UNIFOR LOCAL 649, Applicant v DARCY JENSEN, BONNIE MEARNS, BERYL NELSON CASSANDRA ZITARUK, SASKPOWER and SASKENERGY, Respondents

LRB File No. 183-22 and 173-22; February 23, 2023
Chairperson, Susan C. Amrud, K.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

For Unifor Local 649:	Gary L. Bainbridge, K.C.
For Darcy Jensen, Bonnie Mearns, Beryl Nelson and Cassandra Zitaruk:	Darcy Jensen
For SaskPower and SaskEnergy:	No one appearing

Application for summary dismissal on grounds of delay not granted – Delay was lengthy while respondents pursued other remedies – Union suffered no prejudice – Respondents did not have sophisticated knowledge of labour law – Issues at stake for respondents insignificant – Overall, justice can still be achieved despite lengthy delay in filing original application.

Application for summary dismissal granted – No arguable case raised in original application – Section 6-58 of *The Saskatchewan Employment Act* provides the Board with limited jurisdiction to review internal decisions of a union – Even if decision at issue is governed by section 6-58, principles of natural justice were applied to resolution of dispute.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, K.C., Chairperson: On October 26, 2022, Darcy Jensen, Bonnie Mearns, Beryl Nelson and Cassandra Zitaruk ["Applicants"] filed an Employee Union Dispute[1] ["Original Application"], naming Unifor Local 649 ["Union"] and SaskPower and SaskEnergy ["Employers"] as respondents. The basis for the claim was described as follows:

> *the problem arose when after the strike between Unifor Local 649, SaskPower and SaskEnergy, the executive of Unifor Local 649 had discussions and filed motions to pay certain members of the local, including all branch chairs a sum of $1,200 or 4 days off as recognition of 'going above and beyond' during the strike. This is contrary to the bylaws and constitution of Unifor Local 649 and the Unifor National constitution.*

[1] LRB File No. 173-22.

[2] The remedy requested was that anyone who benefitted from or spoke in favour of the motion should lose their Union cards and no longer be able to serve the Union in any capacity. In addition, the Applicants requested that anyone who received the $1,200 be ordered to repay it to the Union.

[3] On November 8, 2022, the Union filed an Application for Summary Dismissal[2] of the Original Application. The Union asked that this Application be considered without an oral hearing. The Employers indicated that they would not be filing a response to either application.

[4] Clauses 6-111(1)(o), (p) and (q) of *The Saskatchewan Employment Act* ["Act"] provide the Board with authority to consider an application for summary dismissal without an oral hearing:

> *6-111(1) With respect to any matter before it, the board has the power:*
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> > *(o) to summarily refuse to hear a matter that is not within the jurisdiction of the board;*
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> > *(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.*

Therefore, the question before the Board is whether there is a lack of evidence or no arguable case in the Original Application, or whether the matter raised is within the jurisdiction of the Board.

[5] The Original Application did not indicate which section of the Act the Applicants alleged that the Union contravened. In this Application, the Union argues that section 6-59, the duty of fair representation, has not been engaged as this dispute, it says, is of a purely internal nature between the Applicants and their Union. In their Reply to this Application, the Applicants indicated that they agree with that comment. Accordingly, the Board will consider the Original Application as if it claimed that the Union has breached section 6-58 of the Act.

[6] Section 6-58 provides as follows:

> *6-58(1) Every employee who is a member of a union has a right to the application of the principles of natural justice with respect to all disputes between the employee and the union that is his or her bargaining agent relating to:*
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> > *(a) matters in the constitution of the union;*
> >
> > *(b) the employee's membership in the union; or*

[2] LRB File No. 183-22.

> *(c) the employee's discipline by the union.*
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> *(2) A union shall not expel, suspend or impose a penalty on a member or refuse membership in the union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the union if:*
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> *(a) in doing so the union acts in a discriminatory manner; or*
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> *(b) the grounds the union proposes to act on are that the member or person has refused or failed to participate in activity prohibited by this Act.*

Evidence:

[7] The Applicants are members of the Union. They agreed with the Union's statement that their sole dispute is with the manner in which the Union's executive council provided remuneration to certain Union members who performed duties relating to a strike called by the Union against the Employers in September and October 2019.

[8] At the December 2019 meeting of the Union's executive council, a motion was passed to explore providing remuneration of $1,200 each to certain Union members for services provided during the strike. In the Union's view, these members were being asked to accept nominal compensation for services provided instead of the remuneration they were entitled to receive. Because of the COVID-19 pandemic, the December 2019 executive council minutes were not approved until the executive council meeting of June 2020, after which they were posted to the membership[3]. At the executive council meeting in December 2020 the final motion approving the $1,200 remuneration was passed.

[9] The Union's constitution provides its members with an ability to request a review of a decision that they believe did not have fair and reasonable consideration or lacks a rational basis, and which results in an injury or penalty to them. The request for review is to go first to the Union Local. If the member is not satisfied with that decision, they may request a further review by the Committee on Constitutional Matters in the office of the national president. One further and final review is available, by the Public Review Board.

