying Appeal would not be appropriate. Doing so would not be fair to the Employer and would not promote the proper administration of justice. Rather, it would require the Board to turn a blind eye to the prejudice caused by L.M.'s inordinate delay in filing the s. 4-7 Application. The Board acknowledges L.M.'s argument that the Employer could have applied for a remedy under s. 4-7, as she has, to ward off the effects of any delay. However, the Board accepts that as a practical matter, it made no sense for the Employer to do so. The OHS Decision, which is in the Employer's favour, has been in place since November of 2015. In the context of civil litigation, the Court of Appeal has stated that "Defendants are generally understood to have no positive obligation to move litigation forward."[41] The same principle applies here, with respect to the Employer.

[56] Whether Ms. Blanke should be directed to render a decision raises different considerations than whether a new adjudicator should be selected, though L.M.'s inordinate delay in filing the s. 4-7 Application remains relevant to consideration of this relief.

[57] More particularly, all of the evidence and argument has been heard by Ms. Blanke, albeit over 7 years ago. Further, Ms. Blanke advised the Board that she would be rendering her decision by December 1, 2023, but perhaps unsurprisingly, she missed this self-imposed deadline. At this point, there appears to be a legitimate question, in spite of Ms. Blanke's promises to render a decision, about whether she is willing and capable of doing so. For its part, the Employer submits that directing Ms. Blanke to render a decision is "an unrealistic option given [Ms. Blanke's] failure to render a decision to date and her lack of communication with the parties."[42]

[58] The Employer's primary concern with Ms. Blanke being directed to render a decision appears to be that if the decision is adverse to the Employer, the relief ordered against it could be significant. The Employer states:

> *… [L.M.] explicitly states that she is seeking reinstatement with full back pay for the entire time from when her employment was terminated. It would be extremely prejudicial and costly if the Summary Dismissal Application is denied, and [L.M.] was successful on the [Underlying Appeal]. The [Employer] would be responsible for eight years of back pay, for which 6.5 years are attributable to [L.M.]'s delay*.[43]

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[41] *International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48, at para 45(e).
[42] Employer's reply submissions on the Summary Dismissal Application, para 25.
[43] Employer's reply submissions on the Summary Dismissal Application, para 23.

[59] The Board appreciates that this is a concern for the Employer. At the same time, however, as long as the Underlying Appeal remains before Ms. Blanke, it remains open to her to render a decision, whether directed by the Board to do so or not.[44] Subsections 4-1(3) and 4-7(4) state, respectively:

> **4-1** …
>
> *(3) If the term of an adjudicator expires after the adjudicator has begun hearing a matter but before the hearing is completed, the adjudicator may continue with the hearing as if his or her term had not expired, and the decision is effective as though he or she still held office.*
> *…*
>
> **4-7** …
>
> *(4) A failure by an adjudicator to comply with subsection (1) or with an order made pursuant to subsection (3) does not affect the validity of a decision.*

[60] As a practical matter, the Board is cognizant that a direction under s. 4-7(3)(a) may have no effect on Ms. Blanke, given the history with respect to the Underlying Appeal. At the same time, a direction may be enforceable as a judgment of the Court of King's Bench, pursuant to s. 4-11(2). Should such an enforceable direction be given in the circumstances of this case? Would doing so tend to pervert rather than promote the proper administration of justice? Just as the proper administration of justice may be frustrated by a decision-maker taking too long to reasonably grant relief, so too may it be frustrated by a decision-maker being compelled to render a decision if the decision-maker is not capable of rendering a reasonable decision (which may be the case, here). The parties should have the opportunity to address these issues, and any other relevant issues, within the context of the s. 4-7 Application. In doing so, they may wish to address the potential relevance of the Supreme Court's decisions in *Blencoe* and *Abrametz*, and the Court of Appeal's decisions in *Johnson*[45] and *Dolan*,[46] as to whether relief pursuant to ss. 4-7(3)(a) and (b) would be appropriate.

[61] In the context of the Summary Dismissal Application, the issue is whether it is plain and obvious that it would be inappropriate to direct Ms. Blanke to render a decision, potentially within a certain timeline. At this point, the Board is not satisfied that the "plain and obvious" threshold

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[44] In theory, it may be open to the Employer to apply to Ms. Blanke to stay the appeal because of undue delay, based on the considerations in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*] and *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 [*Abrametz*].
[45] *R v Johnson*, 1977 CanLII 1433 (SK CA) [*Johnson*].
[46] *Dolan v Moose Jaw (City)*, 2008 SKCA 170 [*Dolan*], at paras 19-20, 26.

has been met. In fairness, however, the parties' submissions in the Summary Dismissal Application have not been focused on this aspect of L.M.'s requested relief, either.

iv) Conclusion

[62] The result of these reasons is that the request for relief in the s. 4-7 Application is summarily dismissed, other than the request for Ms. Blanke to be directed to render a decision and any relief that may be ancillary thereto. The Board will proceed to hear any evidence and argument that is relevant to the appropriateness of the relief that remains in issue.

[63] An appropriate order will accompany these reasons.

DATED at Regina, Saskatchewan, this **21st** day of **December, 2023.**

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson