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Cited as: 2020 MBQB 68

COURT OF QUEEN'S BENCH OF MANITOBA

APPLICATION UNDER rule 68 of the *Court of Queen's Bench Rules*, Manitoba Regulation 553/88

B E T W E E N:

MANITOBA GOVERNMENT AND GENERAL EMPLOYEES' UNION,	)	Counsel:
applicant,	)	SUSAN DAWES and MICHAEL T. GERSTEIN for the applicant
- and -	)	
THE MINISTER OF FINANCE FOR THE GOVERNMENT OF MANITOBA, THE HONOURABLE SCOTT FIELDING,	)	KEITH D. LaBOSSIERE and MIRANDA D. GRAYSON for the respondent
respondent.	)	
	)	JUDGMENT DELIVERED: APRIL 16, 2020

KEYSER J.

[1] By notice of application, the applicant, Manitoba Government and General Employees' Union ("MGEU"), has applied for an order of *mandamus* requiring The Minister of Finance for the Government of Manitoba, The Honourable Scott Fielding ("the Minister"), to appoint an arbitration board, pursuant to section 48

of ***The Civil Service Act***, C.C.S.M. c. C110 (the "***Act***"), to settle matters in dispute respecting the collective agreement renewal between the parties. MGEU has also applied for an order of *mandamus* requiring the Minister to deliver to the arbitration board, immediately after appointment, a statement of matters referred to the board pursuant to section 51(1) of the ***Act***, identified by the parties as the matters in dispute.

[2] For the reasons which follow, the application will be granted.

[3] Court of Queen's Bench rule 68.01 provides that on an application for judicial review a judge may grant an order of *mandamus*. Counsel agree that the test to be applied in deciding whether to grant *mandamus* was set out by the Federal Court of Appeal in ***Apotex Inc. v. Canada (Attorney General)***, [1993] F.C.J. No. 1098 (QL), affd. [1994] 3 S.C.R. 1100. The following requirements were set out by Robertson J.A., at paragraph 45:

> 1. There must be a public legal duty to act ...
> 2. The duty must be owed to the applicant ...
> 3. There is a clear right to performance of that duty, in particular:
>   (a) the applicant has satisfied all conditions precedent giving rise to the duty ...;
>   (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay ...
> 4. Where the duty sought to be enforced is discretionary, the following rules apply:
>   (a) in exercising a discretion, the decision-maker must not act in a manner which can be categorized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
>   (b) mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
>   (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant" considerations;

> (d) mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and
> (e) mandamus is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.
>
> . . .
>
> 5. No other adequate remedy is available to the applicant ...
> 6. The order sought will be of some practical value or effect ...
> 7. The Court in the exercise of its discretion finds no equitable bar to the relief sought ...
> 8. On a "balance of convenience" an order in the nature of mandamus should (or should not) issue.

[4] Counsel agree that only two of the pre-conditions to the availability of *mandamus* are in dispute in this case. They are as follows:

(i) the Minister submits that MGEU has no clear right to an appointment of an arbitration board and that the statutory pre-conditions have not been satisfied;

(ii) the Minister submits that he has a discretionary right to refuse to appoint an arbitration board and his discretion was exercised fairly.

[5] The MGEU is the bargaining agent for approximately 13,000 employees of the Government of Manitoba ("Manitoba"). The terms and conditions of employment are set out in a collective agreement between MGEU and Manitoba, known as the Government Employees' Master Agreement ("GEMA"). The current GEMA expired March 29, 2019 and as a result notice was sent January 15, 2019 by MGEU to Manitoba of its intention to renew the GEMA. Proposals were exchanged between the parties on March 4, 2019. Both sides met on April 10

and 11, 2019 to discuss the various proposals and it is agreed among the parties that negotiations started at that time. No agreement was reached.

[6] The position of MGEU is that the negotiation for this GEMA is significantly different from other negotiations, for two reasons:

1. Manitoba introduced Bill 28, ***The Public Services Sustainability Act*** ("***PSSA***"), on March 20, 2017. It was subsequently passed and received Royal Assent on June 2, 2017 although it has yet to be proclaimed into force. The ***PSSA*** imposed a four-year sustainability period in the public sector during which wage increases cannot exceed the following maximum increases in rates of pay:

   (a) zero percent for the first 12-month period;
   (b) zero percent for the second 12-month period;
   (c) .75 percent for the third 12-month period;
   (d) one percent for the fourth 12-month period.

   The ***PSSA*** also applies to future bargaining results and is retroactive. In addition, any concluded bargaining that exceeds these parameters is subject to clawback.

   Because of this, there was an exchange of correspondence between the parties as MGEU wanted to know if wage increases outside these sustainability parameters were possible. MGEU contends that Manitoba never replied in a direct manner to this question. The position of Manitoba is that the Minister specifically

responded that there may well be situations where this was feasible.