[10] The Applicants first filed their complaint in February 2021 with the national office. On being informed of the complaint, the Union executive council passed a motion inviting the Applicants to the next executive council meeting to discuss their concerns. They declined to attend. On

[3] However, the Union also indicated that a website update was being undertaken around this time, resulting in the minutes not being added to the website until late October 2020.

February 28, 2021 the Applicants provided their complaint to the Union executive council. The executive council found that the complaint was unfounded and provided a detailed response to the Applicants on March 1, 2021. The Applicants appealed that decision to the national Committee on Constitutional Matters. At the time of the filing of this Application, that appeal was still ongoing.

Argument on behalf of Union:

[11] The Union relies on *Roy v Workers United Canada Council*[4], where the Board stated:

> *[8] The Board recently 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.*

[12] With respect to section 6-58, the Board stated the following, in *University of Saskatchewan Faculty Association v R.J.*[5]:

> *[87] Section 6-58 and its predecessor provision are substantially similar. The purpose of section 6-58 is to protect a member of a union from abuse in the exercise of the power conferred on the union in relation to disputes falling into the categories that are set out. Employees are afforded the right to the application of the principles of natural justice with respect to all disputes between the employee and the union that is his or her bargaining agent relating to: (a) matters in the constitution of the union; (b) the employee's membership in the union; or (c) the employee's discipline by the union.*
> *. . .*
>
> *[98] The principles of natural justice govern individuals' participatory rights with respect to decision-making processes that may adversely affect their privileges, rights, or interests. Given the breadth of circumstances in which these rights may arise, their content is variable depending on the context, including the applicable statutory scheme. However, the*

[4] 2015 CanLII 885 (SK LRB).
[5] 2020 CanLII 57443 (SK LRB).

> *principles of natural justice are generally concerned with ensuring that a person has a fair opportunity to be heard before being adversely affected by a decision, and with ensuring that the decision-maker is free from bias and the appearance of bias.*

[13] The Union argues that section 6-58 of the Act has not been breached. No dispute exists that would trigger section 6-58 but even if it did, the requirements of natural justice were satisfied. The Applicants' complaint does not deal with a dispute between the Applicants and the Union that involves either the Applicants' membership in the Union or discipline of the Applicants by the Union. The Union argues that the decisions and motions made are consistent with the Union's bylaws, constitution and policies. Even if they were not, that is not an issue for the Board. The Applicants' complaint relates to internal Union matters that are not governed by section 6-58 and which the Board has long said do not fall within its jurisdiction. The Board is not a court of last resort for disaffected union members.

[14] The Board has no jurisdiction to grant the requested remedy. Even if it has jurisdiction, granting such an intrusive remedy would fly in the face of the historical attitude of restraint taken by the Board toward internal union matters.

[15] Alternatively, the Applicants unreasonably delayed bringing the Original Application.[6] They have known about the alleged breach since, at the latest, March 1, 2021, over 19 months prior to filing the Original Application. The Union argues that the Applicants provided no explanation for their delay.

[16] In the further alternative, the Applicants were premature in bringing the Original Application. The Applicants have sought relief under the Union's internal processes and are awaiting a final decision. As such, the Original Application was made before they exhausted their internal remedies.

[17] The Original Application further constitutes forum shopping and/or a collateral attack on decisions of other entities.

Argument on behalf of Applicants:

[18] In the Original Application, the Applicants argue that Union bylaws, national constitution and code of ethics were contravened by the Union's council, executive board and branch chairs

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[6] *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) at para 120.

when the motion was passed in December 2020 to pay themselves each $1,200. The Applicants object to the motion being passed without a vote by the Union membership.

[19] The Applicants argue that the requirements of natural justice have not been satisfied. Section 6-58 applies because of the contravention of the constitution. It also applies due to past discipline against the Applicants. One was removed from an elected position; one was informed by her manager that her Union leave has been exhausted and no more Union leave would be approved; two have at various times been revoked from the Union's Facebook page.

[20] Natural justice has not been served as the executive council did not refuse the funds and there has been no third party review of the decision to pay those funds. The Board has jurisdiction over the subject matter of the Original Application as discipline of the Applicants has been established as well as a breach of the *Charter of Rights and Freedoms* and many contraventions of the national constitution and local bylaws. The Applicants state that they did not attend the meeting of the executive council they were invited to because the distrust from the board and council toward the Applicants meant that communication was best left in writing. Subsection 6-58(1) applies as there were breaches of the constitution and bylaws. Subsection 6-58(2) applies because there was discrimination.

[21] The Original Application was the final recourse, after all internal avenues were exhausted. Due to the pandemic and the national president legal implications, the Applicants state that they allowed more time for the national Committee to respond.

Analysis and Decision:

Delay:

[22] The factors to be considered by the Board in determining whether an application should be dismissed on the basis of undue delay were reviewed in detail in *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*[7].

