**MUHAMMAD WAJEEH MUSTAFA, Applicant v SEIU-WEST, Respondent and SASKATCHEWAN HEALTH AUTHORITY, Respondent**

LRB File No. 037-23; August 9, 2024
Chairperson, Kyle McCreary (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

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| For Muhammad Wajeeh Mustafa: | Self-Represented |
| For SEIU-West: | Shannon Whyley |
| For the Saskatchewan Health Authority: | Paul Clemens |

**Costs – Board Does Not Have Jurisdiction to Award Advanced Costs – Amicus – Board Does Not Have Jurisdiction to Appoint Amicus**

## REASONS FOR DECISION

**Background:**

**[1] Kyle McCreary, Chairperson:** Muhammad Wajeeh Mustafa ("The Applicant") has requested that the Board appoint counsel for him in this hearing. In reviewing the submissions of the parties, and the Board's empowering statute, *the Saskatchewan Employment Act* ("the Act"),[1] the Board finds it has no jurisdiction to either appoint an *amicus* ("a friend of the Board who is not counsel to the Applicant but assists in the hearing") or to order either of the parties to pay for counsel for the Applicant. As such, the Board dismisses the Applicant's request for the reasons below.

**[2]** The Applicant filed his underlying application pursuant to s. 6-59 of the Act in LRB File No. 037-23 on March 3, 2023. The Respondent Union is SEIU-West, and the Respondent Employer is the Saskatchewan Health Authority ("SHA"). Both Respondents have filed replies in this matter.

**[3]** The underlying application was originally set for hearing in November of 2023, those dates were adjourned at the request of the Applicant.

[1] SS 2013, c S-15.1.

**[4]** The hearing of the underlying application commenced on June 3, 2024. The first day of the hearing was consumed with opening statements and providing the Applicant's disclosure to the Respondents. On the second day of the hearing an issue was raised in relation to information disclosed by the Applicant to the Respondents at the end of the first day. In responding to this issue, the Applicant repeatedly raised concerns about the Respondents not providing him with legal counsel.

**[5]** The Board inquired whether the Applicant was making an oral application for the appointment of counsel. The Applicant confirmed and the Board treated the oral request as an application and requested written submissions on issue of whether the Board could appoint counsel for the Applicant and if it could whether counsel should be appointed. The underlying application was adjourned due to the issue raised in the Applicant's disclosure.

**[6]** The Applicant did not file written submissions other than a medical note. This decision will not address any accommodations requests that may or may not have been made. It is noted that the note provided does not specify the Applicant's medical related restrictions, nor specify how any restrictions might interact with the requirements of the hearing and the hearing environment.

**[7]** The SHA filed submissions on June 26, 2024. SHA argues that the accommodation evidence filed was insufficient and that the employer does not owe a duty to accommodate in these situations. SHA also argued that pursuant to the Supreme Court of Canada's decision in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII), [2011] 3 SCR 471, that the Board lacks statutory authority to grant the award of costs sought.

**[8]** SEIU-West filed submissions on July 2, 2024. SEIU-West submits that there is no precedent for a Board to appoint an amicus, and further that the Board does not have a jurisdiction to appoint an amicus when considering various authorities including *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (CanLII), [2006] 1 SCR 140; *and Eaton v Ontario (Community Safety and Correctional Services)*, 2018 HRTO 1815 (CanLII). Further, SEIU-West submitted that there is no legal basis to order Union to pay for legal counsel for the Applicant. SEIU-West also raised that the Board has alternative relief it can provide including permitting a support person.

**Analysis and Decision:**

**The Board Declines to Appoint An Amicus**

**[9]** The Board agrees with SEIU-West that an analysis of the question of whether the Board has the ability to appoint an amicus paid for by the public purse must start with an examination of the Board's statute pursuant to the Supreme Court of Canada's direction in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*:

> *35 Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they must "adhere to the confines of their statutory authority or 'jurisdiction'[; and t]hey cannot trespass in areas where the legislature has not assigned them authority": Mullan, at pp. 9-10 (see also S. Blake, Administrative Law in Canada (3rd ed. 2001), at pp. 183-84).*

**[10]** The Board has reviewed Part VI of the Act and does not find any provision to provide it with the power to appoint an amicus funded by the public purse. The Board does have the power to add parties, which may include an intervenor, pursuant to s. 6-112(4)(a), but that section cannot be read to imply the ability to impose a cost on the executive government. It is a section that empowers the Board to ensure that all necessary parties are before it, including intervenors, and to cure irregularities of parties that the initial application failed to name. It does not explicitly or impliedly empower the Board to direct the use of Government resources through the appointment of an amicus.