2. The second reason why MGEU indicated that this bargaining session was different than normal is that in past bargaining situations it was routine to try and settle issues that were non-monetary in nature before dealing with wage issues. For this GEMA MGEU had been advised by Manitoba that if they applied to have an arbitration board appointed then any earlier matters that had been agreed to would come off the table.

[7] Sheila Gordon ("Gordon") is the director of negotiations of MGEU and is the lead negotiator for the bargaining team. She affirmed in her affidavit dated December 30, 2019 that at the meetings held April 10, 2019 and April 11, 2019 she requested confirmation from Brian Ellis ("Ellis"), assistant deputy minister of the Labour Relations Division of the Civil Service Commission of the Government of Manitoba, of whether or not the new GEMA would be expected to be subject to the ***PSSA*** wage parameters. A number of emails were then exchanged between the parties with Gordon demanding an answer before negotiations could resume and Ellis simply reiterating that MGEU should continue to negotiate in good faith. The closest he came to responding was in an email sent June 12, 2019 to Gordon wherein he advised that "if there are circumstances under which your question could be answered in the affirmative, and there may well be, they will be discovered through the negotiation process, not through an email

exchange, and we urge you to come to the table to bargain in good faith" (affidavit of Ellis sworn December 6, 2019, Exhibit "C").

[8] As a result of the email exchanges, Michelle Gawronsky ("Gawronsky"), president of MGEU, sent a letter to the Minister on July 24, 2019 advising that MGEU and Manitoba were unable to reach agreement on their GEMA proposals and to request appointment to an arbitrator pursuant to section 48 of the ***Act*** (affidavit of Gawronsky affirmed October 29, 2019, Exhibit "E"). By correspondence dated August 9, 2019, the Minister refused to appoint an arbitrator stating that Gawronsky's letter did not include a statement of difficulties as required by section 48(2) of the ***Act*** (affidavit of Gawronsky, Exhibit "F"). Gawronsky replied by email dated September 4, 2019 again requesting appointment of an arbitrator and specifying the matters upon which agreement could not be reached (affidavit of Gawronsky, Exhibit "G"). Again she was rebuffed by the Minister on September 13, 2019 (affidavit of Gawronsky, Exhibit "H"). The notice of application was then filed in this court on October 25, 2019.

[9] The important provisions of the ***Act*** are as follows:

> **Definition of "person authorized"**
> 47(1) In this section and sections 48 to 56
>
> **"minister"** means the Executive Council or a committee thereof;
>
> **"person authorized"** means the person authorized by the Lieutenant Governor in Council to carry on, for and on behalf of the government, negotiations under subsection (2) or in respect of any revision of, or dispute arising under, a collective agreement entered into under subsection (3).

Negotiations for collective agreement
47(2) With a view to entering into a collective agreement between the government and the association, the person authorized shall carry on, for and on behalf of the government, negotiations with the association or members thereof authorized to carry on the negotiations for and on behalf of the association, respecting compensation for employees, including the establishment of grades of pay for new classes of employees and the adjustment from time to time of grades of pay for existing classes of employees, and respecting working conditions of employees.

Collective agreement
47(3) With the approval of the Lieutenant Governor in Council, the minister having the administration of this Act or any other member of the Executive Council may, for and on behalf of the government, enter into a collective agreement with the association respecting

(a) compensation for employees, including the establishment of grades of pay for new classes of employees and the adjustment, from time to time, of grades of pay for existing classes of employees; and

(b) working conditions of employees.

Exclusion of certain employees
47(4) A collective agreement entered into under subsection (3) may exclude from its application certain classes of employees, including employees who are in managerial, professional, or administrative positions or in positions the incumbent of which is in a confidential relationship with the government or a minister.

Request for appointment of arbitration board
48(1) Where

(a) negotiations have been begun under subsection 47(2) and no agreement has been reached; or

(b) a collective agreement entered into under subsection 47(3) is in force between the association and the government and a dispute arises with reference to the revision of any provision thereof that is, by the provisions of the agreement, subject to revision during the term of the agreement, between the association and the person authorized;

the association or the person authorized may, in writing, request the minister to appoint an arbitration board for the purpose of making an award and settling the dispute respecting the matters on which agreement cannot be reached and as set out in the request.

Statement of difficulties
48(2) A statement of the difficulties involved in settling the dispute shall accompany a request made under subsection (1) for the appointment of an arbitration board.

Constitution of board
49(1) An arbitration board shall consist of three members appointed as provided in this section.

Nomination by parties
49(2) Where the minister has been requested to appoint an arbitration board, he shall forthwith, by notice in writing, require each of the parties to the dispute, within seven days after receipt by the party of the notice, to nominate one person to be a member of the arbitration board, and upon receipt of the nomination within the seven days, the minister shall appoint that person a member of the arbitration board.

