Saskatchewan
Labour Relations Board

NORTHERN LIVESTOCK SALES, Applicant v THE GRAIN AND GENERAL SERVICES UNION (ILWU CANADA), Respondent

LRB File Nos. 079-24 and 070-24; October 2, 2024
Vice-Chairperson, Carol L. Kraft (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Applicant, Northern Livestock Sales	Steve Seiferling
Counsel for the Respondent, The Grain and General Services Union (ILWU Canada)	Dan LeBlanc

Application for Summary Dismissal – Underlying Unfair Labour Practice Application – Clauses 6-62(1)(a), (b), (g) and (r) of *The Saskatchewan Employment Act* -- Application Denied

Application to Defer to Arbitrator – Unfair Labour Practice Application – Criteria for Deferral Not Met – Application Denied

REASONS FOR DECISION

Background:

[1] **Carol L. Kraft, Vice-Chairperson:** Northern Livestock Sales ("NLS") has applied to have an unfair labour practice application brought by Grain and General Services Union (ILWU) Canada ("GSU") summarily dismissed on the grounds that it does not plead any material facts to support its claim. Further, NLS requests that matters relating to the interpretation of the collective agreement provisions be deferred to the arbitration process under the collective agreement.

GSU's Allegations:

[2] GSU filed an unfair labour practice against NLS on March 28, 2024 ("ULP Application").

[3] The facts pled by GSU in support of its claim against NLS are as follows:

a. GSU is the sole bargaining agent for members of the NLS, and Saskatchewan Wheat Pool Livestock Division, and for Heartland Livestock Services ("HLS").

b. HLS and NLS have bargained together since NLS acquired HLS in 2017. This is pursuant to the Certification Order in LRB File No. 198-01.

c. HLS and NLS most recently bargained together in 2023, resulting in a collective agreement effective January 2023 to December 2024 (the "CBA").

d. Lori Branton was hired as a Branch Accountant with NLS on or about May 4, 2015. She currently occupies this position and is the only individual occupying this position.

e. Ms. Branton has been active in GSU since being hired, including sitting on their bargaining committee.

f. As a member of the bargaining committee, on May 1, 2023, Ms. Branton signed the 2023/24 CBA.

g. That thirty days later, on or about May 30, 2023, NLS unilaterally changed Ms. Branton's work schedule.

h. GSU successfully grieved this change and her former work schedule was restored by Arbitrator Denysiuk in a decision dated October 13, 2023 (the "Denysiuk Arbitration").

i. On October 23, 2023, Mr. Branton filed a harassment complaint against the owner-operator of NLS.

j. On October 26, 2023, Ms. Branton went on sick leave. As of the date of filing the application, namely March 28, 2024, she remained on sick leave.

k. NLS has not at any point in time indicated that they take the position that she is not entitled to sick leave.

l. At some point after October 13, 2023, NLS began to take the position that they are not bound by the 2023/24 CBA. A common employer application has been filed in this regard (LRB File No. 043-24).

m. In an application dated November 28, 2023, an individual representing NLS swore a statement as part of an Application to Amend seeking to amend the Certification Order in LRB File No. 198-01. In essence, this sworn statement claimed that the Accountant Position fell outside the definition of "employee" found in *The Saskatchewan Employment Act* as it was both a managerial position and involved activities that are confidential in nature. Although the Accountant Position was not a new position, no material change was alleged by NLS.

n. NLS filed the Application to Amend while Ms.Branton was on sick leave.

o. The Application to Amend was set for a hearing before this Board to commence April 11, 2024.

p. On March 20, 2023, the Employer's internal investigation into this complaint concluded that its owner-operator did not harass Ms. Branton. Ms. Branton is in the process of appealing this decision to the Occupational Health and Safety division.

q. On March 27, 2024, barely two weeks before the Application to Amend was to be heard, NLS sent Ms. Branton a letter indicating that her position was eliminated immediately. This was on the basis that "NLS has been operating without an accountant in the Prince Albert office for several months and has determined there no (sic) operational need for this position."

r. NLS stated that the Accountant Position would be eliminated effective March 27, 2024. NLS further indicated that Ms. Branton's options were those under the layoff provisions but that, as there were no in-scope lower positions, Ms. Branton's options were effectively to go on layoff or accept a payment of 18 weeks' notice as severance.

s. As an employee taking sick leave, Ms. Branton has a right to assume that her job would be there when she returned from sick leave. This right arises from the sick leave provisions of the CBA, and from SEA (in particular provisions related to protection for employees on leave) and *The Saskatchewan Human Rights Code.*

GSU's Claim:

[4] Based on the foregoing facts, GSU claims that NLS has been or is engaging in an unfair labour practice (or a contravention of the Act, the regulations or an order or decision of the Board) within the meaning of section 6-62 of the SEA including:

> *1. **6-62(1)(a)** - Termination of Ms. Branton, via the elimination of her position constitutes interference with, intimidation of, threats to, and coercion of an employee who is exercising rights conferred by the SEA, including but not limited to:*
>
> > *a. The right to grieve (the termination was in part retaliation for the Denysiuk Arbitration);*
> > *b. The right to be scheduled in accordance with Article 19 of the CBA; and*
> > *c. The right to take paid and unpaid leave in accordance with the CBA, including under Article 8 part 4;*

> *d. The right to a safe workplace - including the right to file a good faith Harassment Complaint - pursuant to section 25 of the CBA and SEA, and the right not to be discriminated against by reason of union activity or physical disability, including under section 4 of the CBA and SEA.*
>
> *2. **6-62(1)(b)** - Termination of Ms. Branton, at least in part because of her union involvement, constitutes interference with the administration of GSU.*
>
> *3. **6-62(1)(g)** - Termination of Ms. Branton constitutes discrimination with a view to discouraging membership in, or activity in, participation in GSU's collective bargaining activities. Ms. Branton was terminated at a time when she was engaged in rights granted by Part 6 of the SEA, (as outlined above).*
>
> *4. **6-62(1)(r)** - Contravene an obligation, prohibition, or other provision of this Part imposed on or applicable to an employer, including:*
>
> *a. 6-4, the right to join a union;*
> *b. 6-5, the prohibition on intimidation;*
> *c. 6-6(1)(c), the prohibition on coercion or intimidation due to a belief that a person has exercised a right conferred in Part 6 of the SEA.*

NLS' Argument:

[5] In NLS' Application for Summary Dismissal, it argues that GSU's ULP Application focuses entirely on interpretation and application of the CBA, specifically with respect to sick leave and elimination periods, as well as complaints of harassment and human rights violations which are properly directed to more appropriate venues.

[6] NLS further argues that complaints of harassment and human rights violations are not within the jurisdiction of the Board and must be summarily dismissed.

[7] With respect to allegations made under the sections of the SEA specified by the GSU, NLS states as follows:

> 1. *Re: s. 6-62(1)(a): there are no material facts plead that NLS ever interfered, restrained, intimidated, threatened, or coerced any employee in the exercise of their rights conferred under Part 6 of the SEA.*
>
> 2. *Re: s. 6-62(1)(b): there are no material facts, or any facts, plead, which suggest or allege that NLS has done anything with respect to the formation, or administration, of the GSU.*
>
> 3. *Re: s. 6-21(1)(g): There are no material facts plead which suggest that NLS has discriminated against any employee with a view to encouraging or discouraging membership in a union. More specifically, the question raised by the GSU is whether the elimination of Ms. Branton's position was improper, as Ms. Branton was not terminated. As such, there is no claim under s. 6-62(1)(g).*

4. *Re: s. 6-21(1)(r): there are no material facts, or any facts plead that NLS ever contravened an obligation, a prohibition, or other provision of Part 6 of the SEA which was imposed upon or applicable to an employer.*

[8] NLS also submits that any allegations of breach of the CBA provisions would need to be remedied through arbitration. To the extent that there is an application by GSU to interpret or determine a breach of the CBA provisions, NLS submits that those matters be deferred to the arbitration process under the CBA.

[9] NLS relies upon the Court of Appeal decision in *United Food & Commercial Workers, Local Union 1400 v Saskatchewan (The Labour Relations Board),* 1992 CanLII 8286 (SKCA)[1] which established criteria for the Board to exercise its authority to defer to arbitration.

[10] NLS points out the GSU has indicated in its ULP Application that the essence of the dispute between the parties relates to the termination of Ms. Branton while she was on leave, a matter GSU describes in its application as one protected by the provisions of the CBA.

