**SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, LOCAL 1105, Applicant v DARRYL UPPER, Respondent and GOVERNMENT OF SASKATCHEWAN, Respondent**

LRB File Nos. 170-22 and 195-22; February 16, 2023
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

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| Counsel for the Applicant, Saskatchewan Government and General Employees' Union, Local 1105: | Jake D. Zuk |
| The Respondent, Darryl Upper: | Self-Represented |
| Counsel for the Respondent, Government of Saskatchewan: | No one participating |

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

**Allegation of Lack of Evidence – Sufficiency of Particulars – Original Application – Residual Questions – Not Appropriate for Summary Dismissal.**

**Allegation of No Arguable Case – Original Application – Alleged Breach of Duty of Fair Representation – Alleged Failure to Investigate and Take Reasonable View – Application Not Patently Defective.**

**Allegation of Delay – Preliminary Hearing Date To Be Set – To Determine Issue of Delay.**

## 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 the Saskatchewan Government and General Employees' Union, Local 1105 [Union] pursuant to clause 6-111(1)(p) of *The Saskatchewan Employment Act* [Act]. The Union asks the Board to dismiss an employee-union dispute that was filed by Darryl Upper [Employee] on October 21, 2022 [original application].[1] The Employee's employment with the Government of Saskatchewan was terminated on August 6, 2021. He was a member of the Union until the termination was upheld in an arbitration award dated April 21, 2022.

[1] LRB File No. 095-22.

**[2]** The Employer has informed the Board that it does not intend to participate in the proceedings of either the original application or the application for summary dismissal.

**[3]** The Union seeks summary dismissal without an oral hearing. In accordance with this process, upon receipt of the application for summary dismissal the Board provided the Employee with ten days to file a Reply. After receiving that Reply, the Board set deadlines for the filing of written submissions. Both the Union and the Employee provided brief written submissions in addition to their pleadings.

**[4]** The Employee does not cite any provisions of the Act in his application. He makes the following allegations against the Union:

- the Union failed to submit a grievance on time;
- the arbitration was not supported by fact finding or interviews of others;
- "went through 5 levels of union saying [he] was being harassed and targeted";
- "more to come in a meeting with Labour board".

**[5]** He also states that he has lost his job due to a lack of investigation and "not proving the facts", that the decision was final, and that the Union did not do anything. He asks to be reinstated and compensated for back pay.

**[6]** In its Reply, the Union explains that it filed a grievance challenging the termination. The grievance proceeded to an arbitration hearing. The hearing was held on March 10, 2022. Following the hearing, the Arbitrator upheld the termination.

**[7]** The Union now asks the Board to dismiss the original application for the following reasons.

**[8]** First, the original application fails to disclose sufficient particulars to ground a breach of the Act. On this issue, the Union addresses each of the three distinct complaints, in turn:

1. *Failure to submit grievance on time:*
   - *The application fails to disclose dates, times, names, and details about any request. The Union did file a grievance on the Employee's behalf and ran an arbitration hearing. The fact that the Union ran an arbitration hearing is admitted by the Employee in paragraph four, item two of the original application.*

2. *Arbitration not supported by fact finding or interviews of others:*
   - *The Employee has provided no details describing who the Union failed to interview. Also, the notion that the arbitration was not supported by fact-finding is untrue. Rather, the hearing and award were based on an agreed statement of facts submitted to the Arbitrator by the parties.*

3. *"Went through 5 levels of union saying [he] was being harassed and targeted":*
    - *The allegation is that the Union failed to assist the Employee with respect to an issue of harassment. There are no supporting details (names, dates, time, or supporting documentation). There are no details indicating that he made requests to the Union for assistance and that those requests were denied or ignored.*

**[9]** For the foregoing reasons, the Union submits that there is a lack of evidence of a breach of the Act by the Union.

**[10]** Second, the Union argues that the underlying application can be dismissed for a failure to disclose an arguable case.

**[11]** The Union argues that the allegation that the arbitration, "was not supported by fact finding or interviews of others", while not capable of exact interpretation, appears to allege "that the Union failed to conduct its own independent investigation with respect to his discipline". It says that a simple failure to conduct an independent investigation is not a breach of the Act. Furthermore, the fact that the Arbitrator upheld the termination does not mean that the Union did not properly prepare for the hearing.

**[12]** Next, the Union submits that there is no arguable case with respect to the claim that the Employee "went through 5 levels of union saying [he] was being harassed and targeted". Again, while this assertion is difficult to interpret, the Union understands it to mean that the Union did not file additional grievances against the Employer for harassment or "targeting". The Union argues that even if the facts asserted in this claim were true, it does not disclose a *prima facie* violation of the Act. The Employee seems simply to disagree with the Union about whether his allegations of harassment against the Employer warranted additional grievances be filed on his behalf.

**[13]** The Union also notes, referring to the comment "decision was final. Union doesn't do anything" that while judicial review is available with respect to an arbitration award, the Union is not obligated to apply for judicial review simply because the grievor is dissatisfied with the award.

**[14]** In the Employee's Reply to the present application, he suggests that a letter dated February 24, 2020 was not grieved; that a Labour Relations Officer decided not to do certain interviews and that there was a lack of notes on his file; and that the Union representative refused to give him an opinion without hearing management's side. He also attached six pages of notes dated July 5, 2021 with no additional explanation.

**[15]** The Union, in its written submissions, objects to the delay in bringing an application that alleges a failure to grieve a letter dated February 24, 2020. The Union observes that the delay lasted approximately 30 months and that the letter resulted in a suspension, which is not a critical job interest.

**[16]** The substantive portion of the Employee's written submissions consists of the following:

> *….As a union member we are restricted from help from the labour board and other government help center due to being part of a union.*
>
> *SGEU has tried to have this file dismissed and doing so has put [a lot] of effort and expense that should be used to help the people paying union dues.*
>
> *The union did not file a reprimand letter grievance, did not do fact finding interviews, and did not take any part in my harassment and singling out by managers for the last years of employment.*
>
> *If you are part of a union you should get help and they should perform their duties to the best of their abilities.*
>
> *I look forward to being able to prove my case and resolve my issues and maybe prevent the same issues in the future for the union Brothers and sisters. Union is Solidarity and it should be ran so.*

**Analysis and Decision:**

The Law:

**[17]** 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 at section 6-111 of the Act:

> ***6-111****(1) With respect to any matter before it, the board has the power:*
> *…*
>
> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*
>
> *(q) to decide any matter before it without holding an oral hearing;*

**[18]** The authority to dismiss an application without an oral hearing was confirmed in *Siekawitch v Canadian Union of Public Employees, Local 21*, 2008 CanLII 47029 (SK LRB) and has been reaffirmed in many recent decisions of this Board.[2]

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[2] *Canadian Union of Public Employees v Reuben Rosom*, 2022 CanLII 100088 (SK LRB); *Moose Jaw Board of Police Commissioners v Canadian Union of Public Employees*, 2022 CanLII 90620 (SK LRB); *Saskatchewan Polytechnic Faculty Association v Chau Ha*, 2022 CanLII 75556 (SK LRB).

**[19]** 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.*
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> 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.*

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

**[21]** The question for the Board 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 or a lack of evidence. The Union bears the onus on the present application.

**[22]** The Union also relies on the articulation of the test as set out in *Soles v Canadian Union of Public Employees, Local 4777*, 2006 CanLII 62947 (SK LRB) [*Soles*]. The reasoning in *Soles* attracted the Court's commentary in *Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers (United Brotherhood of Carpenters and Joiners of America, Local 1985) v Saskatchewan Labour Relations Board*, 2011 SKQB 380 (CanLII) [*Tercon*]. In particular, the Court suggested without deciding that, if the arguable case test is met, it might be unnecessary to carry on and consider whether this is an appropriate case for dismissal without an oral hearing:

> *…Consequently, I question whether this second prong of the Re Soles test is necessary and constitutes an accurate interpretation of the enabling legislation. Once the SLRB finds that an application does not "establish an arguable case", is it necessary to go the additional step and decide whether it is an "appropriate case to summarily dismiss the*