**[11]** Further, the Board is not a Court of inherent jurisdiction. Statutory courts have an implied jurisdiction to appoint amicus counsel as it is necessary to their function as a Court.[2] While the Board has many similarities to a Court, it is an administrative tribunal and fulfills a distinct function in relation to the regulation of labour relations in the Province. The appointment of an amicus is not an essential and implied feature of the Board's operation.

**[12]** The Board does not find that the appointment of amicus is within its powers by necessary implication as the Board's powers in relation to hearings are set out in s. 6-111 of the Act, and there is no provision that in its ordinary and grammatical meaning could be implied to grant the power to appoint amicus, nor is it by necessary implication to the Board's functioning as a tribunal as distinct from a statutory court. Other statutory tribunals have similarly found that they lack this

[2] Ontario v. Criminal Lawyers' Association of Ontario, 2013 SCC 43 (CanLII), [2013] 3 SCR 3

jurisdiction, as stated by the Ontario Human Rights Tribunal *in Eaton v Ontario (Community Safety and Correctional Services*:

> *[7] The applicant's adjournment of the hearing and request for an amicus curiae to represent him was denied at the hearing. The applicant submitted that the criminal courts have jurisdiction to appoint an amicus curiae for unrepresented parties, and, therefore, the Tribunal should do the same. I explained to the applicant that the Tribunal has no statutory jurisdiction to appoint a representative for any party, legal or otherwise. See Portman v. Northwest Territories, 2014 CanLII 21552, Robertson v. Ontario (Health and Long Term Care), 2015 HRTO 781 and Ntema-Mbudi v. City of Ottawa, 2017 HRTO 629.*

**[13]** As the question is beyond the Board's jurisdiction, the Board declines to consider the merits of the appointment of an amicus in this case.

**The Board Does Not Have Jurisdiction to Award Advanced Costs**

**[14]** The Board does not have specific costs jurisdiction, the Board in previous decisions has found, both under *the Trade Union Act*[3] and the Act, costs jurisdiction in relation to powers of monetary compensation related to violations of the Act, Regulations, or Board orders. Even in such circumstances, cost awards have been exceptional. This case raises the Board's jurisdiction to award advanced costs, or order one or both Respondents to pay the Applicant's legal fees in advance of a final determination and prior to any potential finding of a violation of the Act, Regulations or Board Order. The Board finds it does not have jurisdiction to make an advanced costs award.

**[15]** The Board's costs jurisdiction is founded upon compensation when violations have been found, as stated in *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 179 v Monad Industrial Constructors Inc*, 2013 CanLII 83710 (SK LRB):

> *[114] Section 5(g) allows the Board to "fix and determine the monetary loss suffered by …a trade union as a result of a violation of this Act…and requiring those persons to …pay the monetary loss or any portion of the monetary loss that the Board considers to be appropriate".*
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> *[115] In the circumstances of this application, we believe that the Employer and the Respondent Union should make the Applicant Union whole with respect to its costs and expenses incurred as a result of the Applicant Union having been induced to make this application based upon an inaccurate public record, and, in particular, its failure to comply with s. 31 of the Act.*

[3] RSS 1978, c T-17.