[11] NLS submits the Board has followed a longstanding policy of deferring to the grievance and arbitration process contained in a collective agreement where the issues raised involve the interpretation or application of the terms of the collective agreement and where complete relief can be obtained through the arbitration process: *Administrative and Supervisory Personnel Association v. University of Saskatchewan*, 2005 CanLII 63020 (SK LRB) at para 26.

[12] As such, NLS submits the dispute should be determined pursuant to the grievance and arbitration provisions and not by the Board.

GSU Reply:

[13] GSU argues in its Reply that:

(a) *The totality of facts asserted in GSU's underlying application in LRB 070-24 demonstrate Ms. Branton's involvement in union activities since early 2023. The employer's treatment of her has worsened since that activity began – including through unilaterally changing her work hours contrary to the Collective Agreement, applying to move her position out of scope and finally, terminating her position.*

(b) *The Employer's collective actions against Ms. Branton are not adequately considered as individual purported breaches of the Parties' Collective Agreement. GSU is asserting an unfair labour practice based upon the totality of events – culminating in the elimination of the position – rather than a particular breach. The matter belongs before the Board and not before an arbitrator.*

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[1] *Infra* at para 59.

(c) GSU's underlying application asserts facts which if proven, are sufficient to ground an unfair labour practice finding. These assertions of fact are plain on the face of the pleadings.

Summary Dismissal:

[14] The test for summary dismissal is summarized in *Roy v Workers United Canada Council* 2015 CanLII 885 (SK LRB):

> *[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:*
>
> > *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant is able to prove everything alleged in his/her claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
> >
> > *2. In making its determination, the Board may consider only the subject application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his/her claim.*
> >
> > *. . .*
>
> *[9] Generally speaking, summary dismissal is a vehicle for the disposition of applications that are patently defective. The defect(s) must be apparent without the need for weighing of evidence, assessment of credibility, or the evaluation of novel statutory interpretations. Simply put, in considering whether or not an impugned application ought to be summarily dismissed, the Board assumes that the facts alleged in the main application are true or, at least, provable. Having made this assumption, if the Board is not satisfied that the main application at least discloses an arguable case, and/or if there is a lack of evidence upon which an adverse finding could be made, then the main application is summarily dismissed in the interests of efficiency and the avoidance of wasted resource.*

[15] This Board has emphasized that it will only summarily dismiss an application if it is plain and obvious that the application cannot succeed. The test is a stringent one. If the Board concludes that the application has no reasonable prospect of success then it may dismiss the application on a summary basis, but it should do so only in plain and obvious cases, or in cases where the underlying application is patently defective: *Lyle Brady v International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local Union 7715* <u>*2017 CanLII 68781 (SK LRB)*</u>*; Andritz Hydro Canada Inc. v Timothy John Lalonde and Director of Occupational Health and Safety, 2021 CanLII 61031 (SK LRB).*

Applicable Statutory Provisions:

[16] The Board's powers with respect to summary dismissal applications are found in section 6-111 of SEA and section 32 of the Regulations:

> ***Powers re hearings and proceedings***
> ***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;*
>
> *. . .*
>
> ***Applications for summary dismissal***
> ***32****(1) In this section:*
>
> *(a) "application to summarily dismiss" means an application pursuant to subsection*
>
> *(b) "original application" means, with respect to an application to summarily dismiss, the application filed with the board pursuant to the Act that is the subject of the application to summarily dismiss;*
>
> *(c) "party" means an employer, union or other person directly affected by an original application.*
>
> *(2) A party may apply to the board to summarily dismiss an original application.*
>
> *(3) An application to summarily dismiss must:*
>
> *(a) be in writing; and*
>
> *(b) be filed and served in accordance with subsection (5).*
>
> *(4) In an application to summarily dismiss, a party shall specify whether the party requests the board to consider the application for summary dismissal by an in camera panel of the board or as a preliminary matter at the outset of the hearing of the matter that is the subject of the original application.*
>
> *(5) If a party requests that the application to summarily dismiss be heard:*
>
> *(a) by an in camera panel of the board, the application to summarily dismiss must be filed with the registrar, and a copy of it must served on the party making the original application and on all other parties named in the original application, at least 30 days before the date set for hearing the original application;*
>
> *(b) as a preliminary matter at the outset of the hearing of the matter that is the subject of the original application, the application to summarily dismiss must be filed with the registrar, and a copy of it served on the party making the original application and on all other parties named in the original application, at least three days before the first date set for hearing of original application.*
>
> *(6) An application to summarily dismiss must contain the following information:*
>
> *(a) the full name and address for service of the party making the application;*

(b) the full name and address for service of the party making the original application;

(c) the file number assigned by the registrar for the original application;

(d) the reasons the party making the application to summarily dismiss believes the original application ought to be summary dismissed by the board;

(e) a summary of the law that the applicant believes is relevant to the board's determination.

