L.M., Applicant v LLOYDMINSTER AND DISTRICT CO-OPERATIVE LIMITED, Respondent

LRB File No. 128-23; March 22, 2024
Chairperson, Michael J. Morris, K.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

The Applicant, L.M.:	Self-Represented
Counsel for the Respondent, Lloydminster and District Co-operative Limited:	Shane J. Buchanan and Anna Sigurdson (student-at-law)

Application under s. 4-7(2) of *The Saskatchewan Employment Act* – Adjudicator's decision on Part IV appeal over 7 years overdue – Whether Adjudicator should be directed to render a decision – Board refuses to exercise its discretion to make such an order – Board not satisfied that such an order would further the proper administration of justice – Application dismissed.

REASONS FOR DECISION

Background:

[1] **Michael J. Morris, K.C., Chairperson:** These are the Board's reasons following a hearing regarding L.M.'s request for a remedy pursuant to s. 4-7(2) of *The Saskatchewan Employment Act* [Act].[1]

[2] L.M. and Lloydminster and District Co-operative Limited [Employer] participated in a hearing before adjudicator Rusti Ann Blanke [Ms. Blanke] in 2016. That hearing concerned L.M.'s appeal, pursuant to s. 3-53 of the Act, of a November 26, 2015 decision rendered by occupational health officers [Underlying Appeal]. To date, Ms. Blanke has not rendered a decision with respect to the Underlying Appeal.

[3] In *Lloydminster and District Co-operative Limited v L.M.*, 2023 CanLII 122696 (SK LRB) [Summary Dismissal Decision], the Board summarily dismissed L.M.'s request for relief, other than her request that Ms. Blanke be directed to render a decision, and any relief that may be ancillary thereto. On February 7, 2024, the Board held an oral hearing for the purpose of considering the appropriateness of such relief. L.M. gave evidence on her own behalf. The

[1] *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act].

Employer called no evidence. The Employer filed a written argument, and both parties made oral arguments.

[4] During her examination-in-chief, L.M. entered into evidence a chart that she had prepared, based on information she indicated she had obtained from the Board's annual reports.[2] L.M. indicated that her research suggested that she was not the only litigant who was waiting on a decision from Ms. Blanke, pursuant to the Act. She suggested there could be three other applicants with outstanding appeals, from 2015 and 2016. She also entered into evidence an October 2018 Ombudsman's report which arose from another litigant's complaint into the timeliness of Ms. Blanke's decision-making.[3] The author of the report indicated that, at the time, Ms. Blanke had six other outstanding cases.

[5] L.M. indicated that her last communication to Ms. Blanke was in August of 2023, shortly before she applied to the Board requesting relief pursuant to s. 4-7(2). L.M. had emailed Ms. Blanke, asking if Ms. Blanke had made a decision on the Underlying Appeal. She did not receive a reply.

[6] During cross-examination, L.M. acknowledged that she waited over 7 years after the hearing concluded before Ms. Blanke to request any relief from the Board, and that she could have sought assistance from the Board much sooner. She stated that one of the reasons she delayed seeking the Board's assistance was because certain managers she had had conflict with remained employed with the Employer. She was concerned about experiencing stress if she had to return to the workplace and report to them. She sought the Board's assistance after she knew these individuals would no longer be in the workplace, if she were reinstated. At the same time, she agreed that the presence of these individuals in the workplace did not prevent her from proceeding with the Underlying Appeal before Ms. Blanke and requesting reinstatement, back in 2016. It was put to L.M. that she was only seeking relief from the Board because she had quit a job relatively recently. L.M. denied this, and indicated that she was not motivated by financial reasons. She suggested that her request for relief from the Board was at least in part motivated by a desire to assist others who were waiting for decisions from Ms. Blanke.

[2] Exhibit A-1.
[3] Exhibit A-2.

Argument on behalf of L.M.:

[7] L.M. submitted that it is appropriate for Ms. Blanke to be directed to render a decision on the Underlying Appeal. The fact that Ms. Blanke has taken so long to render a decision is unfair, and L.M. would appreciate closure with respect to the matter. Ms. Blanke has never indicated that she is unable to render a decision. Ms. Blanke should have notes from the hearing that she can refer to for the purposes of her decision. She should be directed to render a decision within six months, or a year.