**[16]** Similarly, in *Teamsters, Local 395 v PCL Industrial Constructors Inc*, 2011 CanLII 81816 (SK LRB), the Board expressed doubt of having a costs jurisdiction beyond compensation for loss:

> *[64] In the circumstances of this case, we decline to make any award of costs as requested by the Employer. It is doubtful, based upon the recent ruling of the Supreme Court of Canada in Canada (Canadian Human Rights Commission) v. Canada (Attorney General)[29] if the Board enjoys the power to award costs which are not part of an award of "monetary loss suffered by an employee, an employer, or a trade union as a result of a violation of this Act".[30]*

**[17]** This limited interpretation of the Board's costs jurisdiction was recently commented on in *GRAIN & GENERAL SERVICES UNION v WESTERN PRODUCER PUBLICATIONS LIMITED PARTNERSHIP/WESTERN PRODUCER PUBLICATIONS GP INC.*, 2024 CanLII 16848 (SK LRB):

> *[83] In Monad, the circumstances were somewhat different than those presently before the Board. A union and an employer had taken no steps to amend a dated certification order which applied to them by virtue of successorship provisions. They had also not filed their collective agreements with the Minister, as required under s. 31 of The Trade Union Act,[98] or sought a declaration from the Board with respect to the applicability of the dated certification order.[99] As a consequence, a second union attempted to certify a bargaining unit which was already certified with the first union. The Board determined that the second union should be compensated by the first union and the employer, primarily because they had not filed their collective agreements as required under s. 31 of The Trade Union Act:*
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> > *[115] In the circumstances of this application, we believe that the Employer and the Respondent Union should make the Applicant Union whole with respect to its costs and expenses incurred as a result of the Applicant Union having been induced to make this application based upon an inaccurate public record, and, in particular, its failure to comply with s. 31 of the Act.[100]*
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> *[84] More recently, the Board has stated the following in Andritz Hydro, with respect to when it will consider awarding costs:*
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> > *[30] The Board rarely orders a party to compensate another party for legal expenses, and when it does, it relies on clause 6-104(2)(e) of the Act which applies only to monetary loss suffered by an employee, an employer or a union as a result of a contravention of Part VI, the regulations made pursuant to Part VI or an order or decision of the Board. None of those criteria applies here.[101]*

**[18]** The SHA's argument potentially would ask the Board to revisit its previous decisions on the scope of s. 6-104(2)(e). That is beyond the scope of this case and the question will be left for another day when the issue of the interpretation of s. 6-104(2)(e) as it applies to post hearing costs is fully argued.

**[19]** However, on a plain reading of s. 6-104(2)(e) the Board's authority is restricted to compensating for monetary loss after a violation has been found. It could be argued that this restriction does not apply because of the Board's power to make interim orders under s. 6-103(2)(d) allows for a costs award prior to the completion of the hearing. This implied interpretation cannot be accepted as it would be contrary to a textual, contextual, and purposive analysis.

**[20]** For one, the Board's caselaw has been consistent that costs are exceptional and rely on the power of compensation for loss rather than a general costs power. To award advanced costs would be a significant deviation from previous interpretations which is not supported by the ordinary and grammatical meaning of s. 6-104(2)(e).

**[21]** Further a contextual reading of s. 6-104(2)(e) supports maintaining a restricted interpretation. Costs are specifically addressed by the legislature in Part VI of the Act in ss. 6-51 and 6-91(5) and in Part VII at ss. 7-7(7), 7-17(13), and 7-20(12). These provisions make arbitrations and the essential services tribunal no costs hearings. This restriction has not been imposed on the Board. However, the Board has also not been granted broad costs powers, and the legislature clearly turned its mind to how to address costs in related hearings. Considering this, the Board must be mindful on the grant of the powers by the legislature and that is monetary awards must be part of compensation for violations as required by s 6-104(2)(e).

**[22]** On a purposive analysis, the Board considers the comments of the Board in *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), to be instructive:

> *[238] Two (2) prior decisions of this Board are of especial assistance when answering this question. These decisions are: Gordon Johnson v Amalgamated Transit Union, Local 588 and City of Regina, LRB File No. 091-96 dated February 17, 1998 ["Johnson (No. 2)"], and Petite, supra.*
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> *[239] Johnson (No.2), supra, was the Board's Decision on the remedial aspect of Johnson (No.1), supra. Mr. Johnson made a number of remedial requests including damages and the payment of legal expenses. As the Board had determined that Mr. Johnson's termination grievance should be referred to arbitration, it decided that any award of damages would be premature.*
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> *[240] Former Chairperson Gray carefully considered the issue of costs and determined that such an order was not appropriate in that case. However, her discussion of this question generally is enlightening, and is reproduced in full below:*
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> > *With respect to the claim for monetary loss related to legal fees incurred by Mr. Johnson in bringing this application for an unfair labour practice under section 25.1 of [The Trade Union Act, RSS 1978, cT-17], the Board*

