Saskatchewan
Labour Relations Board

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 5430, Applicant v RUBEN G. PALAO, Respondent and SASKATCHEWAN HEALTH AUTHORITY, Respondent

LRB File Nos. 155-24 and 173-24; December 9, 2024
Chairperson, Kyle McCreary (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Applicant, Canadian Union of Public Employees, Local 5430:	Andrew Restall
For the Respondent, Ruben G. Palao:	Self-Represented
Counsel for the Respondent, Saskatchewan Health Authority:	Paul Clemens

Application for Summary Dismissal – Employee-Union Dispute – Delay

REASONS FOR DECISION

Background:

[1] **Kyle McCreary, Chairperson:** The Canadian Union of Public Employees, Local 5430 ("the Union") has applied for a summary dismissal on the basis of delay of Mr. Palao's application pursuant to s. 6-59 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 ("the Act").

[2] LRB File No. 155-24 is an application by Mr. Palao under s. 6-59 of the Act. It was filed on August 9, 2024. The application does not contain any specific dates of events, but references concerns related to the Union's representation of Mr. Palao in the termination of his employment from SHA ("the Employer").

[3] From Applications and Replies in LRB File No 155-24 and 173-24, the Board finds the following timeline.

[4] Mr. Palao began working for a predecessor to the Employer in 2014.

[5] In March 2020, Mr. Palao went on leave from his employment.

[6] On November 2 or 3, 2020, Mr. Palao ceased to be employed with the Employer. Mr. Palao states that he was terminated, the Union and the Employer state that he resigned.

[7] On November 2, 2022, Mr. Palao contacted the Union about his termination in 2020. The Union investigated the matter and advised Mr. Palao in January 2023 that it was its view that he had resigned in November 2020.

Analysis and Decision:

[8] This is an application for summary dismissal pursuant to s. 6-111(p) of the Act.

[9] The Board's authority to dismiss on the basis of delay in a s. 6-59 application is pursuant to s. 6-103 of the Act, as stated by the Board in *Regina Civic Middle Management Association v Adam Baragar,* 2024 CanLII 79239 (SK LRB) at para 7:

> *[7] The Board's authority to dismiss a s. 6-59 application for delay is pursuant to s. 6-103 of the Act and not pursuant to s. 6-111(3): Coppins v. United Steelworkers, Local 7689, 2016 CanLII 79633 (SK LRB) at paras 19-22; Saskatchewan Government and General Employees' Union, Local 1105 v Darryl Upper, 2023 CanLII 10506 (SK LRB) at paras 62-66; and United Steelworkers, Local 5917 v Lyle Brady, 2023 CanLII 68839 (SK LRB) at paras 22-29. As such, the test on this application for delay is without reference to the 90 day period in s. 6-111(3) of the Act.*

[10] The Board's approach to applications for summary dismissal on the basis of delay in duty of fair representation cases was discussed in *Canadian Union of Public Employees v Reuben Rosom*, 2022 CanLII 100088 (SK LRB):

> *[21] In SEIU-WEST v Alison Deck, 2021 CanLII 23381 (SK LRB) [Deck], the Board observed that "[s]ummary dismissal based on delay does not fit neatly into the wording of s. 6-111(p), given the Board's authority is only available under that clause where there is a lack of evidence or no arguable case".[6] The Board observed, however, that summary dismissal applications had previously been granted on the basis of delay. Nonetheless, the Board found, in the case before it, that it was necessary to consider the impact of the alleged delay within a broader factual context. It dismissed the application for summary dismissal.*
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> *[23] First, the usual rule is that the Board must 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 the claim. However, in an employee-union dispute, it is not uncommon for an employee to provide reasons for delay in the reply to the application for summary dismissal, as was done in this case.*
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> *[24] In these proceedings, the application for summary dismissal operates in a manner that is comparable to (but not the same as) a request for particulars. The parties have had a further opportunity to file submissions. As such, there is no unfairness in considering the Employee's reasons as set out in his reply to the application. It is appropriate for the Board to exercise some flexibility in considering the submissions made by self-represented parties.*

> *[25] Second, in applying the summary dismissal test, the Board must avoid weighing evidence, assessing credibility, or evaluating novel statutory interpretations. Summary dismissal has the effect of conclusively dispensing with an applicant's rights to proceed with an existing claim. When taking this step, the Board must be satisfied that the original application is patently defective. These parameters, while critical, mean that the Board does not have the necessary information to support dismissing the original application at this stage.*

[11] The Board in *United Food and Commercial Workers Union, Local 248-P v Stamper*, 2023 CanLII 39149 (SK LRB), noted that the power to determine a matter without oral hearing is distinct from summary dismissal:

> *[11] The Board agrees that there has been undue delay in the filing of Mr. Stamper's application. Tolerable delay tends to be measured in months, not years.[9] Based on the facts attested to in the Union's reply, the allegations involve events that took place between 2012 and 2021. Mr. Stamper has not provided any evidence to suggest otherwise or any explanation for his delay in filing, including in reply to the Union's summary dismissal application. In these circumstances, the Board would be inclined to find that the delay has been excessive and prejudicial to the Union,[10] and to dismiss Mr. Stamper's application on the basis of undue delay pursuant to clause 6-111(1)(q), without requiring an oral hearing. As identified by the Court in Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers (United Brotherhood of Carpenters and Joiners of America, Local 1985) v Saskatchewan Labour Relations Board, 2011 SKQB 380, at para 108, the power to decide a matter without an oral hearing (s. 6-111(1)(q)) is a distinct power from the power to summarily dismiss a matter due to lack of evidence or no arguable case (s. 6-111(1)(p)). Whether the Board is comfortable exercising its authority under s. 6-111(1)(q) will depend on the specific circumstances before it.*

[12] Whether it is more appropriate to proceed via ss. 6-111(p), 6-111(q) or via an oral hearing will depend on the merits of each case. The Board must seek to achieve a fair and just result through the most proportionate procedure. As stated by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87, in relation to determining when summary judgment is acceptable:

> *[28] … A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.*

[13] Oral evidentiary hearings are not always necessary to achieve a just result, as noted by the British Columbia Board in *Howie v Pulp, Paper and Woodworkers of Canada, Local No 16*, 2014 CanLII 27503 (BC LRB):

> *33 In our view, what the Supreme Court of Canada sets forth in Hryniak is, if anything, even more applicable and appropriate in the quasi-judicial context of an administrative tribunal like the Board and in fact we have been pursuing that sort of approach for some time. For instance, in 2005 the Board noted:*

> *We add from a policy perspective that as a Board we are not inclined to proceed into evidentiary hearings without justification. There must be a proper basis established for the requirement of such a proceeding. In doing its job under the Code, the Board expends public funds. Evidentiary hearings incur expense and delay. Evidentiary hearings are an essential part of the quasi-judicial processes at the Board where warranted, but it would be irresponsible to engage in an evidentiary hearing where not warranted. …*
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> *We add that unless warranted, the expense and delay of evidentiary hearings are not consistent with the purposes of the Code (see Section 2 of the Code). It does not assist labour relations or the public interest under the Code to make the proper determination of labour relations matters more expensive and less timely. (ACFC West – The Association of Canadian Film Craftspeople, Local 2020 Communications, Energy and Paperworkers Union of Canada, BCLRB No. B191/2005 (Leave for Reconsideration of BCLRB No. B343/2004), paras. 11-12)*

What process is required for the Board to be able to determine a matter fairly will depend on the facts of each case. If the pleadings (including the consideration of applications and reply on delay issues) are sufficient to determine a matter, summary dismissal may be appropriate. If further documentary evidence including weighing the replies and affidavits is sufficient, the Board may be able to proceed without an oral hearing. A preliminary hearing may be necessary to determine certain factual allegations, or a full evidentiary hearing may be justified. The question in each case will be how the Board can achieve a just and proportionate result based on the issues and case before it.

[14] In this case, the Board will proceed with a summary dismissal as the pleadings themselves disclose a timeline that includes excessive delay and there are no facts disclosed that require the Board to engage in further procedures. Even assuming the matters disclosed in Mr. Palao's application and reply are true, they do not offer a justification for delay and the Board can consider the test for delay based on matters in the two applications and related replies.

[15] The Board's approach to determining whether delay is acceptable is set out 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):

> *[120] This survey of relevant Board Decisions reveals that while each decision turned on the particular facts of the case, nevertheless a number of factors figure prominently in the Board's analysis of undue delay applications in duty of fair representation claims. The more prominent factors include:*
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> > *• Length of Delay: The length of delay is critical. An applicant will bear the burden to explain the reasons for any delay and the longer the delay, the more compelling must be the reasons for the delay in filing the application. Now that the Legislature has mandated a statutorily prescribed time limit for the filing of unfair labour practice*