Argument on behalf of the Employer:

[8] The Employer submits that it is plain and obvious that it would be inappropriate for the Board to direct Ms. Blanke to render a decision. Doing so would be highly unfair and prejudicial to the Employer.

[9] The Employer notes that, in *Blencoe*, the Supreme Court confirmed that unacceptable delay can amount to an abuse of process in circumstances where the fairness of the hearing (i.e., the ability to respond to the case to meet) has been compromised, but also where it has not.[4]

[10] The Employer submits that there is no question that the delay in Ms. Blanke rendering a decision has been inordinate. It vastly exceeds the prescribed time limit in which Ms. Blanke's decision ought to have been delivered. Under the Act, Ms. Blanke ought to have rendered a decision in 2016, over seven years ago.

[11] The Board expects litigants to assert their rights in a timely manner. The Employer highlights the following extract from *Dishaw* (emphasis is the Employer's):

> ***[31]*** *Another often quoted passage on the issue of determining what constitutes "unreasonable" or "excessive" delay comes from the Ontario Labour Relations Board in that Board's decision in Evenlyn Brody v. East York Health Unit, [1997] O.L.R.D No. 157, wherein the Ontario Board's opinion was as follows, at 19:*
>
> > ***In determining whether the delay in a particular case is unreasonable or excessive, the Board will consider, among other things, such matters as the length of the delay, and the reasons for it, the time at which the applicant became aware of the alleged statutory violation, whether the remedy claimed would have a disruptive impact upon a pattern of relations developed since the alleged contravention, and whether the claim is such that fading recollection, unavailability of witnesses, and the deterioration of evidence would hamper a fair hearing in the dispute. It is generally accepted that the***

[4] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 [*Blencoe*], at para 115.

> ***scale of delay that the Board would find acceptable is to be measured in months rather than years (see City of Mississauga, [1982] OLRB Rep. March 420).*** *However, there is no specified limit with respect to delay, and the Board will consider the circumstances in each case to determine whether the delay is undue.*[5]

[12] The Employer submits that L.M. is responsible for her delay in bringing the current application. L.M. waited until August of 2023 to apply to the Board for a remedy under s. 4-7(2). L.M. has provided no acceptable excuse for this delay. She admitted that she waited until certain personnel were no longer with the Employer to file her application with the Board. While she claims this was due to concerns about her mental health, should she be reinstated, she pursued the hearing before Ms. Blanke and sought reinstatement in 2016, much more proximate in time to her interactions with the subject individuals in the workplace. Further, L.M. provided no medical evidence to corroborate her stated concerns with respect to her health.

[13] The Employer contends that it will be significantly prejudiced if the Board directs Ms. Blanke to render a decision. In attempting to render a decision, Ms. Blanke would be relying upon her memory of evidence given years ago, in spite of any notes that she may (or may not) have. Further, because of the delay, new arguments or issues have arisen in relation to which Ms. Blanke has not heard evidence or argument. For example, the Employer submits that Ms. Blanke's employment history since 2016 could impact any compensation she might be entitled to, based on her having mitigated any loss or having unreasonably failed to do so. Further, Ms. Blanke has no evidence about whether L.M.'s former position even exists, or whether L.M. has the qualifications to return to such a position. It would be extremely prejudicial to the Employer for Ms. Blanke to render a decision in L.M.'s favour without considering these issues and others that have arisen due to the passage of time.

[14] Directing Ms. Blanke to render a decision would amount to an abuse of process. In *Abrametz*, the Supreme Court indicated that "[d]elay will amount to an abuse of process if it is manifestly unfair to a party or in some other way brings the administration of justice into disrepute."[6] Here, the Employer emphasizes the following extract from the Summary Dismissal Decision (emphasis is the Employer's):

> *Just as the proper administration of justice may be frustrated by a decision-maker taking too long to reasonably grant relief, so too may it be frustrated by a decision-maker being*

---

[5] *Dishaw v Canadian Office & Professional Employees Union, Local 397*, 2009 CanLII 507 (SK LRB) [*Dishaw*], at para 31.
[6] *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 [*Abrametz*], at para 43.

> ***compelled to render a decision if the decision-maker is not capable of rendering a reasonable decision (which may be the case, here).***[7]

[15] The Employer submits that the Board should have no confidence that Ms. Blanke will render a decision, if directed to do so, or be able to make a fair and informed decision based on evidence she heard in 2016. Her memory of the evidence will undoubtedly be limited, and she will not have considered new issues that have become relevant since 2016.