[17] The provisions of the *SEA* most relevant on this application read as follows:

6-62*(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*

(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;

(b) subject to subsection (3), to discriminate respecting or interfere with the formation or administration of any labour organization or to contribute financial or other support to it;

…

(g) to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat of termination or suspension or an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to this Part

. . .

(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.

[18] The powers that the Board can exercise on this application are found in the following provisions of the *SEA*:

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.*

. . .

6-104*(2) In addition to any other powers given to the board pursuant to this Part, the board may make order:*

. . .

(b) determining whether an unfair labour practice or a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board is being or has been engaged in:

> *(c) requiring any person to do any of the following:*
>
> > *(i) to refrain from contravening this Part, the regulations made pursuant to this Part or an order or decision of the board or from engaging in any unfair labour practice;*
> >
> > *(ii) to do anything for the purpose of rectifying a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board[.]*
>
> ***6-45****(1) Subject to subsections (2) and (3), all disputes between the parties to a collective agreement or persons bound by the collective agreement or on whose behalf the collective agreement was entered into respecting its meaning, application or alleged contravention, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective agreement.*
>
> *. . .*
>
> ***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 attainments of the purposes of this Act.*
>
> *(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
>
> *. . .*
>
> > *(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[.]*
>
> *. . .*
>
> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> *. . .*
>
> > *(k) to adjourn or postpone the hearing or proceeding;*
> >
> > *(l) to defer deciding any matter if the board considers that the matter could be resolved by mediation, conciliation or an alternative method of resolution[.]*

Analysis and Discussion:

[19] The onus is on NLS to establish that GSU's application, as particularized, has no reasonable chance of success. Insofar as GSU has alleged material facts, they must be taken to be true. The Board is not required, however, to accept the legal conclusions GSU suggests the facts warrant: *Saskatchewan Government and General Employees' Union v Rodney Wilchuck,* 2023 CanLII 50900 (SK LRB).

[20] GSU pleads specific sections of the SEA in its unfair labour practice claim against NLS. Each of these will be discussed.

Clause 6-62(1)(a)

[21] Clause 6-62(1)(a) states that it is an unfair labour practice "to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Part". The reference to "this Part" means Part VI of SEA.

[22] As this Board noted in *Saskatchewan Government and General Employees Union v Lac La Ronge Indian and Child Services Agency Inc*., 2015 CanLII 80539 (SK LRB) at para 22, this section is usually invoked with respect to communication by an employer to employees that interferes with, restrains, intimidates, threatens or coerces those employees. Terminations are normally considered by the Board under section 6-62(1)(g) because of its reverse onus provision.

[23] The test for determining whether or not impugned conduct of an employer represents a violation of clause 6-62(1)(a) is an objective test and has been referred to by this Board in many instances. In *Saskatchewan Government and General Employees Union v Lac La Ronge Indian and Child Services Agency Inc*., 2015 CanLII 80539 (SK LRB) the Board referred to its earlier decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Sakundiak Equipment [2012] 205 C.L.R.B.R. (2nd) 139, 2011 CanLII 72774 (SK LRB),* where the Board said:

> *The test, therefore, remains whether the Union has satisfied the Board on the evidence presented, that an employee of "reasonable fortitude" would be interfered with, restrained, intimidated, threatened, or coerced from the exercise of any right conferred by this Act.*

[24] The employer's impugned conduct is the totality of its actions regarding Ms. Branton since her involvement in union activities in early 2023. GSU alleges the employer's treatment of her has worsened since that activity began – including through unilaterally changing her work hours contrary to the Collective Agreement, applying to move her position out of scope and finally, terminating her position.