> *applications, the Board's tolerance for exceptionally long delays has decreased significantly.*
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> *• Prejudice: Labour relations prejudice is presumed in cases of delay; however, if the delay is extensive or inordinate this factor will weigh more heavily in the analysis. The longer the delay, the greater the prejudice to a respondent. Evidence of actual prejudice to a respondent likely will result in the main application being dismissed.*
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> *• Sophistication of Applicant: An applicant's knowledge of labour law and labour relations matters, generally is an important consideration when assessing the veracity of the reasons for the delay.*
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> *• The Nature of the Claim: The issues at stake for an applicant will be weighed in the balance. If the consequences of dismissing an application for reasons of delay are significant to an applicant, this will weigh in favour of permitting the application to proceed despite a lengthy delay in its initiation.*
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> *• The Applicable Standard: When adjudicating delay applications, the standard which has been applied consistently is: can justice be achieved in the matter despite a lengthy delay in commencing it?*

The Length of Delay:

[16] In determining length, the question is what portion of delay is justified. The Board does not find that Mr. Palao has offered a justification for the delay in proceeding to the Board. None of the medical issues mentioned relate to the ability to commence a proceeding and appear to relate to the merits of the underlying dispute with the Employer. The delay of 19 months from the Union's decision to not grieve to the commencement of Mr. Palao's application to the Board is excessive and unacceptable. As has been mentioned in numerous cases by this Board, tolerable delay should be measured in months and not years.

[17] The justifications offered in written submissions do not support holding a hearing to determine whether they excuse delay. The medical issues raised all relate to the merits of Mr. Palao's complaint against the Employer. Mr. Palao also left the country for a period of time. Without more, this is not an excuse for delay. Lastly, Mr. Palao was unaware of the Board's process, as noted in *Regina Civic Middle Management Association v Adam Baragar,* 2024 CanLII 104394 (SK LRB), this does not justify delay and is a consideration on another stage of the test.

[18] The Board in *United Steelworkers of America, Local 5917 v Lyle Brady*, 2023 CanLII 116917 (SK LRB) sent a matter with 18 months delay in filing, to a preliminary hearing rather than summary dismissal. This case is distinguishable as the Union has also raised the issue of delay in seeking timely assistance based on the Board's decision in *Taylor v. Regina Police Association, Inc*., 2003 CanLII 62854 (SK LRB). The Board finds that the two years of delay in seeking the Union's assistance is also unacceptable delay. As noted in *Taylor*, a failure to seek timely

assistance can be fatal to a s. 6-59 application. The Board finds that the cumulative delay of over three years without any explanation weighs heavily in favour of summary dismissal.

Prejudice:

[19] Prejudice to the Union is presumed when there is excessive delay due to the effect of delay on memory. As stated in *Moose Jaw Firefighters Association, IAFF Local 553 v Hall*, 2023 CanLII 88136 (SK LRB) at para 28:

> *[28] . . . The length of the delay, alone, provides a very compelling reason to dismiss the underlying application. It is well established that prejudice to a respondent is presumed in labour relations matters involving delay. Due to the length of the delay, the presumed prejudice weighs very heavily against proceeding with the application and no evidence of actual prejudice is necessary. The likely corrosion of evidence, both oral and documentary, is glaringly obvious.*

Sophistication of the Applicant:

[20] It was not stated in the application or reply whether Mr. Palao has experience with Board processes. It is presumed that he does not and this factor weighs in favour of not summarily dismissing.

The Nature of the Claim:

[21] The application relates to representation on a loss of position. This factor weighs in favour of the matter proceeding.

The Applicable Standard:

[22] The applicable standard is whether justice can still be achieved even considering the lengthy delay. The Board finds that considering the above factors, justice cannot be achieved if this matter were to proceed on the merits. There has been no explanation for a cumulative delay of over three years. There is presumed prejudice to the Union in defending this matter, and the delay is such that the application pursuant to s. 6-59 is fatally flawed. This prejudice is significant considering the passage of time. This prejudice outweighs the other factors that favour the applicant.

Conclusion:

[23] As a result, the Board has determined that the Application for summary dismissal in LRB file No.173-24 is granted and LRB File No. 155-24 must be dismissed, orders to that effect will accompany these reasons.

[24] The Board would also summarily dismiss this matter on the merits of the s. 6-59 application. As noted, Mr. Palao failed to seek timely assistance. However, even if that were not in issue, there are no allegations raised against specific actions of the Union that would ground a s. 6-59 claim. The application and materials focus on the actions of the Employer and state conclusions against the Union. Even when read generously, there are insufficient facts to ground a s. 6-59 application.

[25] The Board thanks the parties for their written submissions, which were of assistance in determining this matter.

[26] The Board notes that Mr. Palao may ask the Board to reconsider this decision pursuant to s. 6-115(3) of the Act and s. 25 of *The Saskatchewan Employment (Labour Relations Board) Regulations*, RRS c S-15.1 Reg 11.

DATED at Regina, Saskatchewan, this **9th** day of **December, 2024.**

LABOUR RELATIONS BOARD

Kyle McCreary
Chairperson