> *applicant's application without oral hearing" – or has that already been decided when determining the first prong? However, given that the parties have not had an opportunity to squarely address this issue and given that the outcome of this case does not turn on this point, whether or not the second prong of the test set out in Re Soles is necessary can be decided at another time. In any event, the … Panel determined that the second prong of the test had also been satisfied even though taking this step, in my view, was unnecessary. The bottom line is that the result is not affected.*[3]

**[23]** Other aspects of *Soles* (on which the Union relies) are not controversial. In particular, the Union argues that it is up to the Employee to plead sufficient particulars that substantiate a breach of the Act on the part of the Union. This principle finds support in the Court's assessment of *Soles*, as captured in *Tercon*:

> *[101] A body of labour relations board jurisprudence has developed respecting how the "no arguable case" provision ought to be interpreted when assessing the sufficiency of "pleadings" filed with the SLRB. The following principles have emerged:*
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> *(a) The onus is on the applicants to provide sufficient particulars which disclose a violation of the Act. See Re Soles, supra, at para. 25; and Re Morin, [2008] S.L.R.B.D. No. 50, at para. 50.*
>
> *(b) The SLRB, when examining an application, will not assess the strengths and weaknesses of the application/accusation; rather, it will determine whether the material, if presumed to be true, discloses a violation of the Act: Soles at para. 27; Morin at para. 9; and Re Blucher No. 343 (Rural Municipality), [2008] S.L.R.B.D. No. 3 at para. 12.*
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> *[102] This interpretation of the "summary dismissal" provision is similar to the approach taken by courts when assessing whether a statement of claim discloses a reasonable cause of action. In the often quoted decision of Sagon v. Royal Bank of Canada (1992), 1992 CanLII 8287 (SK CA), 105 Sask. R. 133, our Court of Appeal described the test for striking a statement of claim on the basis of disclosing no reasonable cause of action as follows:*
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> > *[16] In determining whether a claim should be struck as disclosing no reasonable cause of action, the test is whether, assuming the plaintiff proves everything alleged in his claim, there is nevertheless no reasonable chance of success, or to put it another way, no arguable case. The court should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the court is satisfied that the case is beyond doubt: Marshall v. Saskatchewan, Government of, Petz and Adam (1983), 1982 CanLII 2387 (SK CA), 20 Sask.R. 309 (C.A.); The Attorney General of Canada v. Inuit Tapirisat, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735; 33 N.R. 304. The court may consider only the statement of claim, any particulars furnished pursuant to demand, and any document referred to in the claim upon which the plaintiff must rely to establish his case: Balacko v. Eaton's of Canada Limited (1967), 1967 CanLII 369 (SK KB), 60 W.W.R.(N.S.) 22 (Sask. Q.B.); Lackmanec v. Hoffman and Wall (1982), 1982 CanLII 2585 (SK CA), 15 Sask.R. 1 (C.A.).*
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> *[103] Although the SLRB is not obligated to precisely follow the jurisprudence relating to civil proceedings in a court – it is not a court and its processes are intended to be less*

[3] *Tercon* at para 108.

> *formal – interpretation assistance can be drawn from judicial decisions. This is because both the courts and the SLRB are concerned with fairness and efficiency. In both systems, the party against whom an allegation is made is entitled to be able to get a clear picture of the basis of the complaint. If, after review of the complaint, it is plain and obvious that the applicant cannot succeed, even if all of the elements of the complaint are made out, then it is not in the interests of justice to permit the complaint to go forward. However the court or board ought not prejudge the case and drive the party pursuing the action "from the judgment seat" except in the clearest of cases. In other words, parties must frame their applications/claim in a comprehensible fashion such that the alleged wrongdoer can understand, in general terms, the nature of the complaint. If, after having done so, and assuming everything in the complaint/application is true, there is no reasonable prospect of success, the matter should be summarily dismissed because to permit obviously bad complaints/claims to advance to the adjudication stage is an injustice.*

**[24]** To summarize, the Employee is required to frame his application in a comprehensive fashion such that the respondent Union can understand, in general terms, the nature of his complaint. If, once this is found to have been done, assuming the facts alleged are true, there is no reasonable prospect of success then the matter should be summarily dismissed.