[25] It may be that this is a matter strictly between an employee and the employer which has nothing to do with the union. However, viewed objectively, and in the absence of any evidence explaining the employer's conduct, it is arguable that the probable effect of Ms. Branton's "mistreatment" on employees of reasonable intelligence and fortitude would interfere with, restrain, intimidate, threaten and/or coerce employees from the exercise of their rights under Part VI of SEA.

[26] Assuming, as I must that these facts are true, it is arguable that NLS's actions constitute an unfair labour practice under Clause 6-62(1)(a) of the SEA in the exercise of their rights under Part VI of SEA.

Clause 6-62(1)(b):

[27] Clause 6-62(1)(b) states that it is an unfair labour practice "to discriminate respecting or interfere with the formation or administration of any labour organization or to contribute financial or other support to it". Here, GSU pleads: "Termination of Ms. Branton, at least in part because of her union involvement, constitutes interference with the administration of GSU."

[28] This Board has indicated in *Saskatchewan Government and General Employees' Union v Saskatoon Downtown Youth Centre Inc*., 2021 CanLII 19681 (SK LRB) that in relation to clause 6-62(1)(b):

> *[T]he focus is on whether the Employer interfered with the administration of the Union. This provision governs conduct that threatens the integrity of the Union as an organization – with an emphasis on the impugned conduct and its significance for the Union's organizational integrity.*

[29] Can the termination of Ms. Branton be characterized as adversely affecting GSU's independence, threatening its integrity as an organization, interfering with its administration or creating obstacles that make it difficult or impossible for GSU to carry on as an entity devoted to representing employees? GSU does not plead any facts to support a claim that the termination of Ms. Branton interfered with the Union as an organization. GSU simply pleads that the termination of someone on the bargaining committee constitutes the interference. Is this sufficient to trigger an s. 6-62(1)(b)?

[30] In *Canadian Office and Professional Employees Union, Local 342 v Canadian Union of Public Employees*, 2022 CanLII 48057 (SK LRB) this Board found the employer interfered with the ability of the union to compose its bargaining committee when it prohibited a member from participating under threat of termination of his employment based on an unfounded allegation of misconduct.

[31] The threshold to find an arguable case is low. GSU's allegations pursuant to clause 6-62(1)(b) are clearly not as obvious as in *Canadian Office and Professional Employees Union, Local 342 v Canadian Union of Public Employees,* for example. However, given the series of events ending in Ms. Branton's termination, which I must assume to be true, this Board can infer

that the employer arguably interfered with the ability of the union to compose its bargaining committee by eliminating Ms. Branton from the roster.

[32] Accordingly, the Board finds that it is not plain and obvious that NLS did not commit an unfair labour practice pursuant to clause 6-62(1)(b) of the SEA.

Clause 6-62(1)(g):

[33] Clause 6-62(1)(g) provides as follows:

> *(g) to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat of termination or suspension or an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to this Part.*

[34] GSU pleads that that termination of Ms. Branton constitutes discrimination with a view to discouraging membership in, or activity in, or participation in GSU's collective bargaining activities. GSU claims Ms. Branton was terminated at a time when she was engaged in rights granted by Part VI of the SEA.

[35] Clause 6-62(1)(g) of the SEA represents an important safety net for employees. This provision prevents an employer from using coercion or intimidation from discriminating in the treatment of its employees because of their support for a union; because of their desire to be unionized; or because they have exercised a protected right: *International Brotherhood of Electrical Workers Local Union 2038 v Clean Harbors Industrial Services Canada*, 2014 CanLII 76047 (SK LRB) at para 87; 2015 SKQB 232 (CanLII).

[36] The Employer's motivation is an important element of a claim under clause 6-62(1)(g). The termination must be made "with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to this Part." As George W. Adams[2] points out:

> *Since employers are not likely to confess to an anti-union animus, tribunals will have to rely on circumstantial evidence to draw inferences about employer motivation. These considerations may include evidence of the manner of the discharge…*

[2] George W. Adams, *Canadian Labour Law,* loose-leaf (12-23 - Rel 5) 2nd ed (Toronto: Thomson Reuters, 2021), at 10-14.