[16] The Employer acknowledges that it may be possible for it to apply to Ms. Blanke for a stay of the Underlying Appeal, based on undue delay. However, it has little confidence that she would respond to such an application. Instead, it requests that the Board direct that Ms. Blanke not issue a decision in the Underlying Appeal, or alternatively, in dismissing L.M.'s application, indicate its preference that Ms. Blanke not issue a decision. In the final paragraph of its written submissions, the Employer indicates that if Ms. Blanke ever does render a decision, it would intend to appeal it to the Board pursuant to s. 4-8, to have it quashed.[8]

Relevant Statutory Provisions:

[17] Section 4-7 of the Act is relevant:

> ***4-7****(1) Subject to the regulations, an adjudicator shall provide the written reasons for the decision required pursuant to clause 4-6(1)(b) within the following periods:*
>
> *(a) with respect to an appeal or hearing pursuant to Part II, 60 days after the date on which the hearing of the appeal or the hearing is completed;*
>
> *(b) with respect to an appeal pursuant to Part III:*
>
> *(i) subject to subclause (ii), 60 days after the date on which the hearing of the appeal is completed; and*
>
> *(ii) with respect to an appeal pursuant to section 3-54, the earlier of:*
>
> *(A) one year after the date on which the adjudicator was selected; and*
>
> *(B) 60 days after the date on which the hearing of the appeal is completed;*
>
> *(c) with respect to an appeal pursuant to Part V, 60 days after the date on which the hearing of the appeal is completed.*
>
> *(2) If the deadline in subsection (1) has not been met, any of the following may apply to the board for an order directing the adjudicator to provide the adjudicator's decision:*

[7] Summary Dismissal Decision, para 60.
[8] The Employer does not indicate whether its intention would depend on whether Ms. Blanke's decision was in its favour, or L.M.'s, although this would presumably be relevant.

> *(a) any party to a proceeding before an adjudicator;*
>
> *(b) the director of employment standards or director of occupational health and safety, as the case may be.*
>
> *(3) On an application made pursuant to subsection (2), the board may do all or any of the following:*
>
> *(a) direct the adjudicator to provide the decision;*
>
> *(b) establish the period within which the decision is to be provided;*
>
> *(c) set aside the adjudicator's selection and direct the registrar to select another adjudicator to hear the appeal;*
>
> *(d) make any other order the board considers appropriate.*
>
> *(4) A failure by an adjudicator to comply with subsection (1) or with an order made pursuant to subsection (3) does not affect the validity of a decision.*
>
> *(5) As soon as is reasonably possible after receiving a decision, the board shall serve the decision on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.*
>
> *(6) This section applies to all appeals or hearings that:*
>
> *(a) were commenced before the coming into force of this section and for which written reasons have still to be provided on or after the coming into force of this section; or*
>
> *(b) are commenced on or after the coming into force of this section.*

Analysis and Decision:

[18] To start, the Board declines the Employer's request to make an order directing Ms. Blanke to not render a decision. Such an order would, in effect, be the equivalent of a permanent injunction. In the Summary Dismissal Decision, the Board discussed the limits of its authority pursuant to s. 4-7(3), which does not include the ability to order this type of relief. In the Board's view, if the Employer is seeking a stay of proceedings in the Underlying Appeal, an application for same is properly directed to Ms. Blanke.

[19] That said, the Board also declines L.M.'s request for it to direct Ms. Blanke to render a decision in the Underlying Appeal. Its reasoning follows.

[20] The Board is not required to grant such a remedy under s. 4-7(3) when an adjudicator is tardy in delivering a decision. In the Board's view, this is clear from the use of the word "may" rather than the word "shall" in the provision. The Board is required to consider whether a remedy

is appropriate, but deciding whether to grant a remedy involves the exercise of the Board's discretion. As such, a request for the Board to direct an adjudicator to render a decision shares some similarities with the judicial remedy of *mandamus*, in relation to which the Court of Appeal has stated:

> *[19] Mandamus is an order issued in the name of the court to compel performance of a public legal duty. It has long been the means by which private litigants have required governmental authorities to discharge their obligations. However, that said, mandamus remains a discretionary remedy and one which is available only in specific circumstances.*[9]

[21] Even where a decision-maker has failed to carry out a required obligation in response to a demand to do so, a judge considering *mandamus* may consider whether the order sought will be of some practical value or effect, whether there is an equitable bar to the relief sought, and whether on a balance of convenience an order in the nature of *mandamus* should (or should not) issue.[10]

[22] Here, there is no dispute that the statutory prerequisites for the Board to make an order under s. 4-7(3) are met. Ms. Blanke's decision is long overdue. The issue is whether the Board should exercise its discretion to direct Ms. Blanke to render a decision.

