Labour Relations Board
Saskatchewan

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. STARBUCKS COFFEE CANADA, INC., Respondent

LRB File Nos. 183-05, 184-05 & 185-05; November 29, 2005
Chairperson, James Seibel; Members: John McCormick and Ken Ahl

For the Applicant: Larry Kowalchuk
For the Respondent: Eileen Libby

> **Remedy – Interim order – Criteria – Where employee known by employer to be key organizer in workplace terminated after relatively minor incident, Board finds arguable case – Potential chilling effect extends beyond immediate moment when it occurs as nascent bargaining unit fragile entity until first collective agreement achieved – Board grants interim reinstatement of and monetary loss for employee.**
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> ***The Trade Union Act*, ss. 5(d), 5(e), 5(f), 5(g), 5.3 and 11(1)(e).**

REASONS FOR DECISION

Background:

[1] On October 18, 2005, Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") filed applications with the Board alleging that Starbucks Coffee Canada Inc. (the "Employer") committed unfair labour practices in violation of ss. 11(1)(a) and (e) of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "*Act*") by reason of the Employer's termination of the employment of Trevor Holloway on October 14, 2005 and further seeking Mr. Holloway's reinstatement and compensation for monetary loss. Concurrently, the Union applied for an order for interim relief seeking, *inter alia*, Mr. Holloway's reinstatement until final hearing and determination of the applications proper. The Board heard the interim application on October 25, 2005. An interim Order was issued on October 26, 2005 with these written Reasons for Decision to follow.

Evidence:

[2] In support of the application for interim relief, the Union filed the affidavit of Trevor Holloway. In opposition to the application, the Employer filed the affidavits of Travis Friesen, Allison Sweet and Cathy Sweet. We have reviewed all of the affidavit material and the applications and reply in detail. A summary of the evidence adduced follows.

[3] Mr. Holloway commenced employment with the Employer on September 23, 2003 and worked part-time until his termination on October 14, 2005.

[4] Mr. Holloway and the Union commenced an organizing drive to unionize the workplace during the first week of September 2005. The Union filed an application for certification with the Board on October 12, 2005, which matter was scheduled for hearing on November 1, 2005. The Employer admits that its representatives were generally aware of Mr. Holloway's activities on behalf of the Union at the time.

[5] During the ten months or so of 2005 prior to his termination, Mr. Holloway received admonishments for several workplace infractions, including the following: (1) January 15 – verbal warning for exceeding the limit of the Employer's "free product" policy; (2) March 3 – verbal corrective action for "a number of performance issues"; (3) April 25 – verbal corrective action for reporting late; (4) July 20 – written corrective action for reporting late; (5) July 24 – written corrective action for violating the Employer's food policy; and (6) July 27 – written corrective action and final warning for failing to show up for his shift.

[6] On October 6, 2005 a fellow employee reported to management that on his shift that day Mr. Holloway had taken a thirty-minute unauthorized break from his duties, during which he failed to return to work despite being requested to do so by the shift supervisor. The store manager, Allison Sweet, and district manager, Trevor Friesen, met with Mr. Holloway on October 11, 2005. When they put the allegation of the thirty-minute absence from the work floor on October 6, 2005 to Mr. Holloway and asked him whether it was true, Mr. Holloway stated that he could not remember the incident, but indicated that he may have been on the telephone for "a couple of minutes."

Ms. Sweet met with Mr. Holloway at the start of his next scheduled shift, on October 14, 2005, and advised him that, as a result of his having violated the final written warning (of July 27, 2005, referred to above), his employment was terminated.

Statutory Provisions:

[7] Relevant provisions of the *Act* include the following:

5. The board may make orders:

(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;

(e) requiring any person to do any of the following:

(i) to refrain from violations of this Act or from engaging in any unfair labour practice;

(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;

(f) requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice, or otherwise in violation of this Act;

(g) fixing and determining the monetary loss suffered by an employee, an employer or a trade union as a result of a violation of this Act, the regulations or a decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or trade union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;

. . .

5.3 With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.

. . .

11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:

> *(a) to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating with his employees;*
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> *. . .*
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> *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*

. . .