Where no nomination, minister appoints member
49(3) Where either of the parties to whom notice is given under this section fails or neglects to nominate a person within seven days after receipt of the notice, the minister shall appoint as a member of the arbitration board, a person he deems fit for the purpose, and that member shall be deemed to be appointed on the recommendation of that party.

Chairman nominated by other two members
49(4) The two members appointed under subsections (2) and (3) shall, within five days after the day on which the second of them is appointed, nominate a third person, who is willing and ready to act, to be a member and chairman of the arbitration board, and the minister shall appoint that person a member and chairman of the arbitration board.

Failure to nominate third member
49(5) Where the two members appointed under subsections (2) and (3) fail or neglect to make a nomination within five days after the appointment of the second member, the Chief Justice for the Province of Manitoba, or in his absence, the Chief Justice of the Court of Queen's Bench, shall forthwith nominate as the third member and chairman of the arbitration board, a person whom he deems fit for such purpose, and the minister shall appoint that person a member and chairman of the arbitration board.

Parties notified of members' names
49(6) When the arbitration board has been appointed, the minister shall forthwith notify the parties to the dispute of the names of the members thereof.

Upon notice given board presumed duly established
49(7) Where the minister has given notice to the parties that an arbitration board has been appointed under this Act, it shall be conclusively presumed that the board described in the notice has been established in accordance with this Act; and no order shall be made or process entered or proceedings taken in any court to question the granting or refusal of an arbitration board, or to review, prohibit, or restrain, establishment of that board or any of its proceedings.

Person ceasing to be member
50 Upon a person ceasing to be a member of an arbitration board before it has completed its work, the minister shall appoint a member in his place, who shall be selected in the manner prescribed by section 49.

Order of reference
51(1) Where the minister has appointed an arbitration board, he shall forthwith deliver to it a statement of the matters referred to it, and may, either before or after the board has made its report, amend or add to the statement.

Reconsideration of report
51(2) After an arbitration board has made its report the minister may, with the consent of the parties, direct it to clarify or amplify the report or any part thereof, or to consider and report on any new matter added to the statement or amended statement of matters referred to it; and the report of the arbitration board shall not be deemed to be received by the minister until the reconsidered report is received.

[Emphasis supplied.]

[10] It has been conceded that negotiations have begun under section 47(2) of the ***Act*** and that no agreement has been reached. As a result, the position of MGEU is that it may request the Minister to appoint an arbitration board for the purpose of making an award and settling the dispute respecting matters on which agreement cannot be reached and as set out in the request. Section 48(2) of the ***Act*** requires a statement of difficulties to accompany the request, and although that was done initially in a general manner, it was done specifically after the request of the Minister. Section 49(2) of the ***Act*** states that where the

Minister has been requested to appoint an arbitration board, he shall forthwith, by notice in writing, require each of the parties to the dispute to nominate someone to be a member of the arbitration board. As well, pursuant to section 51(1) of the ***Act***, he shall forthwith deliver to it a statement of the matters referred to it.

[11] The position of MGEU is, therefore, that the pre-conditions to a request for appointment of an arbitration board have been satisfied and that there is, upon those pre-conditions having been satisfied, a positive duty on the part of the Minister, without discretion, to appoint an arbitration board. The request was made on several occasions for the appointment of an arbitration board and the statement of difficulties was set out in letters dated July 24, 2019 and September 4, 2019. By letters dated August 9, 2019 and September 13, 2019, the Minister declined to appoint a board and indicated that he had discretion to determine if that was warranted or not. He found the application to be premature.

[12] The position of Manitoba is that the pre-conditions to appointment of an arbitration board suggest a duty to bargain in good faith and that the Minister has discretion to determine if the negotiations are at an impasse or not.

[13] What is the standard of review applicable in this situation? MGEU did not specifically address this issue in its brief but argued that it did not matter in this case. MGEU suggests that if correctness is the standard, then the Minister has encroached on the jurisdiction of the Labour Board by importing concepts of

good faith and impasse that appear in ***The Labour Relations Act***, C.C.S.M. c. L10, but not in the ***Act***, and that by relying on these concepts to justify his refusal to appoint an arbitration board that the Minister has overstepped his jurisdiction. Alternatively, MGEU submits that if the standard of review is reasonableness, then the Minister interpreted his powers unreasonably.

[14] Manitoba argues that the standard of review is clearly reasonableness, as per ***Nada v. Canada (Citizenship and Immigration)***, 2019 FC 590. This is because the Minister's decision that the application to appoint an arbitration board was premature was made pursuant to his interpretation of the scope of his duty under the ***Act***. Manitoba finally argues, as well, that it does not matter what the standard of review is determined to be because MGEU has no legal right to appointment of an arbitration board and the Minister exercised his express discretion to decline the appointment, which decision was made fairly in the circumstances.

