Saskatchewan
Labour Relations Board

REGINA CIVIC MIDDLE MANAGEMENT ASSOCIATION, Applicant v ADAM BARAGAR, Respondent, and CITY OF REGINA, Respondent

LRB File No. 167-23; October 29, 2024
Chairperson, Kyle McCreary (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Applicant, Regina Civic Middle Management Association:	Matthew Taras
For the Respondent, Adam Baragar:	Self-Represented
Counsel for the Respondent, City of Regina:	Christine Clifford

Application for Delay – Underlying application dismissed – excessive delay prejudices fair hearing

REASONS FOR DECISION

Background:

[1] Kyle McCreary, Chairperson: The Regina Civic Middle Management Association ("the Union") has applied for a preliminary determination on the question of delay of Mr. Baragar's application pursuant to s. 6-59 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 ("the Act"). Prior to the hearing of that application, the Union sought the Board's direction on the order or proceedings, in a decision reported as *Regina Civic Middle Management Association v Adam Baragar*, 2024 CanLII 79239 (SK LRB)(*Baragar #2*"), the Board directed Mr. Baragar to present his case first.

[2] LRB File No. 167-23 is an application by Mr. Baragar under s. 6-59 of the Act. There was a summary dismissal decision in relation to Mr. Baragar's claim reported as *Regina Civic Middle Management Association v Baragar*, 2024 CanLII 34272 (SK LRB) ("*Baragar #1*"). Pursuant to para 71 of that decision, the Board granted leave to the Union to request a preliminary hearing on the question of delay. On May 2, 2024, the Union requested a preliminary hearing on delay. The Board held a hearing on the issue of delay for August 27, 2024.

[3] Mr. Baragar testified to his reasons for the delay, that being the impact of the COVID-19 lockdowns, the impact of medical treatment he received, his lack of awareness of the Board's processes, and a Human Rights Commission matter.

[4] Mr. Baragar received a one-day suspension in July of 2020. The Union filed a Grievance. The Grievance was settled in September 2020. Mr. Baragar takes issue with the settlement and particularly certain terms of the settlement.

[5] The Union called Ian Cantello, current Union president as a witness. Mr. Cantello testified to the structure of the Union and the turnover at the Union between the events at issue and the current Union leadership. Further, there has been a loss of some of Mr. Baragar's file from the time of the grievance. Mr. Cantello also testified to the Union not having an internal appeal process in relation to grievance decisions.

[6] The Union and Mr. Baragar filed written submissions which the Board has reviewed. The City of Regina took no position on the issue of delay.

Analysis and Decision:

[7] This preliminary delay determination is being heard pursuant to the Board's authority to hold preliminary hearings pursuant to s. 6-111 of the Act.

[8] This delay determination is pursuant to s. 6-103 of the Act, as stated by the Board in *Baragar #2* 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.*

[9] The test applied by the Board in determining whether to dismiss a duty of fair representation application for delay was 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.*

> • *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?*

[10] Since *Hartmier*, the Board has consistently applied this framework in determining whether delay is acceptable in a duty of fair representation application (for example: *United Steelworkers, Local 5917 v Lyle Brady*, 2023 CanLII 68839 (SK LRB); *Fraser v Saskatchewan Government and General Employees' Union*, 2023 CanLII 8378 (SK LRB); and *Canadian Union of Public Employees v Reuben Rosom*, 2022 CanLII 100088 (SK LRB)). Tolerable or acceptable delay is "measured in months, and not years": *Hartmeir* at para 123. The Board must first determine how much of the delay is justified before weighing the unjustified delay with the remaining *Hartmier* factors.