*addressed this issue in [K.H. v Communications, Energy and Paperworkers Union, Local 1-S et al., LRB File No. 015-97] and held that in exceptional circumstances such claims will be allowed. In that instance, the applicant was suffering from a mental illness which impaired his ability to represent himself in relation to his employment problems. However, the Board generally adopts a cautious approach to claims for damages of this nature. In Stewart v Saskatchewan Brewers' Bottle & Keg Workers, Local Union No. 340, [1996] Sask LRBR 386, LRB File No. 025-95,[7] the Board reviewed the practice in other jurisdictions and concluded as follows, at 395:*

> *We are of the view that, like the legislation which is the basis of the decisions of the Canada Labour Relations Board and the British Columbia Labour Relations Board, [The Trade Union Act] confers upon this Board broad powers to fashion remedies like the "make whole" remedies described in those decisions. The powers granted to the Board in ss. 5(e) and (g) of the Act, along with the general remedial power under s. 42 of the Act, permit us a wide latitude in devising remedies which will address the losses suffered by applicants in the context of the objectives of the Act.*
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> *In this connection, it is perhaps helpful to think of legal expenses in terms other than the notion of "costs" as it is understood in connection with proceedings in civil courts. For reasons which have been alluded to earlier, this Board has never considered it appropriate to award costs in that sense of the term as part of the determination of applications under the Act. This does not mean that there are not circumstances in which the expense of obtaining legal advice might not be part of an extraordinary "make-whole" remedy. In some cases, the essence of the infraction which is alleged by an applicant concerns the representation to which an employee is entitled under the Act. In this sense, granting some compensation for the use by an application of the services of a solicitor is more akin to compensation for a breach of fiduciary duty than to costs in their traditional sense.*
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> *As counsel for the Union pointed out, this Board has expressed some reservations about the use of private counsel by employees in their dealings with a trade union. In Brent Liick v Canadian Union of Public Employees, [1995] 3rd Quarter Sask. Labour Rep. 78, LRB File No. 237-93, the Board made the following comment at 102-103:*
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> > *As we indicated in the Berry decision, it is not unusual for an individual employee to seek the advice of private counsel, and it may in some circumstances be appropriate for a trade union to accept assistance from that source. As we have indicated above, however, it is the trade union which enjoys the exclusive right and obligation to represent employees in matters which concern their terms and conditions of employment, including issues related to disciplinary action. This severely restricts the role which may be play by private counsel. It is the trade union which retains control over decision concerning whether and how grievances should be pursued, not the individual employee or his counsel. The employee is bound by the decisions*

> *reached by the trade union or settlements reached with an employer; neither the employee nor counsel can exercise a veto over such actions or insist that the trade union comply with their demands.*
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> *We would reiterate our view that an employee is not entitled to retain legal counsel to make representations every time the employee has a disagreement or difference of opinion with the trade union, or to present the bill for those legal services to the trade union as a matter of course.*
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> *We must also admit to a concern that we not encourage the view that proceedings before this Board can only be undertaken effectively when an applicant is represented by legal counsel. The Board makes considerable efforts to remain accessible to parties who are not represented by lawyer and to conduct hearings in which a lay person can participate.*
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> *Nonetheless, there are, in our opinion, circumstances in which it is justifiable to consider a remedial order to assist an applicant with the expenses associated with legal representation. We expressed our view in our earlier Reasons for Decision that the circumstances which gave rise to this application are exceedingly unusual. As the British Columbia Board point out in the Kelland case, supra, not all cases in which a trade union has committed a breach of the duty of fair representation are cases in which that union has completely disqualified itself from further representation of the complainant. Similarly, not all cases in which an applicant wishes to raise complaints about defects in the procedures followed by a trade union are cases in which the applicant should be permitted to make use of legal services as the expense of the trade union.*

*In our view, this case does not present an exceptional circumstance to bring Mr. Johnson within the rule set out in the Stewart case, supra. The Union's executive committee was found by the Board in its Reasons for Decision to have acted in a supportive fashion toward Mr. Johnson and actively urged the membership of the Union to support the arbitration of his grievance. They followed the procedures which were set out in their constitution for approving the referral of a grievance to arbitration. However, the Board found that this method was arbitrary and resulted in a breach of the duty of fair representation.*

*In these circumstances we cannot conclude that the Union placed itself in a position of completely disqualifying itself from further representation of Mr. Johnson. Similarly, unlike the K.H. case, supra, it is not a situation where Mr. Johnson was incapable of representing his case to the Union, to the Union membership or to this Board. As indicated in the Stewart decision, supra, the Board processes are intended to be utilized by persons without legal training. The Board will take steps both prior to a hearing and during a hearing to ensure that an employee's complaint is fairly put to the Board and that the hearing is conducted in a fashion that takes into account the lack of legal training and familiarity with Board processes. As a result, no Order will issue with respect to any expenses incurred by Mr. Johnson in the Board processes.*

> *[241] More recently, in Petite, supra, another duty of fair representation claim, the Board made an order for legal costs payable by the Union to Mr. Petite. The Applicant, a journeyman boilermaker welder, lived on Cape Breton Island in Nova Scotia. While working at SaskPower's Poplar River Plant located in Coronach, Saskatchewan, he was terminated. Although the Union had filed a termination grievance, it failed to take any further action to move it forward.*
> *[242] Chairperson Love concluded the Union had breached section 25.1 of TUA and directed that the grievance should proceed to arbitration. As ancillary to this Order, he directed at paragraph 97:*
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> > *[97] The Applicant has also been put to considerable expense with respect to prosecution of his application against the Union. In order to place the applicant in the same position that he would have been, but for the failure, the Board is of the opinion that it is appropriate to provide some compensation for the expense to which he has been put. Accordingly, the Board further orders:*
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> > > *1. That the Union shall forthwith pay to the Applicant his reasonable and necessary expenses incurred for travel and sustenance from his home to attend the initial hearing of this matter and the continuation of the hearing.*
> > >
> > > *2. That the Union shall pay to the Applicant, or to his counsel upon written direction from the Applicant, a counsel fee for retained counsel in respect of this matter of $750.00 per hearing day.*

**[23]** That is the purpose of the provision is to provide compensation for loses incurred that are directly attributable to a breach. The purpose is not to imbue the Board with a general costs jurisdiction, let alone a jurisdiction related to advanced costs. Thus, an advanced costs award without a finding of breach of the Act, Regulations or a Board Order, would be contrary to the purpose of the provision.

**[24]** To the extent the Applicant wishes to pursue the question of payment for representation further, the Board notes that the Court of King's Bench may possess the jurisdiction to determine this question, as noted by the Supreme Court of Canada in *R. v. Caron*, 2011 SCC 5 (CanLII), [2011] 1 SCR 78:

> *[35] I am satisfied that the supervisory jurisdiction of the superior courts over the provincial courts in Alberta includes the power to order interim funding before an inferior tribunal where it is "essential to the administration of justice and the maintenance of the rule of law" …*

**[25]** The Board finds it does not have jurisdiction to award advanced costs because s 6-104(2)(e) of the Act does not directly or by implication grant the power to award advanced costs. Nor does ss 6-103, 6-104, 6-111, or 6-112 of the Act provide the Board with either explicit or

implied authority to appoint an amicus to be paid for by the public purse or order the Respondents to pay for the Applicant's counsel in a hearing pursuant to s. 6-59.

**[26]** As a result, the Applicant's request for the Board to appoint counsel for him in this hearing is dismissed.

**[27]** The Board thanks the Respondents 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 **9** day of August**, 2024.**

**LABOUR RELATIONS BOARD**

Kyle McCreary
Chairperson