Application of the Law:

**[25]** Next, the Board will assess whether the Employee has framed the original application in comprehensible fashion such that the Union can understand in general terms the nature of the complaint. The Union has described this issue as pertaining to a "lack of evidence".

**[26]** The first allegation the Employee makes is that the Union failed to submit a grievance on time. The Board agrees with the Union's observation that this allegation, on its own, fails to disclose sufficient particulars. If this is an allegation with respect to the termination grievance, it provides no details outlining the breach of the Union's duty in failing to submit a grievance on time when said grievance still proceeded to arbitration. If it does not relate to the termination grievance, it provides no information on the specifics of the grievance, nor the relevant dates, times, and representatives involved.

**[27]** In relation to this allegation, the insufficiency of particulars became increasingly evident throughout the course of the parties' submissions. The Union, in its application for summary dismissal, appears to have assumed that this allegation pertains to the termination grievance. The Employee, in his Reply to this application, suggests that, instead, the complaint relates to the letter, dated February 24, 2020, that he believes should have been grieved and was not. Having reviewed that Reply, the Union then apparently found it necessary to address the allegations made in relation to the letter. Clearly, the original application, on its own, failed to particularize the

allegations in a way so that the Union could reasonably understand the complaint in general terms.

**[28]** Similar comments can be made about the Employee's second allegation, that is, that the arbitration was not supported by fact finding or interviews of others. The original application, on its own, failed to particularize these allegations in a way so that the Union could reasonably understand the nature of the complaint. In the present application, the Union states that it is unclear whom the Employee wishes had been interviewed and states that the suggestion that there was no fact finding is patently untrue (given the agreed statement of facts submitted at the arbitration). However, in his Reply to the present application, the Employee suggests that there is a connection with the letter, dated February 24, 2020, the interviews that should have occurred, the fact-finding process necessary for the arbitration, and the fact that his termination was upheld.

**[29]** 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.

**[30]** However, the Employee has attempted to correct his failure to particularize the facts through his Reply to the Union's application for summary dismissal. In similar circumstances in *Canadian Union of Public Employees v Reuben Rosom*, 2022 CanLII 100088 (SK LRB) [*Rosom*], the Board made the following comments:

> *[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.*

**[31]** In *Tercon*, the Court commented on the Board's decision in *Soles* to take into account, not pleadings, but submissions (that were not contained in pleadings):

> *[109] Also, Re Soles suggests that the material that must be assessed when deciding whether the application discloses an "arguable case" is "... the application and/or written submission", however considering written submissions as part of the assessment process is troubling. To do so would lead to a commingling of "pleadings" with "arguments" that could cause confusion and uncertainty. Having the "submissions" of counsel, be it written or oral, morph into a pleading upon which parties rely to define the issues would be an unjustifiable distraction that could lead to unfairness. A more conceptually appropriate approach, at this stage, might be to restrict the assessment analysis to considering the applications, the particulars, documents referred to therein and other documentation of this kind. Here, however, the nature and scope of what was considered is without significance because the Chair Love Panel interpreted the "written submissions filed" to be the*

> *"particulars". At para. 166, he states that the SLRB will base its assessment on "... the application and/or written submissions filed (in this case the particulars) ...".*

**[32]** Applications that allege a breach of a union's duty of fair representation come before the Board, as a rule, due to a breakdown in the relationship between a union member (or former member) and that individual's workplace representative. This means that there is a pattern, by design, of self-represented individuals bringing duty of fair representation applications against unions that are represented by counsel.

**[33]** As an administrative tribunal, the Board must operate with a degree of flexibility in its approach to process and form. Similarly, it has a responsibility to make its processes accessible to self-represented parties. In this respect, the Board is guided by the *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) (online) established by the Canadian Judicial Council and endorsed by the Supreme Court of Canada in *Pintea v Johns*, 2017 SCC 23.