[37] Further, clause 6-62(1)(g) creates a presumption in favour of the employee. It requires that the Board must first determine if the provisions of subsection 6-62(4) will be engaged. Subsection 6-62(4) provides:

> *(4) For the purposes of clause 1(g), there is a presumption in favour of an employee that the employee was terminated or suspended contrary to this Part if:*
>
> *(a) an employer or person acting on behalf of the employer terminated or suspends an employee from employment; and*
>
> *(b) it is shown to the satisfaction of the board or the court that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right pursuant to this Part.*

[38] There are two pre-conditions to engaging clause 6-62(1)(g). First, there must have been an employee terminated or suspended. Secondly, it must be shown to the satisfaction of the Board, that employees of the employer or any of them, "had exercised or were exercising or attempting to exercise" a right pursuant to this Part.

[39] The ULP Application pleads that Ms. Branton was terminated. The pleadings described the termination of her position as follows:

> *NLS stated that the Accountant Position would be eliminated effective March 27, 2024. NLS further indicated that Ms. Branton's options were those under the layoff provisions but that, as there were no in-scope lower positions, Ms. Branton's options were effectively to go on layoff or accept a payment of 18 weeks' notice as severance.*

[40] NLS argues that the question raised by GSU is whether the elimination of Ms. Branton's position was improper as she was not terminated.

[41] NLS may argue in its defence that Ms. Branton was not terminated, however, whether NLS has a defence to the allegations is not taken into account in a summary dismissal application. On the face of the pleadings, a lay-off or severance offer to Ms. Branton does support an allegation that she was terminated.

[42] The Board finds that the pleadings thus appear to satisfy the first condition, i.e. that the employee was terminated.

[43] With respect to the second condition, GSU argues that "Ms. Branton was terminated out of retaliation against her for union activities, and for the purpose of interfering with union activities, including discouraging others from participating in the union." GSU pleads that Ms. Branston was exercising or attempting to exercise the following rights under the SEA:

> *a. The right to grieve (GSU alleges "the termination was in part retaliation for the Denysiuk Arbitration");*
>
> *b. The right to be scheduled in accordance with Article 19 of the CBA;*
>
> *c. The right to take paid and unpaid leaven in accordance with the CBA;*
>
> *d. The right to a safe workplace – including the right to file a good faith Harassment Complaint – pursuant to section 25 of the CBA and SEA, and the right not to be discriminated against by reason of union activity or physical disability, including under section 4 of the CBA and SEA.*

[44] GSU's Application does not link any of these "rights" to specific sections of Part VI of the SEA. On the contrary, GSU links them to provisions of the CBA or other Parts of the SEA such as its claim that NLS terminated Ms. Branton, while she was taking a leave.

[45] However, GSU does claim that NLS' actions against Ms. Branton were done in response to Ms. Branton being a member of the GSU bargaining committee. The right to join or assist a union is a fundamental right under Part VI of SEA. Section 6-4(1) provides:

> *6-4(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*

[46] It is arguable that the rights Ms. Branton was exercising or was attempting to exercise pursuant to Part VI was her participation in the GSU bargaining committee. Accordingly, based on the totality of the facts asserted by GSU, it is not plain and obvious that Ms. Branton's termination was unrelated to her exercising or attempting to exercise a right pursuant to Part VI. Ms. Branton was on the bargaining committee and shortly after executing the CBA her alleged "mistreatment" started.

[47] This Board is satisfied, for the purposes of the summary dismissal application, that subsection 6-62(4) applies and this Board must presume that Ms. Branton's termination was contrary to Part VI of SEA. Accordingly, the Board finds that there is an arguable case that NLS committed an unfair labour practice pursuant to clause 6-62(1)(g) of the SEA.

Clause 6-62(l)(r) of SEA:

[48] This section provides that it is an unfair labour practice for an employer "to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer."

[49] NLS argues that GSU has not made any reference to an obligation, prohibition, or other provision of Part VI that has been imposed on and breached by NLS, and therefore, had failed to particularize its complaint.

[50] GSU relies on this section based on the following SEA provisions:

- *6-4 the right to join a union;*
- *6-5 the prohibition on intimidation;*
- *6-6(1)(c)) the prohibition or coercion or intimidation due to a belief that a person has exercised a right conferred in Party 6 of SEA.*

[51] GSU does not elaborate on the application of section 6-6(1).