42. The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders

> *requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.*

Arguments:

[8] There was no serious disagreement between counsel for the parties as to the test applied by the Board on interim applications of this kind. In *Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn)*, [1999] Sask. L.R.B.R. 190, LRB File No. 131-99, the Board described the test as follows, at 194:

> *…(1) whether the main application reflects an arguable case under the Act, and (2) what labour relations harm will result if the interim order is not granted compared to the harm that will result if it is granted.*

[9] Mr. Kowalchuk, counsel for the Union, referred to several of the Board's decisions where application of the test had resulted in interim reinstatement of the terminated employee pending hearing and determination of the application for final relief, including the following: *United Food and Commercial Workers, Local 1400 v. Tropical Inn, operated by Pfeifer Holdings Ltd. and United Enterprises Ltd.*, [1998] Sask. L.R.B.R. 218, LRB File Nos. 374-97. 375-97 & 376-97; *Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suites Hotel (1998) Ltd.*, [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00, 125-00, 139-00, 144-00 & 145-00, at 444; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Partner Technologies Incorporated*, [2000] Sask. L.R.B.R. 737, LRB File Nos. 290-00, 291-00 & 292-00; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Universal Reel & Recycling Inc.*, [2001] Sask. L.R.B.R. 809, LRB File Nos. 226-01, 227-01 & 228-01; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Northern Steel Industries Ltd.*, [2002] Sask. L.R.B.R. 304, LRB File No. 114-02; *Canadian Union of Public Employees, Local 4617 v. Heinze Institute of Applied Computer Technology Inc.*, [2003] Sask. L.R.B.R. 374, LRB File Nos. 122-03, 123-03 & 124-03; *Canadian Union of Public Employees v. Del Enterprises, o/a St. Anne's Christian Centre*, [2004] Sask. L.R.B.R. 228, LRB File Nos. 219-04, 220-04 & 221-04;

United Food and Commercial Workers, Local 1400 v. D & G Taxi Ltd., [2004] Sask. L.R.B.R. 347, LRB File Nos. 244-04, 245-04 & 246-04.

[10] Counsel submitted that, while the facts of some of the cases cited above differ in certain respects from those of the instant case, they demonstrate that the "timing" of the termination is an important factor: that is, whether it occurred at a time when the confidence of the employees in the union's ability to be an effective representative, and to be protected from unlawful employer actions as a result of the employees' exercising rights under the *Act*, is particularly vulnerable.

[11] Addressing the assertion of the Employer's managers that reinstatement in the present circumstances would have a negative effect on workplace morale and the ability to effectively manage the store, counsel asserted there was no evidence that such would be the result and that it is at least as likely, if not more so, that it would communicate that the employees were free to exercise their rights under the *Act* without fear of discipline or termination.

[12] Ms. Libby, counsel on behalf of the Employer, filed a written brief which we have reviewed in detail. While acknowledging as correct the statement of the test applied by the Board on applications for interim relief as set forth above, counsel argued that the application ought to fail on both parts of the test. With respect to the first arm of the test – whether there is an arguable case under the *Act* -- counsel asserted that the Board ought to make a preliminary review of the merits of the case and that, if it did so, even though the Employer acknowledged that it was generally aware that Mr. Holloway was engaged in organizing the employees, it must arrive at the conclusion that the Employer in the present case had reasonable and plausible grounds for terminating Mr. Holloway's employment quite apart from any suggestion of anti-union animus -- that is, Mr. Holloway was terminated by reason of the application of progressive discipline, having been given a "final warning" in July 2005. Counsel pointed out that the affidavits of the Employer's managers deposed that union activity was no part of the basis for the termination. The reasons for dismissal were otherwise coherent and credible. The managers had concerns about the ability to manage if Mr. Holloway was not terminated. Counsel referred to the decision of the Board in *United Food and Commercial Workers, Local 1400 v. Arch Transco Ltd. and Buffalo Cabs (1976) Ltd., o/a Regina Cabs*, [2004]

Sask. L.R.B.R. 327, LRB File Nos. 241-04, 242-04 & 245-04, as authority for the proposition that a guise of union activity cannot be used as a shield from legitimate discipline.

[13] Counsel also argued that *Arch Transco*, *supra*, at 344, where the Board cites its decision in *Service Employees' International Union, Local 336 v. Swift Current District Health Board*, 1st Quarter Sask. Labour Rep. 170, LRB File No. 011-95, is authority for the proposition that, to succeed on an interim application, the applicant union must describe some interest alleged to be impaired if the application proper is left to be heard on its merits at some later date and suggested that the Union had not done so in the present case. While counsel admitted that, in *United Food and Commercial Workers' Local 1400, v. Heritage Inn (Moose Jaw)*, [2001] Sask. L.R.B.R. 125, LRB File Nos. 056-01, 057-01 & 058-01, the Board drew an inference of a "chilling effect" upon the union's organizing drive where an employee engaged in assisting in the effort was terminated, counsel argued that it may only be reasonable to draw such an inference where organizing is still in progress and there is the prospect that there will be a vote on the representation issue. In the present case, the application for certification had been filed "freezing" organization for that purpose and in that application the Union alleged that it had the support of a majority of the employees in the bargaining unit applied for.