**[34]** The Board has the authority to adapt its processes to the circumstances before it, which includes considering the relative knowledge and experience of self-represented parties. The Board may "conduct any investigation, inquiry or hearing that the board considers appropriate".[4] A "technical irregularity does not invalidate a proceeding before or by" the Board.[5] And, the Board has authority to allow a party to amend pleadings in any manner and to amend any defect or error.[6]

**[35]** On the other hand, although the Board may make accommodations for a self-represented party, it undertakes to ensure that its proceedings are fair for all parties. Proceedings should not be constructed (and re-constructed) on ever-shifting sands. Parties should not take advantage of the Board's flexible processes by hiding in the weeds, obscuring their allegations, and generating an element of surprise for the responding party.

**[36]** Taking all of these principles into account, 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, or "other documentation of this kind", as stated in *Tercon*. 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 for summary dismissal, which the Board will proceed to do.

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[4] Subsection 6-103(2) of the Act.
[5] Subsection 6-112(1) of the Act.
[6] Subsections 6-112(2) and (3) of the Act.

**[37]** Piecing together the Employee's allegations, he is suggesting that the Union failed to bring a grievance in relation to a letter from the Employer dated February 24, 2020, and that at some point, the Employee believed that he was being harassed but felt that he was not listened to or believed by the Union, and then felt that the Union failed to investigate the alleged harassment (at whichever time), which was connected to his termination, and which failure to investigate impacted the result of the Arbitration hearing.

**[38]** These allegations lack clarity as to when and for how long the alleged harassment was taking place, when and in what way the Employee approached the Union to seek assistance in relation to the alleged harassment, and when the investigation is supposed to have taken place. They raise a question as to whether the investigation is supposed to have taken place in furtherance of a potential grievance following the letter of February 24, 2020; or, as to whether the investigation is supposed to have taken place after this and closer in time to the arbitration hearing; or both. Although it is not explicitly stated, it is implied that the letter of February 24, 2020 was a disciplinary letter. Other than the reference to the disciplinary letter, the termination, and the arbitration, there are no details about timing. However, it is implied that the alleged failure to perform any fact finding impacted the outcome of the arbitration.

**[39]** The Union acknowledges the Board's reluctance to consider in a summary dismissal proceeding whether there is a "lack of evidence", as expressed in *Soles*:

> *[23] It is therefore incumbent upon us to consider whether in this case, the application should be summarily dismissed without a hearing because there is a lack of evidence or no arguable case. In our view, it is not appropriate to consider the specific ground of a "lack of evidence" because, by its very words, it infers a requirement to produce evidence at this stage of the proceedings. While we will examine below the requirements for the filing of an application, we note that, at the pleadings stage, a party is not specifically required to outline all the evidence it intends to adduce or all the documents it intends to introduce in evidence at a hearing. While it is possible that the Board may in the future utilize a process where the parties must file their evidence in written form rather than have an oral hearing (i.e. a "paper hearing"), a practice currently generally limited to the determination of interim applications, it would seem that the ground of a "lack of evidence" would more appropriately be used for dismissing an application following the introduction of evidence, whether or not an oral hearing is held.*

**[40]** The Union argues, however, that the present proceeding involves sworn pleadings which constitute evidence. It says that the Employee has been given an opportunity to present sufficient evidence but he has not. In the Board's view, the pleadings lack clarity as to the timing of certain events. However, the Board is not persuaded that it is appropriate to dismiss the original application on a summary basis for this reason. Although there are aspects of the Employee's

case that should be clarified, there are accommodations that can be made or processes that can be implemented to allow this to happen.

**[41]** To be sure, the Employee's suggestion, in his original application, that there is "more to come" at a meeting with this Board is problematic. It suggests that the Employee believed, at least in the initial stages of this process, that it was appropriate to adopt a strategy to provide a minimum of information, to be followed by more critical information at a later date. There is a limit to what can reasonably be expected of a respondent during the course of a hearing. An applicant should not make it their goal to lie in the weeds on critical facts or arguments. Such a strategy is not a proper use of the Board's resources.

