Saskatchewan Labour Relations Board

OPTA INC., Applicant v DENNIS RAY HAGERTY, Respondent

LRB File Nos. 116-24 and 128-24; August 16, 2024
Chairperson, Kyle McCreary; Board Members: Al Parenteau and Aina Kagis

For the Applicant, Opta Inc.: Jana M. Linner, K.C.

For the Respondent, Dennis Ray Hagerty: Self-Represented

Summary Dismissal – No arguable case

Summary Dismissal – No jurisdiction

REASONS FOR DECISION

Background:

[1] Kyle McCreary, Chairperson: Opta Inc. ("Opta") has applied to have Dennis Hagerty's ("Hagerty's") unfair labour practice application summarily dismissed both on the grounds that it does not plead an arguable case and that the case is outside the Board's jurisdiction. For the reasons that follow, the Board grants Opta's application.

[2] Hagerty filed an unfair labour practice application against Opta Minerals on June 12, 2024. The alleged unfair labour practice was pled as follows:

> *Opta Minerals failed to provide duty to accommodate their employee (Dennis Hagerty) to return to work as outlined in his return to work program provided by WCB and Queen City Physiotherapy.*

[3] The relief sought is set out as:

> *I (Dennis Hagerty) would like to return to work as a full-time employee. I would like to receive all wages and benefits from time I was off work (Nov 30, 2022) until Present Date.*

[4] Opta filed a reply on June 27, 2024. Opta also filed the within application for summary dismissal on June 27, 2024. Included in the application for summary dismissal was the following factual summary:

> a. *Opta is a processor, distributor, and seller of industrial minerals. Opta has several locations, including in Regina Saskatchewan (the "Regina Plant").*

> *b. The Regina Plant is a unionized workplace, with members of the bargaining unit represented by United Steelworkers, Local 5917 ("USW").*
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> *c. Opta and USW are parties to a collective agreement dated November 1, 2023 to October 31, 2026 (the "CBA").*
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> *d. Denis Ray Hagerty has been employed by Opta since November 2020, most recently in the position of Dryer/Operator, a position within the USW bargaining unit. Mr. Hagerty has at all material times been a member of the USW bargaining unit.*
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> *e. Mr. Hagerty has been away from work since November 30, 2022, due a medical leave related to an injury received at a different workplace.*
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> *f. There have been issues with Mr. Hagerty's return to work plan and the parties have been engaged on the issue as recently as June 2024.*

[5] Opta filed written submissions on July 29, 2024. Opta seeks summary dismissal on the grounds that even assuming Hagerty's allegations can be proved, they do not constitute an unfair labour practice. Opta cites *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB); *Marcel Pelletier v Touchwood Agency Tribal Council,* 2023 CanLII 61388 (SK LRB); and *Saskatoon Co-Operative Association Limited v Craig Thebaud*, 2020 CanLII 35487 (SK LRB); in support of this position. Opta also argues that the Board lacks jurisdiction on the subject matter underlying Hagerty's application and cites *Lapchuk v Saskatchewan (Highways)*, 2017 SKCA 68 (CanLII) and *Saskatchewan Public Safety Agency v Fraser*, 2023 CanLII 75460 (SK LRB) in support of its position.

[6] Hagerty did not file a reply to the summary dismissal application.

Analysis and Decision:

Is There an Arguable Case?

[7] The Board finds that there is no arguable case. It is plain and obvious that, even assuming the facts pled are true, Hagerty's pleadings do not disclose an unfair labour practice. Even when read generously, the matters relate to a workplace accommodation dispute and do not relate to a breach of Part VI of the *Act*.

[8] The Board relies on the test for determining summary dismissal as set out in *Roy v Workers United Canada Council*:

> *[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:*

> *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.*

[9] Even assuming Hagerty can prove all of the statements referenced above at para 2, the Application for an unfair labour practice demonstrates no arguable case. There is no provision referenced identifying what unfair labour practice is alleged. Even reading the pleading generously with any possible violation in mind, there are no facts pled that would support a finding of an unfair labour practice against the employer under any of the subsections of s. 6-62 of the *Act*. There are no facts pled to connect the duty to accommodate issue with a matter governed by Part VI of the *Act*. Therefore, even assuming Hagerty can prove the duty to accommodate issue, there is no arguable case before the Board because there is no breach of the portion of the statute that it is responsible for unfair labour practices.