[23] The first consideration is the length of the delay. The length of delay is critical. The Applicants bear the burden of explaining the reasons for the delay. The longer the delay, the more compelling must be the reasons for the delay. In this matter, the motion in dispute was passed in December 2020 and the Original Application was filed on October 26, 2022. While this is a lengthy

[7] *Ibid*.

delay, the Applicants were pursuing other remedies during that time, and the Union was well aware of the other proceedings.

[24] Next the Board will review prejudice. Labour relations prejudice is presumed in cases of delay. If the delay is extensive or inordinate this factor will weigh more heavily in the analysis. Evidence of actual prejudice is a significant factor. Here, there is no prejudice to the Union. They were aware of and addressing the Applicants' complaint during the period of the delay.

[25] The next factor that the Board will review is the sophistication of the Applicants. The Applicants' knowledge of labour law and labour relations matters generally is an important consideration when assessing the reasons for the delay. In this matter, this factor weighs in favour of the Applicants. They were pursuing their complaint in the manner they considered most appropriate. When their patience with the national Committee's delay ran out, they filed the Original Application.

[26] The nature of the claim or the issues at stake for the Applicants will be weighed. If the consequences of dismissing the Original Application for reasons of delay are significant to the Applicants, this will weigh in favour of permitting it to proceed despite a lengthy delay in its initiation. This factor does not favour the Applicants. The consequences to them of dismissing the Original Application are insignificant.

[27] Finally, when considering a delay argument, the standard that has been consistently applied is whether justice can be achieved in the matter despite a lengthy delay in commencing it. The lengthy delay in this matter does not lead to a finding that justice could not be achieved.

[28] Weighing all of the factors described above, the Board has determined that this is not an appropriate case in which to dismiss the Original Application for delay.

Application for summary dismissal:

[29] The onus was on the Applicants to plead allegations in the Original Application that disclose a contravention of the Act.[8] Even assuming, for the purpose of this Application, that the Applicants' allegations are true, there is no arguable case in the Original Application.

[8] USFA v RJ, 2020 CanLII 57443 (SK LRB)

[30] Section 6-58 applies to what may be characterized as internal disputes between a union and an employee who is a member of a union, but it does not give the Board jurisdiction over all internal disputes. The Board does not routinely review every internal decision made by a union.[9]

[31] The Original Application does not allege a dispute between the Applicants and the Union that could even arguably fall under clauses 6-58(1)(b) or (c). There is no complaint in the Original Application regarding the status of the Applicants' membership and none of the Applicants face discipline by the Union. Whether there was past discipline of the Applicants by the Union is not the issue before the Board in the Original Application. Further, subsection (2) does not apply, because the Union has not taken any of the actions described in subsection (2) against any of the Applicants.

[32] That leaves the issue of whether the Applicants have provided an arguable case that clause 6-58(1)(a) applies. For clause (a) to apply, the dispute must relate to matters in the constitution of the Union. When it applies, it requires that the principles of natural justice be applied to the resolution of the dispute.

[33] When the Applicants first raised their complaint, they were given access to the Union's internal complaint process. Before the Union's executive council made a decision on their complaint, they were invited to a meeting of the executive council. Following the dismissal of their complaint, the executive council provided them with a detailed response explaining the decision. The Union constitution provides them with two further rights of appeal, and the Applicants are pursuing them.

[34] In *Saskatchewan Polytechnic Faculty Association v Chau Ha*[10] the Board stated:

> *The Board's jurisdiction pursuant to section 6-58 is limited to determining whether the applicant has been afforded the right to the application of the principles of natural justice. It "requires that the principles of natural justice be brought to bear in the resolution of the dispute." It does not extend to assessing the merits of whatever decision or action, by the Union, gave rise to the duty to apply those principles: Schreiner v Canadian Union of Public Employees, Local 59, 2005 CanLII 63091 (SK LRB) at para 37.*

[35] The Board maintains a position of considerable deference to the procedures and practices followed by unions in their dealings with their members. The Board does not sit in appeal of decisions made by the Union. Even if it is arguable that matters in the constitution of the Union

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[9] *Stewart v Saskatchewan Brewers' Bottle & Keg Workers, Local Union No. 340*, [1995] 2nd Quarter Sask Labour Rep 204.
[10] 2022 CanLII 75556 (SK LRB) at para 58.

are at issue in the dispute between the Applicants and the Union, the Board is satisfied that the Union has applied and is applying the principles of natural justice to their dispute.

[36] Accordingly, the Board is satisfied that the Original Application should be dismissed. It discloses no arguable case. It is plain and obvious that it has no reasonable chance of success.

[37] As a result, with these Reasons, an Order will issue that the Application for Summary Dismissal in LRB File No. 183-22 is granted and the application in LRB File No. 173-22 is dismissed.

[38] The Board thanks the parties for the helpful submissions they provided, all of which were reviewed and considered in making a determination in this matter.

DATED at Regina, Saskatchewan, this **23rd** day of **February, 2023.**

LABOUR RELATIONS BOARD

Susan C. Amrud, K.C.
Chairperson