**[42]** The next question is whether the Employee has disclosed an arguable case of a breach of the Act.

**[43]** Although the Employee has not cited any provision of the Act, it is obvious that the dispute puts in issue an alleged breach of section 6-59. Section 6-59 sets out the Union's duty of fair representation, as follows:

> ***6-59****(1) An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.*
>
> *(2) Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee.*

**[44]** In considering whether a union has breached its duty pursuant to section 6-59 of the Act, the Board relies on the guidance provided in *Glynna Ward v Saskatchewan Union of Nurses*, LRB File No. 031-88 (as cited in *Berry v SGEU*, 1993 CarswellSask 518):

> *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.*
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> *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:*
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> > *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.*

**[45]** The Board also relies on the succinct descriptions provided by the Ontario Labour Relations Board in *Toronto Transit Commission*, [1997] OLRD No 3148, at paragraph 9:

> *. . . a complainant must demonstrate that the union's actions are:*
>
> *(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.*

**[46]** The Employee suggests that the Union failed to investigate. He says that he lost his job as a result of this omission and as a result of the Union "not proving the facts".

**[47]** The Union argues that it is not necessarily a breach of section 6-59 for a union to choose not to conduct an independent investigation. For this proposition, the Union relies on the Board's reasoning in *University of Saskatchewan Faculty Association v R.J.*, 2020 CanLII 57443 (SK LRB) [*University of Saskatchewan*].

**[48]** In *University of Saskatchewan*, the Board explained that in considering a complaint under section 6-59 it will assess whether the union "took a reasonable view of the circumstances and made a thoughtful decision not to advance a grievance". To meet this expectation a union must be found to have taken "reasonable measures to ensure it is aware of the relevant information".[7] What will be considered an appropriate and adequate investigative process will depend on the circumstances of a given case.

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[7] *Judd v Communications, Energy and Paperworkers' Union of Canada, Local 2000*, [2003] BCLRBD No. 63, 2003 CanLII 62912 (BC LRB) [*Judd*] at para 64.

**[49]** These principles are helpfully explained by the B.C. Board in *Judd v Communications, Energy and Paperworkers' Union of Canada, Local 2000,* [2003] BCLRBD No. 63, 2003 CanLII 62912 (BC LRB) [*Judd*] (cited in *University of Saskatchewan* at para 78):

> *[62] The requirement that the union must "make sure it is aware of the circumstances [and] the possible merits of the grievance' is often referred to in shorthand form as "conducting an adequate investigation". It is important to note, however, that not every case will necessarily require an "investigation". There may be some grievances where the relevant information is already in the union's possession.*
>
> *[63] In the more typical case, however…gathering the relevant information will require an "investigation". An adequate investigation may include considering the sequence of events, learning the grievor's point of view, obtaining information from potential witnesses, and offering the grievor a chance to respond. There may also be, depending on the circumstances, other ways of testing the employer's assertions. An employee is expected to cooperate and participate with the union in the investigation.*
>
> *[64] The key is that the union must take reasonable measures to ensure it is aware of the relevant information. What is "reasonable" will depend on the particular circumstances – including the significance of the issues for the employee.*

**[50]** In the Board's view, the Employee does not make a "bald" assertion that the Union failed to investigate a grievance. He says, albeit very briefly, that the Union's alleged failure to investigate resulted in him losing his job and "not proving the facts" at the arbitration. It is not difficult to understand that he has alleged that, in this case, an independent investigation of the underlying facts was necessary so that his side of the conflict could be presented. The essence of the Employee's complaint is that the Union failed to take reasonable measures to ensure it was aware of the relevant information underlying the reasons for the workplace discipline to which he was being subjected.

**[51]** Next, the Union responds separately to the Employee's allegation that he "went through 5 levels of union saying [he] was being harassed and targeted". The Union "understands this allegation to be against the union for failing to file additional grievances … for harassment or 'targeting'". It submits that, "even if this claim is accepted as true", it does not disclose an arguable case. The Union argues that this allegation is a vague assertion that reveals the Employee's discontent with the outcome of the arbitration and "disagreement with the union about whether his allegations of harassment against the employer warranted additional grievances on his behalf".