[14] Lastly counsel argued that the remedies sought by the Union, particularly meetings with employees, were inappropriate where the application for certification had already been filed.

Analysis and Decision:

[15] In the present case, there is no reason to depart from the test for the grant of interim relief enunciated in *Regina Inn*, *supra*, and we were not asked to by counsel for either party. In our opinion, the test is met in the present case and the only issue remaining is what relief ought to be granted. An Order for relief was granted on October 25, 2005, in terms described later in these Reasons, with written reasons to follow. These are those written reasons.

[16] We are satisfied that the application reflects an arguable case under the *Act*. Mr. Holloway was the Union's key employee organizer in the workplace. His efforts

on behalf of the Union were known to the Employer by its own admission. The matters for which he was disciplined as set out above are relatively minor. While the Employer states that it followed a coherent policy of progressive discipline before dismissing Mr. Holloway and that it was merely coincident with the culmination of the organizing drive, it is certainly not a customary progressive discipline policy that goes from final written warning to termination for a relatively minor incident – taking a short unauthorized break. While it is not our function to assess the merits of the Employer's actions as far as determining whether it had just and reasonable cause, we are charged with the responsibility on this interim application to assess whether there is an arguable case that the Employer's actions are not coherent and plausible apart from any suggestion that participation in union activity played no part in the termination. In the present case, we are satisfied that such an arguable case is made out.

[17] We are also satisfied that the potential for labour relations harm that may have resulted if an interim order was not granted providing for reinstatement pending hearing and determination of the application proper is greater than that which could result from the granting of the interim Order.

[18] In the present case, counsel for the Employer argued that, because an application for certification has been filed, there is no argument to be made that the Employer's action in dismissing Mr. Holloway could have a "chilling effect" on the organizing drive; counsel further asserted that this is especially so given that, in its certification application, the Union alleges that it has the majority support of the employees, effectively ensuring that there will be no vote on that application that could be affected by the Employer's actions impugned in this application.

[19] In our opinion, this argument has little merit in the circumstances. The chilling effect of allegedly unlawful discipline or termination of an employee known to be active in a union's organizing efforts extends beyond the immediate organizing drive itself or any potential vote on a certification application, because it strikes at the very heart of the overarching object and purpose of the *Act* as expressed in s. 3: that is, the right of employees to engage in activities to select a trade union to represent them in collective bargaining with their employer free of fear or apprehension that the exercise of such rights may jeopardise their continued employment.

[20] The potential chilling effect of the violation of these rights through an unfair labour practice, such as is alleged to have been committed in the present case, extends beyond the immediate moment when it occurs. Even after the organizing drive is complete and even after a union has been certified to represent the employees (notwithstanding that a representation vote may not be required), a nascent bargaining unit is a fragile entity until a first collective agreement is achieved. The bargaining agent is vulnerable to activities by the employer that may be designed to make it look weak, ineffectual and unable to effectively represent the employees or protect them from allegedly unlawful employer activity.

[21] The Board has always considered such allegations very seriously. In *Saskatchewan Joint Board, Retail, Wholesale ands Department Store Union v. Courtyard Inns Operating Ltd.*, [1996] Sask. L.R.B.R. 673, LRB File Nos. 154-96, 155-96 & 156-96, the Board observed as follows, at 674-75:

> *Any allegation that the dismissal of an employee is related to the pursuit of lawful union activity, by that employee or by other employees, has always been viewed with great seriousness by this Board. In Saskatchewan Government Employees' Union v. Regina Native Youth and Community Services Inc., [1995] 1st Quarter Sask. Labour Rep. 118, LRB Files No. 144-94, 159-94 and 160-94, the Board made this point in the following terms, at 123:*
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>> *It is clear from the terms of Section 11(1)(e) of The Trade Union Act that any decision to dismiss or suspend an employee which is influenced by the presence of trade union activity must be regarded as a very serious matter. If an employer is inclined to discourage activity in support of a trade union, there are few signals which can be sent to employees more powerful than those which suggest that their employment may be in jeopardy. The seriousness with which the legislature regards conduct of this kind is indicated by the fact that the onus rests on the employer to show that trade union activity played no part in the decision to discharge or suspend an employee.*
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> *A decision to dismiss or suspend an employee which is motivated, even in part, by considerations related to the exercise of the right to engage in union activity, which is protected by The Trade Union*

Act, can have the effect of discouraging employees from supporting a trade union or participating in union activity at any time. If the dismissal or suspension occurs at the very moment when the trade union is trying to win the support of employees who have not been previously represented by a union, the event can send a particularly strong message to employees whose views on the representation issue have not been decided, and can have a devastating impact on the capacity of the union to solicit support from employees.