[52] However, as previously mentioned, the right to join or assist a union is a fundamental right under s. 6-4(1) of SEA. This section prohibits an employer from interfering with an employee's right to, among other things, join or assist a union. By extension, a breach by an employer of section 6-4(1) is a breach of a provision of Part VI imposed on an employer. Therefore, such an employer may be found to have committed an unfair labour practice pursuant to clause 6-62(1)(r).

[53] Accordingly, it is not plain and obvious that the claim pursuant to section 6-62(1)(r) has no reasonable chance of success. The Board finds that there is an arguable case that NLS committed an unfair labour practice pursuant to clause Clause 6-62(l)(r) of SEA.

Decision:

[54] For all of the foregoing reasons, the application to summarily dismiss the ULP Application is denied. The Board is satisfied that the underlying ULP Application discloses an arguable case for potential violations of the clauses discussed herein. An appropriate order will accompany this decision.

Deferral to the Grievance Process:

[55] NLS in its Reply, also requests that the application to interpret and provide relief pursuant to the CBA should be deferred to the arbitration process under the CBA, as any allegations of breach of the CBA provisions would need to be remedied through grievance arbitration.

[56] NLS requests that GSU's application be summarily dismissed, in its entirety, and, to the extent that there is an application to interpret or determine breach of CBA provisions, that those matters be deferred to the arbitration process under the CBA.

[57] GSU argues that the Employer's collective actions against Ms. Branton are not adequately considered as individual purported breaches of the parties' collective agreement. It says GSU is asserting an unfair labour practice based upon the totality of events – culminating in the elimination of the position – rather than a particular breach. The matter they say belongs before the Board and not before an arbitrator.

[58] Unlike the summary dismissal application, the Board may consider evidence regarding a request to defer. However, there was no evidence presented to the Board by either party in this regard. Further, there is no evidence before the Board as to whether a grievance has even been filed by the GSU on behalf of Ms. Branton.

[59] The considerations and criteria for deferral which have been adopted by this Board[3], are set out in *United Food & Commercial Workers, Local Union 1400 v Saskatchewan (The Labour Relations Board),* 1992 CanLII 8286 (SKCA). In that case, the Union had filed two grievances on behalf of one of its members. Subsequently, it filed an unfair labour practice application in relation to the same events. This Board decided to defer a hearing into the unfair labour practice application until the grievance arbitration was concluded. On appeal, the Saskatchewan Court of Appeal *per* Bayda CJS concluded the Board had erred in doing so, and directed it to proceed with the unfair labour practice application.

[60] In making this direction, the Court explained at paragraphs 16 and 17:

> *[Retail, Wholesale and Department Store Union v LRB (Sask) and Morris Rod-Weeder Co., 78 C.L.L.C. 14,960] speaks of "an alternative remedy of the same grievance" and makes clear the principle that where a trade union elects both the grievance-arbitration procedure provided for in the collective agreement between the parties and application to the Board for an unfair labour practice order to resolve the same dispute, the Board may consider the trade union's election to use the grievance-arbitration procedure as a relevant factor in determining whether to dismiss the application. The case is authority for the proposition that for such an election to constitute a relevant (as opposed to an "extraneous" or "irrelevant") consideration three preconditions must co-exist: (i) the dispute put before the Board in the application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the **same**, dispute; (ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance-arbitration procedure, and (iii) the remedy under the collective agreement must be a suitable alternative to the remedy sought in the application to the Board. . .*
>
> *How does the situation respecting "relevance" change where there has been no election by the trade union but the employer asserts that the election was available to the trade*

[3] *Communications, Energy and Paperworkers Union of Canada, Local 911 v. ISM Information Systems Management Canada Corporation (ISM Canada)* 2013 CanLII 1940 (SK LRB).

> *union to make? In my respectful view, essentially the same three preconditions must coexist before it can be said that the availability of a grievance-arbitration procedure in a collective agreement is a "relevant" consideration. The approach for establishing that relevance is this. It is necessary first to delineate and define with some precision the dispute between the parties. Next, it is necessary to determine whether the collective agreement empowers the arbitrator to resolve the same dispute and to grant a suitable alternative remedy then the availability of a grievance-arbitration procedure in an agreement is a "relevant" consideration in much the same manner as an actual election was found to be in Morris Rod-Weeder. [Emphasis added.]*

[61] For the reasons that follow, this Board finds that the criteria for deferring to arbitration are not satisfied in this present case.