**[52]** In support of this argument, the Union relies on the rationale as expressed in *Canadian Union of Public Employees v Allan Klippenstein*, 2022 CanLII 44759 (SK LRB) [*Klippenstein*], at paragraphs 24, 25, and 27:

> *[24] It is well recognized that the union is the owner of a grievance. The employee does not have a right to have a grievance be filed or be pursued to arbitration. It is the union's decision whether to take these actions. In deciding whether to file or proceed with a grievance, a union is entitled to consider a variety of factors, including the likelihood of success at arbitration, the union's resources, the cost of an arbitration, and the interests of the collective membership.[3]*
>
> *[25] To fulfill its duty, a union must take a reasonable view of the problem and make a thoughtful decision about what to do. To be successful on a claim of arbitrariness, an applicant must prove that the union has acted in a manner that was flagrant, capricious, totally unreasonable, or grossly negligent. The threshold for finding that the union engaged in arbitrary conduct is high. It is not sufficient to show that the union's conduct was, for example, merely negligent.*
>
> *…*
>
> *[27] A duty of fair representation application is not an opportunity for an employee to appeal a decision taken by a union to this Board: Prebushewski v CUPE, Local No. 4777, 2010 CanLII 20515 (SK LRB), at para 55. By extension, the Board's role is not to assess the merits of the grievance but instead to assess the union's decision-making process and conduct in handling the grievance. Relatedly, the Board will afford union representatives considerable latitude in the handling of grievances: Hargrave v CUPE, Local 3833, 2003 CanLII 62883 (SK LRB); McRae-Jackson v CAW-Canada, 2004 CIRB No 290, at para 8; Emeka-Okere v CUPE, 2021 CanLII 89513 (SK LRB) at para 55.*

**[53]** At paragraph 26 of *Klippenstein*, the Board also stated:

> *[26] In Hartmier v SJBRWDSU, Local 955, 2017 CanLII 20060 (SK LRB), the Board set out four criteria that a union must fulfill to meet its duty, with particular relevance to arbitrariness: whether the union conducted a proper investigation into the full details of the grievance; whether it clearly turned its mind to the merits of the grievance; whether it made a reasoned judgment about its success or failure; and, if it decided not to proceed with the member's grievance, whether it provided clear reasons for its decision.*

**[54]** The Union states that the Employee has not pleaded that the Union "failed to turn its mind to the merits, ignored him, discriminated against him, or failed to make a reasoned judgment".

**[55]** In assessing the allegations that are subject to an application for summary dismissal, the Board is required to assume that the facts alleged are true or, at least, provable. Consistent with the *Hartmier* criteria[8], the Employee is alleging that the Union failed to conduct a proper investigation into the full details of a grievance or grievances and failed to make a reasoned

[8] *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).

judgment about the success or failure of a grievance or grievances. Therefore, it is not plain and obvious that the original application should be dismissed as disclosing no arguable case.

**[56]** The Union has also raised the timeliness of the Employee's complaint with respect to the letter dated February 24, 2020. The Union relies on *Nistor v United Steelworkers of America*, 2003 CanLII 62878 (SK LRB) [*Nistor*], which involved an application that was filed 16 months after the events in question and after the applicant had been terminated for a subsequent incident. The Board decided that it was appropriate to dismiss the application for reasons of delay alone, making the following comments:

> *[20] However, in this case, the Applicant was aware that the Union had not referred the suspension grievance to arbitration prior to the termination of his employment and the subsequent arbitration of his termination grievance. He did not explain to the Board why he did not pursue an application under s. 25.1 at some point between the Step 3 meeting on January 23, 2001 and July 1, 2001, the date of the culminating incident. The Applicant is an experienced union member and had the knowledge and ability to bring an application to the Board in a timely fashion.*
>
> *[21] We find that the Applicant unreasonably delayed bringing his application under s. 25.1 and that this delay has prejudiced the Union's ability to prosecute the grievance if it was found to be in violation of s. 25.1.*

**[57]** There are some parallels between *Nistor* and the current case. The Employee complains that the Union did not file a grievance about a letter of suspension. Since then, the Employee has been terminated due to what the Board assumes is an intervening event and that termination has been upheld.