The Board commented on the significance of the dismissal or suspension of an employee during this sensitive period in Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Moose Jaw Exhibition Company Ltd., [1996] Sask. L.R.B.R. 575, LRB Files No. 131-96, 132-96 and 133-96, at 587:

> *Serious disciplinary action against an employee is, it goes without saying, an important event for that employee at any time. The significance of such steps from the point of view of The Trade Union Act and this Board is related to the signal which is sent, not only to the employee most directly affected, but to all employees, concerning the risks which they may be taking by engaging in activities which they are legally entitled to undertake. When such action is taken against an employee who is playing a significant role in a union organizing campaign and in the activities which lay the foundation for the collective bargaining relationship, the Board has always been highly alert to the possibility that a decision to discipline such an employee at this particular time may be something other than a coincidence. In this case, we would have to say that, had we been persuaded that the explanation given by the Employer held water, we would still have been very concerned by the timing of the decision to suspend and then dismiss Ms. Ponto, and this factor would probably, in itself, have led us to the conclusion that the Employer could not meet the onus of proof under Section 11(1)(e).*

As this passage suggests, the Board has imposed a heavy onus on any employer whose decision to dismiss or suspend an employee coincides with manifestations of trade union activity. In the context of an application for interim relief, the rationale which the Board has enunciated in cases like the ones quoted above is of considerable relevance in weighing the arguments put forward on behalf of the parties.

[22] There is little or no credible danger that the interim reinstatement of Mr. Holloway will signal to the employees that they may act as they please with impunity on the job leading to a descent into anarchy in the workplace. Indeed, these Reasons shall make it clear that the Employer has the right to manage the workplace and the employees will be held accountable for their behaviour in the ordinary course. However, this is very much different from sanctioning activities of management that are arguably unlawful under the *Act* in that they violate the rights of employees as expressed above.

[23] In all of the circumstances, we issued an Order for interim relief on October 25, 2005 in the following terms:

1. **THAT** within twenty-four (24) hours of the issuing of this Order, the Respondent Starbucks Coffee Canada, Inc. (the "Employer") shall reinstate Trevor Holloway to his position as coffee barrista with all of the rights and benefits he previously enjoyed as an employee pending final hearing and decision of the Applications or until further order of the Board;

2. **THAT** within seven (7) days of the date of the issuing of this Order, the Employer shall pay to Trevor Holloway an amount equivalent to the amount he would have earned had he not been terminated, less deductions required by law, from the time of his termination on October 14, 2005, to the time of continuing his employment by reinstatement in accordance with this Order; in the event the parties cannot agree upon the amount of compensation to be paid, the Investigating Officer of the Board is directed and authorized to calculate the amount, and for that purpose shall have access to all records of the Employer necessary to make the determination;

3. **THAT** within twenty-four (24) hours of the issuing of this Order, the Employer shall post a copy of this Order at the workplace at 2627 Gordon Road, Regina, Saskatchewan, in a location where the Order is visible to and may be read by as many employees as possible, such posting to remain until the final determination of the applications;

4. **THAT** during the thirty (30) days next following the issuing of this Order, the Employer shall allow a representative of the Union to meet with each employee for a period of twenty (20) minutes separately and apart from other employees and the Employer during the employee's paid work time; the Employer shall make available a room for this purpose; the Union shall provide the Employer with at least four (4) hours notice of its intention to attend at the workplace for the purposes of such meetings;

5. **THAT** within twenty four (24) hours of receiving the written Reasons for Decision of this interim application, the Employer shall post a copy of the Reasons for Decision at the workplace in the same manner as in paragraph 3 of this Order;

6. **THAT** this Order shall remain in effect until such time as the Board disposes of the Applications filed under ss. 5(d), (e), (f) and (g) of *The Trade Union Act;* depending upon whether the final application for reinstatement of Trevor Holloway is determined in favour of the Union or the Employer, there may be no further obligation to employ Trevor Holloway from that time;

7. **THAT** the Board shall remain seized of this matter for the purposes of determining any issues associated with the implementation of this Order.

DATED at Regina, Saskatchewan, this **29th** day of **November, 2005.**

LABOUR RELATIONS BOARD

James Seibel
Chairperson