Saskatchewan
Labour Relations Board

SASKATCHEWAN POLYTECHNIC FACULTY ASSOCIATION, Applicant v CHAU HA, Respondent, and SASKATCHEWAN POLYTECHNIC, Respondent

LRB File Nos. 174-23 and 154-23; February 26, 2024
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Applicant, Saskatchewan Polytechnic Faculty Association:	Gordon D. Hamilton
The Respondent, Chau Ha:	Self-represented
Counsel for the Respondent, Saskatchewan Polytechnic:	Kit McGuinness

Application for Summary Dismissal – No Arguable Case – Original Application Employee-Union Dispute – Alleged Breach of Section 6-59 of *The Saskatchewan Employment Act* – Whistleblower Protection in Collective Agreement – Employee Made Inquiries – Union Found Employee's Concerns Invalid – Protection Not Available.

Employee Claims Right under Collective Agreement – Arguable that Duty is Owed – Not Plain and Obvious that Application will Fail.

Application for Summary Dismissal Not Granted – Original Application May Proceed.

REASONS FOR DECISION

Introduction:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an application for summary dismissal brought by the Union, Saskatchewan Polytechnic Faculty Association. The original application was filed by an Employee of Saskatchewan Polytechnic, Chau Ha, on October 20, 2023. In it, the Employee alleges that the Union breached its duty of fair representation pursuant to section 6-59 of *The Saskatchewan Employment Act* [Act]. The Union claims that the original application discloses no arguable case and asks the Board to dismiss it in its entirety. The Union has sought to have its application determined without an oral hearing. For the following reasons, the Board has decided to dismiss the Union's application and allow the original application to proceed.

[2] As is usual in employee-union disputes, the Employer has been notified of both the original and the summary dismissal application and is a respondent to both. The Employer's position is that the original application is entirely, or almost entirely, between the Employee and the Union. Despite this, the Employer submits that the original application is an abuse of this Board's resources and processes.[1]

[3] Following receipt of the summary dismissal application, the Board set deadlines for written submissions from each of the parties. The Board received written submissions from the Union and the Employee, but not from the Employer.

Background:

[4] In the original application, the Employee pleads the following:

a. SaskPoly is wasting money;

b. A provision of the collective bargaining agreement ("CBA") provides whistleblower protection, as follows:

> *3.7* *Whistle Blowers Protection*
>
> *3.7.1* *No employee or Association representative may be disciplined for publicizing any alleged wrong doings within Saskatchewan Polytechnic, if a wrong doing has been brought through the formal Association structure and provided the employer has been informed of such instances and has been given a reasonable opportunity to remedy any problems.*

c. The Employee wants to go public;

d. The Union has not established a formal complaint process as required by Article 3.7.1 of the CBA;

e. The absence of any process means that the Employee effectively has no rights to blow the whistle;

f. The Union is inappropriately acting as judge of the validity of the complaint on the basis that the Union cannot guarantee that she will not be disciplined for whistle blowing;

g. The Union has determined that her concerns are invalid;

h. It did not fully consider her concerns;

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[1] Employer's Reply to Summary Dismissal Application, at 2.

i. After making said determination, the Union proceeded to ignore her.

[5] The Employee states that the Union has no formal process, whether for determining the validity of her complaints or determining whether the Employer has remedied a validated concern. She complains that the Union has been biased and hostile towards her, has rejected her complaints, and has then proceeded to ignore her. She claims that the Union has arbitrarily decided that:

> *the member can't whistle blow because they can't guarantee they won't be disciplined and the union will only go public if they deem the employee's complaint is valid, the employer's response is not valid, the employer has not [remedied] the concern and then maybe the union might grieve it or go public if they feel like it.*

[6] Included with the original application are an email exchange with the Union and copies of external whistleblower policies (and one private member's bill).

[7] In its reply to the original application, the Union states that the Employee has not alleged a breach of section 6-59 of the Act.

[8] In the present application, the Union pleads as follows:[2]

a. The Employee has not been disciplined for whistleblowing. She has no reasonable chance of success in proving a failure to represent her in relation to discipline that hasn't occurred.

b. The CBA provision refers to "a procedure for employees to submit whistleblower concerns". The Union representative advised the Employee of the process and explained why her specific concerns were not ones that the Union was prepared to advance.

c. The Union "has no obligation to accept and promote any member's concerns about how SaskPoly is managed or mismanaged."

d. The Employee's claims about SaskPoly not properly using its funds do not fall into any of the grievance categories set out in the CBA. The Union has no control over the way funds are managed.

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[2] See, Appendix A.

e. It was explained to the Employee that an employee has protection under the Article if disciplined, and in order to enforce a member's rights, a grievance may be required.

f. The Employee has not provided a basis to find that her rights under the CBA have been ignored or dealt with in an arbitrary, discriminatory, or bad faith manner.

g. The issue raised by the Employee must be in relation to rights that are situated in the CBA or Part VI. The Employee's complaint does not relate to rights that are situated in the CBA or Part VI of the Act.

h. Furthermore, there is no evidence of "serious or major negligence" in respect of the Union's conduct.

Analysis:

[9] In respect of the present application, the Board's authority can be found in clauses 6-111(1)(p) and (q) of the Act:

> ***6-111****(1) With respect to any matter before it, the board has the power:*
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> *. . .*
>
> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*
>
> *(q) to decide any matter before it without holding an oral hearing;*

[10] The question for the Board to consider is whether, assuming the Employee proves the allegations, the claim has no reasonable chance of success, that is, whether it is plain and obvious that the application should be dismissed as disclosing no arguable case. In deciding whether to dismiss, the Board may consider the subject application, any particulars provided, and the documents (referred to within the application) upon which the Employee relies. The Board assumes that the facts alleged in the original application can be proven.[3]

[11] The Board must dismiss only if it is plain and obvious that the original application will not succeed.[4] The Board must avoid weighing evidence, assessing credibility, or evaluating novel statutory interpretations. The Union, as the party seeking summary dismissal, has the onus to demonstrate that the application is patently defective.

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[3] *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB) [*Roy*], at para 9.
[4] *Ibid*.

[12] The Employee brings the original application pursuant to section 6-59 of the Act:

> ***6-59****(1) An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.*
>
> *(2) Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee.*

[13] The case law with respect to this provision is well established. The Board often relies on its decision in *Berry v SGEU*[5] for guidance as to the meaning of the terms "arbitrary", "discriminatory" and "bad faith":

> *21 This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:*
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> > *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favouritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*
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> *22 In the case of Gilbert Radke v. Canadian Paperworkers Union, LRB File No. 262-92, this Board observed that, unlike the question of whether there has been bad faith or discrimination, the concept of arbitrariness connotes an inquiry into the quality of union representation. The Board also alluded to a number of decisions from other jurisdictions which suggest that the expectations with respect to the quality of the representation which will be provided may vary with the*
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> > *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*

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[5] *Berry v SGEU*, 1993 CarswellSask 518.

[14] The Board also relies on the following succinct descriptions cited by the Ontario Board in *Toronto Transit Commission*[6], at paragraph 9:

> *. . . a complainant must demonstrate that the union's actions were:*
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> > *(1) "Arbitrary" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
> >
> > *(2) "Discriminatory" – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
> >
> > *(3) "in Bad Faith" – that is, motivated by ill-will, malice[,] hostility or dishonesty.*

[15] The Employee uses all of these terms in the original application, as well as "biased" and "personal favoritism".

[16] The Board's task in relation to the original application is to determine whether the Union breached its duty of fair representation – not to determine whether the Employee's dispute with the Employer is valid.

[17] Section 6-59 sets out the right of an employee to be fairly represented "with respect to the employee's … rights pursuant to a collective agreement" (or Part VI of the Act). In other words, an employee's rights "must be situated in a collective agreement or Part VI".[7]

[18] In the original application, the Employee is claiming rights that allegedly flow from Article 3.7.1 of the CBA. She claims that she has a right, pursuant to Article 3.7.1, to a "formal Association structure" that would ensure that she was treated in a manner that was fair, non-discriminatory, and unbiased with respect to a complaint she may raise against the Employer. The Employee also says that she is only guaranteed protection if the Union finds validity in her complaint; she doesn't agree with this premise, but she also claims that she has been precluded from claiming protection from reprisal (discipline) because the Union has improperly dismissed her concerns. She says that, essentially, the Union's duty to represent her begins at the point that she brings her concern to the Union (and possibly before) because the Union is the gatekeeper for her claims to protection.

[19] For the purposes of the present application, the Board has reviewed and considered Article 3.7.1 of the CBA. Article 3.7.1 suggests that an employee is protected from discipline if the

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[6] *Toronto Transit Commission*, [1997] OLRD No 3148.
[7] *Saskatchewan Polytechnic Faculty Association v Chau Ha*, 2022 CanLII 75556 (SK LRB).

appropriate process is followed. Presumably, if the process is followed and reprisals are taken for whistleblowing then a grievance would or could be filed.

[20] To be clear, the Employee does not suggest that she has officially done any whistle blowing; nor does she suggest that she has been disciplined.

[21] Most complaints pursuant to section 6-59 arise in the context of an employee's request for or experience with a grievance or an arbitration or both. However, a grievance request is not necessarily a prerequisite to finding that a union owes a duty of fair representation. For example, a union has been found to owe a duty to an employee in disciplinary meetings and prior to discipline being imposed.[8] In *Ferguson v CPAA*[9], the Canada Labour Relations Board found that the union was required to prepare the employee so that she may be in the best position to demonstrate that no discipline was warranted.[10] Thus, given the right context, it is arguable that a union owes a duty to an employee in disciplinary meetings.

[22] Relatedly, it is common for this Board to assess an alleged breach in context, which will include the union's conduct at any discipline meetings, before discipline is imposed.

[23] If a union is required to represent an employee fairly in anticipation of potential discipline, then it is at least arguable that a union is required to represent an employee when making a decision that will impact whether that employee is protected from discipline later on, especially when the CBA establishes the Union as the first formal point of contact.

[24] This puts the emphasis on the Union's conduct not after the discipline but before. The usual order of events is reversed but the Employee's right in relation to the Employer still flows from the CBA.

[25] Labour boards in Canada have found a vast array of arenas in which a union does not have a duty of fair representation to an employee. Examples include criminal proceedings, human rights complaints, workers' compensation appeals, and employment insurance, among others.[11] What most of the examples share in common is that the rights in relation to the employer that are being claimed do not flow from the collective agreement. In this case, the Employee's right to

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[8] Michael MacNeil, Michael Lynk, Peter Engelmann, *Trade Union Law in Canada*, loose-leaf (12/2023 – Rel 5) (Toronto: Thomson Reuters, 2023 [*Trade Union Law*], at 7-98.
[9] 1997 CarswellNat 2776.
[10] Whether the Board would adopt such a finding would likely depend on the case. Employee-union disputes are highly context-specific.
[11] *Trade Union Law*, at 7-103 to 7-106.

protection from discipline is found in the CBA. Given the materials before the Board, the Union could arguably be described as the gatekeeper of those rights.

[26] To be sure, it is not common for the Board to scrutinize internal union procedures outside of a complaint pursuant to section 6-58. Here, the Employee alleges that the lack of a formal process (which is allegedly provided for in the CBA) has impacted her ability to obtain protection from the Union in a potential discipline scenario; in other words, it has impacted her ability to grieve or successfully grieve potential discipline. The lack of the process allegedly precludes the Employee's ability to benefit from the Union's representation in relation to the Employer. The Employee wants the Union to invoke a fair, non-discriminatory, and unbiased process to allow her to bring her complaints forward without discipline.

[27] The Employee also wants the Union to consider her concern fairly and without personal animosity or bias.

[28] Together, these allegations might be compared to an allegation that a union has failed to investigate a matter before deciding whether to file a grievance. The absence of a formal process for accepting and considering grievance requests may impair the union's decision-making function. The Board may consider whether a union has failed to properly investigate the matter. The Board's focus is on the conduct of the union, and specifically, on whether the union complied with its duty to fairly represent the employee. Its focus is not, generally, on whether the internal process is problematic, separate and distinct from whether, in following that process, the union has breached its duty. The process and how it was applied, however, may be relevant to the Board's determination.

[29] Bearing in mind these observations, it is at least arguable that the Union has a duty to fairly represent the Employee when deciding whether to accept the Employee's concern as valid in the context of Article 3.7.1. The focus of the original application might have been better articulated. Nonetheless, given the foregoing, it is not plain and obvious that the original application has no reasonable chance of success. Rather, the application discloses an arguable case of a breach of section 6-59 of the Act.

[30] Finally, the Union's argument that there is no evidence of serious or major negligence is better left to the substantive hearing.[12]

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[12] *UFCW, Local 1400 v ATCO Structures & Logistics Ltd. and ATCO Frontec Ltd*., 2023 CanLII 115175 (SK LRB), paras 18-24.

[31] For all of these Reasons, the Union's application is dismissed. An appropriate order will accompany these Reasons.

[32] The matter in LRB File No. 154-23 will be placed on the Appearance Day schedule to determine next steps.

DATED at Regina, Saskatchewan, this **26th** day of **February, 2024.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson

Appendix A – Union's Pleadings[13]

…

i. Ms. Ha claims that the SPFA failed to represent her in regard to article 3.7.1 of the CBA, Whistle Blowers Protection. This section is reproduced, as follows:

> *3.7 **Whistle Blowers Protection***
> *3.7.1 No employee or Association representative may be disciplined for publicizing any alleged wrong doings within Saskatchewan Polytechnic, if a wrong doing has been brought through the formal Association structure and provided the employer has been informed of such instances and has been given a reasonable opportunity to remedy any problems.*

ii. Ms. Ha has not been disciplined for anything relating to whistle blowing. Ms. Ha has no reasonable chance of success to prove a failure to represent her for such discipline that has not occurred.

iii. This section also refers to a procedure for employees to submit whistleblower concerns. Bill Grosskleg advised Ms. Ha of the normal practice of the SPFA when they or other employees have concerns with Saskatchewan Polytechnic ("SaskPoly") in his email to her, dated October 4, 2023, which was included in Ms. Ha's application material. Mr. Grosskleg clearly advised that under article 3.7.1, SaskPoly must be informed of such concerns and given a reasonable opportunity to remedy any problem. Ms. Grosskleg also made clear that when employee concerns are validated, the SPFA has a legislated responsibility to represent its members. He then went on to explain why her specific concerns raised are not ones the SPFA was prepared to advance at this time.

iv. The SPFA has no obligation to accept and promote any member's concerns about how SaskPoly is managed or mismanaged. Those concerns have historically been raised and addressed through collective bargaining, whereby all members have an opportunity to bring forward concerns and changes they would like to see. Concerns about how SaskPoly is managed is not something to be raised in a grievance, where there is no authority to support a finding that SaskPoly needs to alter how they manage funds.

v. The CBA provides definitions of grievances that can be raised, at Article 24:

> *Employee Grievance – An individual employee's grievance where the subject matter of the grievance is specific to the employee.*
>
> *Group Grievance – A grievance where a number of employees at one (1) Campus with similar disputes join together in filing a grievance.*
>
> *Policy Grievance – A grievance is of general interest and/or deals with an interpretation of the collective agreement and filed by the bargaining unit.*

vi. Ms. Ha's claims about SaskPoly not properly using funds does not fall into any of the above grievance categories. It is certainly not a grievance specific to Ms. Ha, it is not a group grievance, and it is not a grievance relating to the interpretation of the CBA nor is it a grievance that could be raised by the SPFA that could qualify

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[13] *Union's Application for Summary Dismissal*, at 1-3.

as one of general interest. The way funds are managed is not something the SPFA has control over and is outside what is governed under the CBA.

vii. *Ms. Ha had also asked how the SPFA ensures members do not get disciplined for whistle blowing. Mr. Grosskleg, in his email, dated October 4, 2023, addressed this by stating that the SPFA cannot guarantee that members are not disciplined for whistle blowing, but they do have protection under Article 3.7.1 if they are disciplined. A grievance may be required in order to enforce a member's rights. Again, Ms. Ha has not been disciplined for whistle blowing, so the SPFA has no obligation to advance such a grievance on her behalf at this time.*

viii. *Ms. Ha included Bill 609 in her application. This cannot be relied on, as it was never passed by the Saskatchewan Legislature. Ms. Ha also included Whistle Blowing policies for other organizations; again, not relevant to the SPFA and SaskPoly.*

ix. *Ms. Ha has not provided any basis where her rights under the CBA have been ignored or dealt with in an arbitrary, discriminatory, or bad faith manner. Article 3.7.1, which this grievance relates to, provides protection to a member of SPFA representative that has been disciplined after raising concerns and giving SaskPoly an opportunity to remedy any problems.*

x. *Ms. Ha simply does not agree with the SPFA's finding on the concerns she raised with them about SaskPoly's management of funds. This is an issue outside of the CBA and not at all relevant to the SPFA's obligations to represent members under section 6-59 of The Saskatchewan Employment Act (the "Act"). Ms. Ha's concerns are outside of any possible grievance relating to her.*

xi. *In Saskatchewan Polytechnic Faculty Association v Chau Ha, 2022 CanLII 75556 (SK LRB), this Board examined a summary dismissal application in relation to another complaint by this Applicant pursuant to Section 6-59. The Board concluded at paragraph 67 that the issue raised by a complainant under Section 6-59 must still be in relation to employee rights that are "situated in a collective agreement or Part VI".*

xii. *Ms. Ha's complaint does not relate to rights that are situated in a CBA or Part VI of the Act. Her right under Article 3.7.1 specifically relates to discipline after whistle blowing, which has not occurred. This is not a proper subject to be raised under Section 6-59.*

…