[10] The Board grants the request for summary dismissal as there is no arguable case.

The Board Lacks Jurisdiction to Hear Hagerty's Application

[11] The Board also grants Opta's application for summary dismissal on the lack of jurisdiction. The essential character of this dispute is an accommodation issue arising out of a unionized position. It is for another forum to determine where this matter is properly heard, but it cannot be heard at the Board.

[12] The approach to determining whether an arbitrator has exclusive jurisdiction was discussed by the Court of Appeal in *Lapchuk v Saskatchewan (Highways)*:

> *[15] There is no dispute about the basic legal concept that is central to the resolution of this appeal. The foundation of the required approach is s. 6-45 of The Saskatchewan Employment Act (formerly s. 25(1) of The Trade Union Act). It provides for the resolution of employer-employee disputes by way of grievance and arbitration:*
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> > *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.*
> >
> > *(2) Subsection (1) does not prevent the director of employment standards as defined in Part II or the director of occupational health and safety as defined in Part III from exercising that director's powers pursuant to this Act.*
> >
> > *(3) Without restricting the generality of subsection (2), the director of employment standards may issue wage assessments, issue hearing notices, take action to collect outstanding wages or take any other action authorized pursuant to Part II that the director of employment standards considers appropriate to enforce the claim of an employee who is bound by a collective agreement.*
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> *[16] In Weber v Ontario Hydro, the Supreme Court adopted what it called the "exclusive jurisdiction" model for determining the effect of final and binding arbitration clauses like s. 6-45. Under this approach, an employee must proceed by arbitration rather than the courts to resolve a workplace dispute. It holds that the courts lack jurisdiction to entertain a dispute that arises out of the collective agreement, subject only to a residual discretionary jurisdiction in courts of inherent jurisdiction to grant relief not available under the statutory arbitration scheme.*
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> *[17] The Supreme Court has also made it clear that a dispute will be held to come under the collective agreement if it does so either expressly or inferentially. The determining factor is the essential character of the dispute, not the legal packaging in which it is presented. See: New Brunswick v O'Leary at para 6; Regina Police Assn. Inc. v Regina (City) Board of Police Commissioners, 2000 SCC 14 at para 25, [2000] 1 SCR 360.*

[13] The Majority of the Supreme Court of Canada found in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 (CanLII), that this approach applies not just between the Courts and tribunals, but also when determining whether an arbitrator's exclusive jurisdiction ousts another tribunal. The Majority of Supreme Court of Canada summarized the analytical approach as follows:

> *[39] To summarize, resolving jurisdictional contests between labour arbitrators and competing statutory tribunals entails a two-step analysis. First, the relevant legislation must be examined to determine whether it grants the arbitrator exclusive jurisdiction and, if so, over what matters (Morin, at para. 15). Where the legislation includes a mandatory dispute resolution clause, an arbitrator empowered under that clause has the exclusive jurisdiction*

> *to decide all disputes arising from the collective agreement, subject to clearly expressed legislative intent to the contrary.*
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> *[40] If at the first step it is determined that the legislation grants the labour arbitrator exclusive jurisdiction, the next step is to determine whether the dispute falls within the scope of that jurisdiction (Morin, at paras. 15 and 20; Regina Police, at para. 27). The scope of an arbitrator's exclusive jurisdiction will depend on the precise language of the statute but, in general, it will extend to all disputes that arise, in their essential character, from the interpretation, application, or alleged violation of the collective agreement. This requires analysing the ambit of the collective agreement and accounting for the factual circumstances underpinning the dispute (Weber, at para. 51). The relevant inquiry is into the facts alleged, not the legal characterization of the matter (Weber, at para. 43; Regina Police, at para. 25; Quebec (Attorney General) v. Quebec (Human Rights Tribunal), 2004 SCC 40, [2004] 2 S.C.R. 223 ("Charette"), at para. 23).*
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> *[41] Where two tribunals have concurrent jurisdiction over a dispute, the decision-maker must consider whether to exercise its jurisdiction in the circumstances of a particular case. For the reasons given below, concurrency does not arise in this case. I would therefore decline to elaborate here on the factors that should guide the determination of the appropriate forum.*

[14] The Court of Appeal in *Lapchuk* has already determined that s. 6-45 is an exclusive jurisdiction clause, the question then is what the essential nature of the dispute is.

[15] While the standard for summary dismissal remains whether it is plain and obvious, evidence from the Application can be considered similar to a motion to strike for abuse of process: *Kashuba v Wilton (Rural Municipality)*, 2022 SKCA 37 (CanLII) at para 71, or a summary determination of jurisdiction: *Frank and Ellen Remai Foundation Inc. v Bennett Jones LLP*, 2016 SKQB 213 (CanLII).

[16] Opta has filed evidence that Hagerty is a unionized employee subject to a Collective Bargaining Agreement and a brief history of the return to work issue. The essential nature of this dispute is one of accommodation of a unionized employee in the workplace. Hagerty has complained about a failure to accommodate and a desire to return to work with backpay. This is a matter that arises directly and inferentially from a Collective Bargaining Agreement, especially as *The Saskatchewan Human Rights Code*, 2018, SS 2018, c S-24.2, is an implied term of the CBA: *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U.*, Local 324, 2003 SCC 42 (CanLII), [2003] 2 SCR 157. As stated by the Court of Appeal in Livingston v Saskatchewan Human Rights Commission, 2022 SKCA 127 (CanLII):

> *[11] Human rights legislation and the base protections provided by employment standards legislation are incorporated into all collective bargaining agreements: Parry Sound (District) Social Services Administration Board v O.P.S.E.U., Local 324, 2003 SCC 42, [2003] 2 SCR 157. Labour arbitrators have jurisdiction over a variety of tort claims, such as conspiracy, interference with contractual relations, deceit, negligent misrepresentation, infliction of*

mental distress, negligence and defamation: Blanco-Arriba v British Columbia, 2001 BCSC 1557 at para 39, 96 BCLR (3d) 183. Arbitrators also have been found to have jurisdiction over remedies arising from tortious activity, such as aggravated and punitive damages: Moznik v Richmond (City), 2006 BCSC 1848 at para 80, 62 BCLR (4th) 374. Finally, labour arbitrators have determined that they have jurisdiction to consider whether an employee's privacy rights have been breached in the course of employment and to apply specific privacy legislation. See, for example: United Steelworkers, Local 7552 v Agrium (2009), 185 LAC (4th) 296 (WL) (Sask LA) (Arbitrator: William F.J. Hood); and Retail, Wholesale and Department Store Union, Local 496 v Prince Albert Co-operative Association Ltd., 2016 CanLII 25618 (Sask LA) (Chair: William F.J. Hood). This was also recognized in Weber, where the appellant's claims included the tort of breach of privacy and the Court found that claim, among others, fell within the exclusive jurisdiction of a labour arbitrator.

[17] Thus, Mr. Hagerty's claim in its essential nature engages the exclusive jurisdiction of an arbitrator under s. 6-45 of the SEA. The Board does not need to determine, nor does it have the jurisdiction to determine whether this is within the exclusive jurisdiction of an arbitrator or whether there is concurrent jurisdiction with the Human Rights Commission or the Courts. However, the record is sufficient to determine that there is no basis for the Board to assert jurisdiction when considering the essential nature of the dispute.

[18] As a result, with these Reasons, an Order will issue that the Application for Summary Dismissal in LRB File No. 128-24 is granted and the application in LRB File No. 116-24 is dismissed.

[19] 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.

[20] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **16th** day of **August, 2024.**

LABOUR RELATIONS BOARD

Kyle McCreary
Chairperson