Is the Dispute the Same Dispute?

[62] NLS submits that the issues in dispute rest entirely in the application and interpretation of the CBA.

[63] GSU alleges the Employer's collective actions against Ms. Branton are not adequately considered as individual purported breaches of the Parties' Collective Agreement. GSU is asserting an unfair labour practice based upon the totality of events – culminating in the elimination of the position – rather than a particular breach.

[64] The dispute in the ULP Application is bigger than the question of whether Ms. Barton was laid off/terminated in accordance with the collective agreement. The dispute in the underlying application concerns an unfair labour practice which GSU alleges is demonstrated by a confluence of NLS actions, rather than as separate events. GSU puts into issue the totality of the employer's actions. Further, some of those actions, such as the attempt to remove Ms. Branton's position from the bargaining unit, are not matters within the jurisdiction of an arbitrator.

[65] The Board finds that the dispute is not the same.

Can the Grievance Process Resolve the Dispute?

[66] This Board's authority with respect to unfair labour practices is a unique jurisdiction granted to the Board to oversee the collective bargaining relationship between the parties. As this Board stated in *Saskatchewan Crop Insurance Corporation v. Saskatchewan Government and General Employees' Union*, 2017 CanLII 68785 (SK LRB) at para 31, "This is not a jurisdiction that can be assumed or resolved through the grievance process."

[67] The question of whether the lay-off/termination was done in accordance with the collective agreement could be addressed through arbitration, and that specific question could be resolved through arbitration. However, arbitration would not address the employer's cumulative behaviour which GSU alleges constitutes the unfair labour practice. If these actions were an attempt to disrupt or influence participation in union activity, this Board cannot defer its jurisdiction over such an important aspect of the labour relations scheme to another forum.

[68] The Board finds that the grievance process would not resolve the dispute.

Can the Grievance Process Provide a Suitable Remedy?

[69] Similarly, the remedy which may be sought under the collective agreement is not suitable to the remedy sought in the underlying application. An arbitrator could certainly look at the termination or lay off of Ms. Branton to determine if it was warranted and in compliance with the CBA. However, an arbitrator would not be able to provide a suitable remedy. For example, if an arbitrator found that the lay off was unwarranted or contrary to the CBA, and Ms. Branton was reinstated, such remedy, while addressing one of the important issues, does not, and cannot, provide a suitable remedy to address a potential finding of an unfair labour practice.

[70] Similarly, an arbitral finding that the lay-off/termination was in accordance with the collective agreement, may not necessarily absolve NLS of an unfair labour practice. The Board would therefore need to retain jurisdiction to provide an appropriate remedy.

[71] The Board finds that the grievance process would not provide a suitable remedy.

[72] Finally, NLS argues that complaints of harassment and human rights violations are not within the jurisdiction of the Board and must be summary dismissed. The Board disagrees.

[73] As previously noted, the issue before the Board is whether the employers' cumulative actions constitute an unfair labour practice. Whether any one of those actions may also involve matters of human rights is not an issue before the Board. This Board has previously determined on many occasions that the Human Rights Commission has primary jurisdiction over discrimination on the basis of disability: *Brown v. Westfair Foods Ltd.* (2002), 2002 SKQB 154 (CanLII), 213 D.L.R. (4th) 715 (Sask. Q.B.), and *Cadillac Fairview Corp. Ltd. v. Saskatchewan (Human Rights Commission)* (1999), 1999 CanLII 12358 (SK CA), 173 D.L.R. (4th) 609 (Sask. C.A.), stated, at 41 and 42. However, the underlying issue before the Board in this case does not involve an assessment of whether the employer discriminated against Ms.

Branton on the basis of a prohibited ground under *The Saskatchewan Human Rights Code*, SS 1979, c S024.1.

Board Order:

[74] The Board's order will accompany these reasons as follows:

1. The application by NLS for summary dismissal of LRB File No. 070-24 is dismissed; and

2. The application by NLS for deferral of LRB File No. 070-24 to the grievance/arbitration process is dismissed.

DATED at Regina, Saskatchewan, this **2nd** day of **October, 2024.**

LABOUR RELATIONS BOARD

Carol L. Kraft
Vice-Chairperson