**[58]** In seeking dismissal based on delay, the Union relies on what are now well-established principles reviewed and upheld in the Board's decision in *Hartmier* at paragraph 120:

> *[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 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?*

**[59]** The central question on an application to dismiss based on delay is: can justice can be achieved in the matter despite the delay?

**[60]** In *Rosom*, the Board dismissed an application for summary dismissal made on the basis of the employee's delay in filing the original employee-union dispute. The Board commented on recent case law in which it had considered its authority to summarily dismiss an employee-union dispute for delay:

> *[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.*

**[61]** The Board proceeded to consider whether the usual process on summary dismissal applications, which restricts the assessment to "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" could support the request for a dismissal, in that case. The Board found that there were outstanding issues that had to be weighed that prevented it from dismissing the original application through the summary dismissal process.

**[62]** To be clear, there is no doubt that the Board may dismiss an employee-union dispute for delay.

**[63]** Section 6-103 of the Act states:

> ***6-103****(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*
>
> *(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
>
> > *(a) conduct any investigation, inquiry or hearing that the board considers appropriate;*
> >
> > *(b) make orders requiring compliance with:*
> >
> > > *(i) this Part;*
> > >
> > > *(ii) any regulations made pursuant to this Part; or*
> > >
> > > *(iii) any board decision respecting any matter before the board;*
> >
> > *(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act;*
> >
> > *(d) make an interim order or decision pending the making of a final order or decision.*

**[64]** Pursuant to section 6-103, the Board "shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of the Act". In comparison, the Board "may" make orders requiring compliance with Part VI and "may" conduct any hearing that the Board considers appropriate. Although section 6-59 of the Act sets out the Union's duty, it does not specify the duty of the Board. These provisions, taken together, provide the Board with discretion whether to hear the merits of an application brought pursuant to section 6-59 if in hearing that application the Board is unable to achieve justice due to an inordinate delay.

**[65]** This reasoning is consistent with the Ontario Divisional Court's decision in *Dhanota v U.A.W., Local 1285*, 1983 CarswellOnt 1324; the B.C. Board's decision in *Atwal v British Columbia (Labour Relations Board)*, 2002 CarswellBC 1470; and the Manitoba Board's decision in *Janzen and Manitoba (Director, Workplace Safety and Health), Re*, 2005 CarswellMan 1034[9].

**[66]** The Board has the authority to determine its own procedure. Even in the absence of a specific statutory time frame, there is support for the proposition that the Board may hear and decide the issue of delay prior to a hearing on the merits. Doing so serves an important purpose,

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[9] Affirmed in *Janzen v Hi-Tec Industries Ltd*., 2006 CarswellMan 26 (Man C.A.).

which is to ensure that justice can be achieved in deciding a dispute before investing time and expense into running a hearing on the substantive issues.

**[67]** As explained, the Board is not persuaded based on the submissions before it that the application should be dismissed for failing to disclose a lack of evidence or an arguable case. Still, the Board has questions about the timing of the material events, the answers to which may inform its determination on delay. These factors suggest that it would be more appropriate to assess the delay argument in a preliminary hearing than through the summary dismissal procedure.

**[68]** As such, the Board will set down a preliminary hearing for the purpose of determining whether the original application should be dismissed for delay. Taking into account its observations about clarity and detail, the Board will also schedule a date for a case management conference to ensure that the preliminary hearing is fair.

**[69]** Pursuant to sections 6-111(1)(h) and 6-112 of the Act, the proceedings are amended such that the issue of delay is sought to be determined not through a summary dismissal proceeding but through a preliminary hearing. The matter will be placed on the Board's Motions Day calendar to set the dates for the case management conference and the preliminary hearing. The application for summary dismissal, brought pursuant to clauses 6-111(1)(p) and (q) of the Act, is otherwise dismissed.

**[70]** An appropriate Order will accompany these Reasons.

**DATED** at Regina, Saskatchewan, this **16th** day of **February, 2023.**

**LABOUR RELATIONS BOARD**

Barbara Mysko
Vice-Chairperson