[15] Manitoba urges the interpretation that bargaining includes the duty to bargain in good faith and that the parties must bargain to impasse even if those terms are not explicitly set out in the ***Act***.

[16] Manitoba points to section 48(1) of the ***Act*** to explain the full legislative intent of the ***Act*** in this respect. The section refers to the ability to request appointment of an arbitration board to settle the dispute respecting "matters on which agreement cannot be reached and as set out in the request" (emphasis supplied). This is a qualitative difference than language used at the start of

section 48(1)(a) which refers to "where negotiations have begun ... and no agreement has been reached" (emphasis supplied). Therefore the Legislature must have intended to set out a distinction between the absence of a final agreement and an inability to agree.

[17] Manitoba relies, as well, on several decisions from the Saskatchewan labour board as support for its position. In ***Swift Current (City) (Re)***, [2014] S.L.R.B.D. No. 34 (QL) (Sask. L.R.B.), the parties had met twice for negotiations after which the union applied for appointment of an arbitration board. The legislation allowed for this request when, in the opinion of either party, a point arrived where agreement could not be reached. The City alleged an unfair labour practice on the part of the union by referring everything to arbitration. The board determined that whether or not agreement could be reached required an objective test as

> [51] ... [t]o adopt a subjective standard to such an important determination would, we submit, make the legislation meaningless insofar as any requirement to attempt to bargain collectively. ...

[18] This position was reinforced in the subsequent case of ***Saskatoon Co-operative Assn. Ltd. v. UFCW, Local 1400***, 2018 CarswellSask 6, 22 C.L.R.B.R. (3d) 168 (QL) (Sask. L.R.B.), where the board relied on the objective test set out in ***Swift Current (City)***. Manitoba thus relies on these two cases in support of its position that one party cannot simply decide subjectively that no agreement is possible since this would frustrate the entire process of bargaining. Manitoba also stresses the reality that the ***PSSA*** has not yet been proclaimed

into force and thus it is not a factor to be considered since it merely informs the position of Manitoba.

[19] In my view, this position is disingenuous at best. The ***PSSA*** proposals were the starting point of Manitoba in the negotiation process and it is Manitoba that is in the position to have the ***PSSA*** proclaimed into effect at any time and to make its provisions retroactive, despite any advances made in negotiations up to that point. It is the sword of Damocles hanging over the bargaining process.

[20] I find that the provisions in the ***Act*** mandate the appointment of an arbitration board upon either party making that request, and supplying the statement of difficulties. MGEU has made that request and has provided the necessary statement of difficulties. There is no question that, unlike earlier negotiations, any bargaining that took place in the context of this GEMA was very short – approximately one and one-half days in duration. However, I do not find that a bar to the request, nor do I find the Saskatchewan labour board cases to be of much assistance. The statutory scheme in Saskatchewan is much different than what exists in Manitoba. Our legislation does not statutorily require bargaining in good faith in the ***Act***, nor does it require bargaining to an impasse. Thus, I find that the ***Act*** does not give the Minister the ability to refuse appointment of an arbitration board, as long as all the pre-conditions to that appointment have been satisfied. I find they have been so satisfied.

[21] If I am wrong in that assessment, I find that the Minister did not reasonably exercise any discretion he might have had, for a number of reasons.

[22] Firstly, not requiring parties to bargain to an impasse does not, in my opinion, frustrate the bargaining process. The appointment of an arbitration board does not in any way prevent negotiation but may assist the parties in their endeavours to reach a settlement. In fact, there remains an ongoing duty to bargain even after appointment of an arbitration board. It is an organic process.

[23] Secondly, as I said earlier, it is disingenuous for Manitoba to suggest that the ***PSSA***, even though not yet proclaimed, does not hang over the process. The affidavits filed in this application demonstrate that the normal approach to the GEMA negotiations is for the parties to resolve non-monetary issues before dealing with wage increases. However, it is not reasonable to expect MGEU to spend lengthy periods of time and substantial resources on non-monetary issues if Manitoba will ultimately take the position, if the parties are at an impasse on wages and an arbitration board appointment is later requested, that any issue resolved in prior negotiations is off the table. The parties would then still be in the same position after lengthy bargaining that they are today.

[24] As a result, I conclude that MGEU is entitled to the *mandamus* relief requested and the Minister is directed to appoint an arbitration board, pursuant to section 48 of the ***Act***, to settle the matters in dispute and as well as to deliver to the arbitration board, once appointed, a statement of matters referred to the arbitration board.

[25] My decision is based on representations and evidence available to me at the time this application was argued. I am satisfied that MGEU is entitled to the

relief sought. Having said that, I realize that ultimately this may be a pyrrhic victory. The COVID-19 pandemic has wreaked havoc on our Province since the application was heard, but that is a reality that will of necessity be dealt with through the arbitration and bargaining process.

B Keyser J.