[11] The Board has no standard timeline for an acceptable period of delay in duty of fair representation cases, as noted in *Fraser*:

> *[103] In summary, although other Boards have set policies imposing specific time limits on employee-union applications, this Board has not. Instead, this Board's approach is to determine whether justice can be achieved in hearing the dispute with consideration given to the five factors that are outlined in Hartmier. There is no specific timeline that will result in a rebuttable presumption or that will result in the Board refusing to hear the application. The consequence is some variability in the timelines that will be found to be acceptable, depending on the facts as presented to the Board.*

The Length of Delay:

[12] In determining length, the question is what portion of delay is justified. The Union is the moving party in this delay application. The Union is seeking relief in an order for dismissal without a full hearing. As the party seeking relief, the Union bears the burden of establishing that it is entitled to the relief sought. While Mr. Baragar may bear the ultimate burden in justifying delay

once delay has been established, the Union bears an initial evidential burden of establishing that there has been a delay, and any other evidence that support the relief it seeks from the Board.

[13] The evidence before the Board is that the initial delay begins from the settlement of the grievance in September 2020 and extends to the filing of this application in November 2023. The question the Board must first answer is how much, if any, of this delay is justified.

[14] Mr. Baragar at the hearing offered five justifications for delay:

a. The COVID-19 lockdowns;
b. Mr. Baragar's Lack of Awareness of the Board's Process;
c. The Impact of Medical Treatment; and
d. Mr. Baragar was waiting for the Human Rights Matter to conclude; and
e. The Union failed to advise Mr. Baragar of his rights to bring a s. 6-59 application.

In written submissions, Mr. Baragar also raised work and family obligations as additional justifications. The Board will consider each of these justifications in turn.

The COVID-19 Lockdowns

[15] The Board does not find the Covid lockdown of March 2020 justifies the delay that commenced six months later. Evidence was called on the initial lockdown news release, the Public Health Order in effect on January 21, 2022, and the City of Regina's return to work in March 2022. None of this evidence establishes the restrictions that were in place in September 2020 onwards, or how those restrictions prevented the Applicant from filing with the Board. Further, the Applicant admitted in cross examination that he continued to work from home the entire time with computer and internet access. The March 2020 lockdown is irrelevant to explaining the Applicant's actions in September of 2020 and onwards given the availability of electronic filing and the Applicant's continued access to a computer and the internet. The Board does not accept this first ground as justifying any of the delay.

Mr. Baragar's Lack of Awareness of the Board's Process

[16] The Board in previous cases has dealt with a lack of awareness argument under the sophistication of the applicant: *Saskatchewan Government and General Employees' Union, Local 1105 v Darryl Upper*, 2023 CanLII 75148 (SK LRB). The Board intends to follow a similar practice in this case as a lack of awareness is essentially an ignorance of the law argument, and the Board declines to accept ignorance of the law as a justification for delay. This is similar to the Courts

approach to ignorance of the law in relation to limitations periods, as discussed by the Saskatchewan Court of Appeal in *Fibabanka A. Ş. v Arslan*, 2023 SKCA 13 (CanLII):

> *[43] As a matter of law, the principle of discoverability provides that "a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence" (Nadeau v Nadeau, 2021 SKCA 69 at para 34, citing with approval Fehr v Sun Life Assurance Company, 2018 ONCA 718 at para 169, 84 CCLI (5th) 124; see also Central Trust Co. v Rafuse, 1986 CanLII 29 (SCC), [1986] 2 SCR 147 at para 224; Tender Choice Foods Inc. v Versacold Logistics Canada Inc., 2013 ONSC 80 at para 20, affirmed 2013 ONCA 474). It is the facts, not the law, that must be known or ought to have been known by the plaintiff for the clock to start running (see Luscar Ltd. v Pembina Resources Ltd., 1994 ABCA 356 at para 129, [1995] 2 WWR 153 [Luscar], citing with approval Hill v South Alberta Land Registration District, 1993 ABCA 75, [1993] 5 WWR 57 [Hill]). Moreover, as the Alberta Court of Appeal in Hill went on to say "error or ignorance of law, or uncertainty of the law, does not postpone any limitation period" (at para 9). Knowledge of the viability of a legal claim is not required; but simple knowledge of the facts, or facts that could have been ascertained with reasonable diligence, is what matters (Dickieson v Dickieson, 2010 ABQB 227 at para 21, 28 Alta LR (5th) 310 [Dickieson]).*

[17] As it relates to the issue of the Union's alleged failure to advise Mr. Baragar of his rights under s. 6-59, the Board again reiterates that ignorance of the law, regardless of the cause is not an acceptable justification for delay. Further, the Board agrees with the comments of the British Columbia Board in *Babich v Unifor, Local Union No. 333-BC*, 2019 CanLII 24907 (BC LRB), and declines to find on the facts of this case that the Union owes Mr. Baragar a positive duty to inform him of his rights under s. 6-59.

Medical Issues

[18] The Applicant received medical treatment from September of 2020 to October of 2022. This treatment was intensive from September 2020 to May 2021. During the course of medical treatment, the Applicant continued to work and did not take a leave of absence. The Applicant testified that he would take 4-5 days off after a treatment. The Board accepts that delay is justified based on the medical evidence until June of 2021. However, by June of 2021, the medical treatments were less intensive, and the Applicant had retained counsel in February 2021 in relation to a related Human Rights Commission matter.

Human Rights Complaint

[19] The Applicant contends that he had to await the conclusion of the Human Rights Commission matter in July 2023 before this matter could be pursued. The Board declines to accept this as a justification for delay. While the underlying facts may have overlapped, the

Union's representation and the settlement of the grievance were not in issue before the Human Rights Commission.

[20] The Board also notes that the Applicant had access to legal counsel from February 2021 to October 2022. The Applicant disclosed legal billings establishing regular contact with counsel during that time. The Applicant testified to raising concerns related to his Union with his counsel. The Board is unaware of the advice received and the advice itself is privileged. However, the assistance of counsel weighs heavily against this period of delay being justified. The jurisdiction of the Human Rights Commission and the Labour Relations Board are distinct. As found by this Board in *Baragar #1*, the Human Rights Commission matter does not fall within s. 6-59 of the Act, as stated at paras 46-50:

> *[46] Furthermore, where a complaints process falls outside of the union's control, the union has been found not to have a duty to represent.*
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> *[47] According to the original application, the City's harassment policy "specifically allows complainants to concurrently file an internal complaint and a complaint under the Code".[18]*
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> *[48] However, a human rights complaint, such as that which is engaged in the present case, does not necessarily or directly involve the union as party. Relatedly, the Alberta Board has found that the human rights complaint process is outside the control of a union:[19]*
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> > *19 Of the Union's handling of the Complainant's request to provide legal counsel or otherwise assist in his human rights complaint to the Alberta Human Rights Commission, that aspect of the Complaint is also without foundation. The duty of fair representation is a duty to represent the member with respect to rights under the collective agreement. An employee who files a complaint with the AHRC rather than a grievance, or in addition to a grievance, steps outside the collective agreement and asserts statutory rights instead. A union has no control over that process, and so has no obligation either to hire legal counsel that it has no ability to instruct, or to otherwise assist the employee.*
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> *[49] It is no different if an employee is on the receiving end of a complaint. The Union has no control over the SHRC process, and has no obligation to hire legal counsel, who it cannot instruct, or to assist the employee.*
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> *[50] In summary, the SHRC Allegation does not fall within the parameters of section 6-59. It is plain and obvious that this allegation will fail.*

As the Union had no duty to represent in relation to the Human Rights matter, waiting for its conclusion is not an acceptable justification of delay in this case.

Additional Justifications

[21] Mr. Baragar also raised work commitments and family obligations in his written submissions. While it is accepted that these are obligations that can take considerable time, they

are not extraordinary obligations to justify a departure from the expectations the Board has of timeliness on all parties. Many parties that come before the Board must do so while balancing competing personal and professional obligations. These obligations may justify short term delay in particular cases and the need for extensions, they do not justify a waiver of delay that is measure in years.

Conclusion on Length of Delay

[22] In summary, the Board determines that the delay from September 2020 to June 2021 is justified. The underlying application in this matter was filed in November 2023. Mr. Baragar has cited *Theresa Eyndhoven v. CUPE*, 2019 CanLII 10594 (SK LRB) for the proposition that the Board allowed a much longer delay in that case. Delay was not raised in that case and thus it is distinguishable on the basis that the Board did not make any finding on the issue of delay in that case. As noted above, the length of acceptable delay is context specific in the duty of fair representation cases and variable. The baseline from *Hartmier* is that delay should be measured in months, and the delay in this case is measured in years.

[23] The delay of two years and five months is significant and not acceptable on its own. The Board shall consider the remaining *Hartmier* factors to determine whether to dismiss Mr. Baragar's application.

Prejudice:

[24] The Union's evidence of alleged prejudice was that all of the Union executive involved have left the Union and the current executive is not in contact, the inherent prejudice related to the passage of time, and the loss of documents due to the failure to preserve and the lack of notice from the applicant of an intention to bring a proceeding. The Board will address each of these in turn.

[25] The turnover at the Union is problematic for a defendant from a logistics perspective, but without more is not prejudice. The inability to contact again presents logistical issues, but again is not prejudice. These are matters that increase the cost and difficulty of defending a matter, but on their own are not prejudice sufficient to justify dismissal. This type of issue can be distinguished from a witness passing away. That prejudice cannot be rectified with any amount of effort versus the prejudice of turnover can potentially be rectified with sufficient effort. This is not to say turnover and inability to contact can never be sufficient prejudice. No evidence was called as to the efforts and expenses incurred to locate the individuals who were no longer with

the Union. There is a point where the difficulty of locating witnesses to testify who are no longer easily accessible could ground a prejudice argument, but without that evidence, the Board finds that the issues of turnover and loss of contact are not prejudicial to the Union's ability to respond to the case. However, the turnover and lack of contact does support the importance of the second ground of prejudice alleged.

[26] The Board agrees with the previous Board decisions that there is presumed prejudice 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.*

This is especially so in a case such as this where the witnesses are no longer directly involved in the case. As the Union established, none of their key witnesses are involved in the Union's affairs or in contact at this time. The Board finds in this situation there is clear prejudice to the quality of oral evidence the Union may be entitled to call, especially when considered with the third ground of prejudice alleged.

[27] Documents can be used to refresh memory where it has faded. In this case, that may not be entirely possible as the Union has destroyed some of the relevant records. If the Applicant had given notice to the Union of an intention to bring a claim, that would be an issue for the Union to deal with. However, the Applicant did not give notice for three years. The failure to preserve documents in this situation is weighed against the Applicant. Without knowing the content of the documents, the prejudice cannot be quantified. The loss of documents combined with the presumed prejudice of fading memories establishes that the Union is prejudiced by delay in this case.

Sophistication of the Applicant:

[28] While Mr. Baragar is an educated and capable individual, he is not familiar with the Board's practices and timing requirements. This lack of experience supports giving more lenience on timelines. However, as noted, Mr. Baragar has provided evidence of receiving legal counsel during the period of the delay and testified to raising concerns about the Union's conduct with his counsel. This access to legal counsel minimizes the import of Mr. Baragar's lack of experience

with the Board's process. The Board finds that the sophistication of the applicant is a neutral factor to the question of delay.

The Nature of the Claim:

[29] The application relates to a one-day suspension. The Applicant contends that the focus should be on the nature of the allegation and the speculated impact it has had on the Applicant's advancement. These factors are outweighed by the short duration of the suspension, and the nature of the claim still falls on the low end of the scale compared to a duty of fair representation case that relates to a termination or similar loss of employment rights.

The Applicable Standard:

[30] The applicable standard is whether justice can still be achieved even considering the lengthy delay. The Board finds that considering the above factors that justice cannot be achieved. There is evidence of actual prejudice in addition to the presumed prejudice caused by the substantial delay. The nature of the claim and the sophistication of the applicant is insufficient to outweigh the substantial impact on justice caused by the delay.

Conclusion:

[31] As a result, the Board has determined that the Application in 167-23 must be dismissed, an order to that effect will accompany these reasons.

[32] The Board thanks the parties for their presentations which were of assistance in determining this matter.

[33] The Board notes that Mr. Baragar 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 **29th** day of **October, 2024.**

LABOUR RELATIONS BOARD

Kyle McCreary
Chairperson