[23] Fundamentally, the Board has serious concerns about Ms. Blanke's ability to render a reasonable decision in the Underlying Appeal. It is not satisfied that directing her to do so, via an order that may be enforced as an order of the Court of King's Bench,[11] will further the proper administration of justice. It may not cause Ms. Blanke to do anything. Alternatively, it could compel Ms. Blanke to render a decision that she may not be capable of reasonably rendering.

[24] It has been over 7 years (in fact, close to 8) since Ms. Blanke heard evidence and argument from the parties. The Employer's concerns about Ms. Blanke's ability to recall the evidence are valid. Further, the Board has no evidence before it that Ms. Blanke even has any notes or other records from the Underlying Appeal, at this point.

---

[9] *Dolan v Moose Jaw (City)*, 2008 SKCA 170, at para 19. See also *R v Johnson*, 1977 CanLII 1433 (SK CA), at para 17.
[10] *Apotex Inc. v Canada (Attorney General)*, 1993 CanLII 3004 (Fed CA), at para 55, cited in *Stevens v Anderson*, 2022 SKKB 270, at para 18.
[11] Pursuant to s. 4-11(2) of the Act.

[25] Ms. Blanke's statements to the parties at various points in time about when her decision would be rendered, and her most recent statement to the Board in this regard,[12] are completely unreliable. Respectfully, they cause the Board profound concern about her ability to render a reasonable decision in the Underlying Appeal. Relatedly, in the Board's view, Ms. Blanke rendering a decision at this point in time carries an appreciable risk of bringing the administration of justice into disrepute. Accordingly, it would be inappropriate for the Board to exercise its discretion to direct Ms. Blanke to render a decision.

[26] In the circumstances before the Board, both L.M. and the Employer have been deprived of a decision in the Underlying Appeal. This is truly unfortunate. However, in considering the equities, it is the Employer that has had the risk of the *status quo* being upended through the Underlying Appeal since 2016, and L.M. who has elected to sit on her rights, insofar as seeking a remedy from the Board with a view to obtaining a decision from Ms. Blanke. As indicated in the Summary Dismissal Decision, L.M. bore the obligation to move the Underlying Appeal toward resolution, including through seeking a remedy from the Board, if required, not the Employer.[13] If the reason for L.M. waiting to apply to the Board was because managers with whom she had conflict remained with the Employer until 2023, this was not a reasonable excuse for her delay. As the Employer points out, their presence in the workplace did not prevent L.M. from prosecuting the Underlying Appeal before Ms. Blanke in 2016, in which she was requesting reinstatement. Realistically, it would have been reasonable for the Employer to have considered the Underlying Appeal abandoned prior to L.M.'s application to the Board in 2023.

[27] The Board's jurisprudence with respect to delay establishes that litigants are not expected to sit on their rights. The extract the Employer quotes from *Dishaw* is illustrative. In *Dishaw*, the Board concluded that the applicant's 23 month delay in applying for relief against his union was excessive, and had caused prejudice to the union. As a result, it summarily dismissed his application. Here, L.M.'s delay in seeking relief with respect to Ms. Blanke's delay is much longer. Had she sought relief earlier, the Board might not have had the same concerns about directing Ms. Blanke to render a decision. Alternatively, it might have considered setting aside Ms. Blanke's selection as an adjudicator and directing the Registrar to select another adjudicator.[14]

---

[12] In an email to the Board's Registrar dated November 22, 2023, Ms. Blanke advised that she expected to render her decision on or before December 1, 2023.
[13] Summary Dismissal Decision, para 55.
[14] The Board explained its reasons for dismissing L.M.'s request for this type of relief in the Summary Dismissal Decision.

[28] In the result, the Board is dismissing L.M.'s application. An appropriate order will accompany these reasons.

DATED at Regina, Saskatchewan, this **22nd** day of **March, 2024.**

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson