Marcia Scheller, Applicant v United Food and Commercial Workers, Local 1400, Respondent

LRB File Nos. 012-25; June 13, 2025
Chairperson, Kyle McCreary (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*
Citation: *Scheller v UFCW, 1400*, 2025 SKLRB 27

Counsel for the Marcia Scheller: Self Represented

For the United Food and Commercial Workers, Local 1400 : Heath Smith

Determination Without Oral Hearing – Application determined without an oral hearing as the application and reply were sufficient for the Board to determine the case on its merits and it was procedurally fair to proceed without an oral hearing

Section 6-59 – Duty of Fair Representation – No evidence to support a finding of arbitrary, discriminatory or bad faith conduct – Application dismissed

REASONS FOR DECISION

Background:

[1] **Kyle McCreary, Chairperson:** Marcia Scheller has filed an application pursuant to s. 6-59 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1(the "Act") against the United Food and Commercial Workers, Local 1400 (the "Union") in relation to issues between her resignation on August 28, 2024 and the end of her employment with her former employer, Real Canadian Superstores.

[2] Ms. Scheller filed her application in LRB File No. 012-25 on January 22, 2025 ("the Application").

[3] The Union filed its reply on February 5, 2025 ("the Reply").

[4] The parties appeared on March appearance day and it was adjourned over to April appearance day.

[5] The Board Registrar advised the parties on March 17, 2025, that the matter may be determined by the Board on the basis of written materials. The parties were provided with filing

deadlines for filing materials and submissions in addition to the Application and Reply for the Board to consider in potentially determining the matter.

[6] The Board received no further filings from any party.

[7] The Board Registrar advised the parties on June 2, 2025, that the Board had not received any further materials and that the matter would be advanced to the Board for consideration based on the materials that are in Board possession.

[8] In the Application, Ms. Scheller swore the following facts to be true:

> *I gave Loblaws my 2 week written notice on Aug 28 2024, my last day of employment was to be Sept 11, 2024. I received a text message on Friday Aug 30th asking for an exit interview, then all my access to schedules, paystubs and employee discount were not accessible. On Tuesday Sept 3rd I reached out to the union telling them what had happened. They replied on the 4th with an "I'm on it" text. My employee discount came back on the 12th of September. I was not scheduled to work any other shifts after submitting my resignation letter. My ROE showed that my last day of employment was Aug 30th. But I got paid the stat holiday of Sept 2nd. I never received any information from union at all. I did reach out to them and have supporting documents to show that.*

[9] In the Application, Ms. Scheller seeks the following relief:

> *Financial compensation for the shifts that I could have worked and was not scheduled for, I would like my ROE to be changed to fired not quit as I was let go before my last available day to work. I also would like to see disciplinary action against my former manger that thought it was ok to do this.*

[10] The Reply was sworn by Mr. Aulden Furlong. Mr. Furlong swore the following:

> *On, or about, August 20, 2024, Ms. Scheller and the Union Representative assigned to her workplace, Mr. Aulden Furlong ("Mr. Furlong"), discussed, over text message, Ms. Scheller's availability for work. During the text message exchange, Ms. Scheller informed Mr. Furlong that she had set her availability for work to between 7AM and 11AM on Saturdays and Sundays and expressed dissatisfaction with the fact that she was not being scheduled for work during her available periods. Mr. Furlong asked Ms. Scheller whether there were any junior employees scheduled to work during the periods which she was available to work. In response, Ms. Scheller indicated that she had been informed, by her supervisor, that a 7AM-11AM shift did not exist as a shift for which the Employer scheduled employees.*
>
> *In response to Ms. Scheller's concerns, Mr. Furlong informed to Ms. Scheller that if there were any employees junior to Ms. Scheller scheduled to work within Ms. Scheller's availability, a grievance could be filed, but if there were not, the Union would not be able to pursue a grievance, as her preferred shift simply did not exist.*
>
> *In the period following August 20, 2024, Ms. Scheller was not scheduled for any shifts, as the Employer scheduled no shifts that fell within the bounds of her availability.*

On, or about, August 28, 2024, Ms. Scheller provided her Employer with a two-week notice of resignation, indicating that her last day of work would be September 12, 2024.

On, or about, September 3, 2024, Ms. Scheller contacted Mr. Furlong by text message. In the message, Ms. Scheller provided Mr. Furlong with a screenshot of a request from the Employer for her to complete an exit survey, along with a screenshot which indicated that she had been locked out of the Employer's employee application. Accessing the Employer's employee application allows them direct access to schedules, pay stubs, and employee discounts. Additionally, Ms. Scheller indicated to Mr. Furlong that she had no scheduled shifts within her two-week notice period, and that she had not been contacted regarding "call-in" shifts.

On, or about, September 4, 2024, Mr. Furlong responded to Ms. Scheller and informed her that he would be looking into both the issues of her access to employee documents and the fact that she had not been scheduled for any shifts during her notice period.

Also on, or about, September 4, 2024, Mr. Furlong emailed Mr. Garth Martin ("Mr. Martin"), the Store Manager at Ms. Scheller's workplace, and inquired about Ms. Scheller's loss of access to the Employer's application, despite her final day of work being September 12, 2024.

On, or about, September 9, 2024, Mr. Furlong sent a follow-up email to Mr. Martin, carbon copying Ms. Rachelle Lepage ("Ms. Lepage"), a Human Resources professional for the Employer, and indicated that he had not yet received a response about Ms. Scheller's issues, and that he was looking to follow up.

Also on, or about, September 9, 2024, Mr. Martin asked Ms. Lepage, via email, how the issues that Mr. Furlong identified, surrounding Ms. Scheller's lack of access to the employee application, should be addressed.

Also on, or about, September 9, 2024, Ms. Lepage responded to Mr. Martin, and explained that it was her understanding that Ms. Scheller had relinquished her remaining scheduled shifts, and therefore would not be attending at the workplace for the remainder of her notice period. Ms. Lepage then advised Mr. Martin that Ms. Scheller's "date of termination" would have to be changed, and that her access to the employee application should be reinstated until September 12, 2024.

Also on, or about, September 9, 2024, Mr. Martin forwarded his email chain with Ms. Lepage to Mr. Furlong. Mr. Furlong then contacted Ms. Scheller to notify her that her access to the Employer's application and, thereby, her employee discount, should have been reinstated.

[11] Ms. Scheller filed an Appearance Day Form which included the following information:

Yes I have received a Payment from Loblaws and a payslip under description states grievance settlement.

[12] No party has filed sworn materials to provide context or explanation of that statement, and as such the Board's analysis will focus on the evidence in the Application and Reply.

Relevant Statutory Provisions:

[13] This application relates to the Union's the duty of fair representation in s. 6-59, which reads:

> ***Fair representation***
> ***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.*

[14] The matter was determined without an oral hearing and on the basis of the sworn Application and Reply as the Board is authorized to do in s. 6-111, which reads in part:

> *6-111(1) With respect to any matter before it, the board has the power:*
>
> *(e) to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the board considers appropriate, whether admissible in a court of law or not;*
>
> *…*
>
> *(q) to decide any matter before it without holding an oral hearing;*

Analysis and Decision:

Determining the Matter without an Oral Hearing

[15] The Board has authority to determine any matter without an oral hearing pursuant to s. 6-111(1)(q) of the Act. The Board may do so where it has sufficient information to fairly determine the matter, and it is procedurally fair to proceed without an oral hearing: *Stephen-McIntosh v SEIU-West*, 2025 SKLRB 2 (CanLII).

[16] Considering the scope of the duty of fair representation as discussed below and the contents of the Application and Reply, the Board has the information necessary to determine this case.

[17] As it relates to procedural fairness, the Board gave the parties notice of a potential determination without an oral hearing and provided an opportunity to file further materials and argument. The Board did not receive any materials and notified the parties that it had not received materials and would be proceeding in its consideration. The Board has received no objections to

the process followed and no argument on why an oral hearing would be necessary in this case. The Board has also not received a request for further time to prepare and file materials. The Board finds that it is appropriate to proceed without an oral hearing in this case.

Was There a Breach of the Duty of Fair Representation?

[18] Ms. Scheller alleges that the Union has breached its duty of fair representation under s. 6-59 of the Act. The duty of fair representation is a duty owed by the Union in its representation of members in relation to collective bargaining rights: *COPE, Local 397 v Kerr,* 2025 SKLRB 25 (CanLII)*; Livingston v CUPE,* 2025 SKLRB 18 (CanLII)*.*

[19] The Board's analysis in a duty of fair representation case is focused on ensuring that the Union has exercised its statutory powers in a manner that is fair, ie not arbitrary, discriminatory or in bad faith. The Board does not sit in appeal of the Union and only reviews for compliance with the duty. This was discussed by the Saskatchewan Court of King's Bench in *Saskatchewan Government and General Employees' Union v Lapchuk*, 2025 SKKB 53 (CanLII):

> *[102] The duty of fair representation does not compel a detailed evaluation of the actions of the union nor does it envision necessarily a second guessing of the decisions of the union. As well, that duty does not elevate the Union's actions to a requirement of achieving perfection or even of acting without negligence. As a result, the SLRB is not to merely sit in appeal of any decisions taken by SGEU. In Haley v C.A.L.E.A. (No. 1), 1981 CarswellNat 602 (WL) (Can LRB), this principle was put as follows:*
>
> > *30 It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.*
> >
> > *31 But the law does not condone all good faith action. Some action or inaction is such a total abdication of responsibility it is no longer mere incompetence — it is a total failure to represent (e.g. Forestell and Hall [41 di 179, [1980] 3 Can LRBR 491], supra. Some conduct is so arbitrary or seriously (or grossly) negligent it cannot be viewed as fair. This is especially so when a critical job interest of an individual is at stake.*

[20] Within reviewing this standard, the Union is permitted to make mistakes. The Board does not review a union's handling of a file on a reasonableness standard, it is reviewed on whether

the handling was totally unreasonable. The distinction between non-actionable decisions and arbitrary decisions was reviewed by the Board in *Ha v Saskatchewan Polytechnic Faculty Association*, 2024 CanLII 126796 (SK LRB):

> *[25] As noted above, Board has interpreted arbitrary conduct to include conduct that is "flagrant, capricious, totally unreasonable, or grossly negligent". This conduct must be distinguished from errors, omissions, or mere negligence which are not actionable.*
>
> *[26] This distinction between non-actionable errors and gross negligence was drawn by this Board in Hargrave v. Canadian Union of Public Employees, Local 3833, 2003 CanLII 62883 (SK LRB):*
>
> > *[34] There have been many pronouncements in the case law with respect to negligent action or omission by a trade union as it relates to the concept of arbitrariness in cases of alleged violation of the duty of fair representation. While most of the cases involve a refusal to accept or to progress a grievance after it is filed, in general, the cases establish that to constitute arbitrariness, mistakes, errors in judgment and "mere negligence" will not suffice, but rather, "gross negligence" is the benchmark. Examples in the jurisprudence of the Board include Chrispen, supra, where the Board found that the union's efforts "were undertaken with integrity and competence and without serious or major negligence. . . ." In Radke v. Canadian Paperworkers Union, Local 1120, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, at 64 and 65, the Board stated:*
> >
> > > *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.*
>
> *[27] Similarly, the Alberta Board noted the distinction between mere negligence and arbitrary conduct in Leduc v United Mine Workers of America, Local 2009, 2016 CanLII 156707 (AB LRB) at para 31:*
>
> > *[31] A myriad of cases across Canada have adopted the position that "mere negligence" is not sufficient to trigger a breach of the duty of fair representation. (See Canadian Labour Law Second Edition, George Adams, starting at 13-40.1 as well as Trade Union Law in Canada, Michael MacNeil, Michael Lynk, Peter Engelmann at 7.200). As reviewed by Adams at 13-40.2, "gross negligence" was commented upon by the British Columbia Labour Relations Board in Morgan v. Registered Psychiatric Nurses Association of British Columbia, [1980] 1 Can. L.R.B.R. 441, where the Board emphasized that a simple mistake or even handling a matter poorly does not breach the union's duty. Rather, "it is only when the alleged carelessness reaches that of a blatant or reckless disregard for an employee's interests that the duty of fair representation will be violated if the trade union is responsible for 'serious negligence'". The Ontario Labour Relations Board also looked at gross negligence as opposed to simple negligence. In Prinesdomu v. CUPE, Local 1000 (1975), 75 C.L.L.C. 16,196, the Board states at p. 1354: "flagrant errors in processing grievances – errors consistent with a 'not caring' attitude – must be inconsistent with the duty of fair representation".*

[21] The Board has reviewed the Union's actions as set out in the Application and the Reply. The Union responded to Ms. Scheller's concerns in a manner consistent with the duty of fair representation. The Union raised issues with the Employer and as evidenced with Ms. Scheller's statement that she received her employee discount back achieved some measure of results.

[22] Ms. Scheller has included no facts that would support an allegation of discriminatory or bad faith conduct. The only question is whether the Union acted arbitrarily, which would include gross negligence. The Union turned its mind to the issues and attempted to achieve results. Ms. Scheller would have preferred faster or better results, but the Board finds the Union complied with its duty. The Union showed regard for Ms. Scheller's interest in the scheduling of shifts during her notice period and access to her employee discount and sought to achieve a resolution. The Union did not unfairly disregard Ms. Scheller's interests and repeatedly contacted the Employer in a short span of time. The Board can find no basis for a breach of the duty on the facts before the Board.

Conclusion:

[23] The Union has complied with its duty of fair representation, Ms. Scheller's application is dismissed.

[24] With these Reasons, an Order will issue that the Application in LRB File No. 012-25 is dismissed.

DATED at Regina, Saskatchewan, this **13th** day of **June, 2025.**

LABOUR RELATIONS BOARD

Kyle McCreary
Chairperson