Labour Relations Board
Saskatchewan

VALERIE JONES and KENDRA MEMORY, Applicants v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION and HILL VIEW MANOR, Respondents

LRB File No. 144-06; November 8, 2006
Chairperson, James Seibel; Members: Hugh Wagner and Leo Lancaster

For the Applicants: Valerie Jones and Jim Yeaman
For the Certified Union: Greg Eyre
For the Employer: No one appearing

Decertification – Interference – Evidence established that employees regularly consulted manager to discuss garnering of support for application, manager advised employees that employees would make more money if union was removed and manager tolerated activities relating to application during work time – Manager not called as witness to rebut assertions – Board exercises discretion to dismiss application pursuant to s. 9 of *The Trade Union Act*.

Decertification – Interference – Applicants for rescission sole members of union's negotiating committee following termination of another employee - No collective agreement in place, no bargaining and no request from union to employer or vice versa to bargain – Employees have had no opportunity to experience working life with union representation under collective agreement – While not enough by itself for Board to disallow vote, factor to consider – Board exercises discretion to dismiss application pursuant to s. 9 of *The Trade Union Act*.

***The Trade Union Act*, ss. 5(k) and 9.**

REASONS FOR DECISION

Background:

[1] By a certification Order of the Board dated October 21, 2005 (LRB File No. 168-05) Saskatchewan Government and General Employees' Union (the "Union") was designated as the certified bargaining agent for a unit of all employees employed by Hill View Manor (the "Employer"), except the owner and three nursing positions. The Employer operates a special care home in Estevan, Saskatchewan. At all material

times, the Applicants, Valerie Jones and Kendra Memory, were employed by the Employer and were members of the bargaining unit.

[2] By application dated August 30, 2006, filed with the Board on September 20, 2006, the Applicants made application for rescission of the certification Order pursuant to s. 5(k)(ii) of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "*Act*"). There is no first collective agreement in place between the Employer and the Union. The application was filed during the statutory "open period."

[3] In its reply to the application, filed with the Board on September 29, 2006, the Union alleged that the Applicants do not represent a majority of employees in the bargaining unit and that the application was, in any event, filed as a result of employer influence.

[4] Section 9 of the *Act* provides as follows:

> *The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent.*

[5] In the application, the Applicants estimated there were 25 employees in the bargaining unit. The statement of employment, filed with the Board on September 9, 2006, lists 28 employees as being in the bargaining unit. Based upon the statement of employment as filed, the application was accompanied by purported evidence of support of a majority of employees in the bargaining unit.

[6] By letter to the Board dated October 3, 2006 and copied to each of the Applicants, the Union advised that it intended to dispute the accuracy of the statement of employment. By further letter to the Board dated October 5, 2006 and copied to each of the Applicants, the Union advised of its specific objections to the statement of employment, namely, that the names of Jim Yeaman and Marilyn Isabey should be removed therefrom and the names of Robin Ruziuk (sp.) and Laureen (sp.) Mason should be added thereto.

Evidence:

[7] The Applicant, Valerie Jones, testified on behalf of the Applicants. She has been employed with the Employer as a housekeeper since the facility opened approximately four years ago, but also volunteers to do other jobs at the facility. She usually works from 7 a.m. to 11 a.m., Monday to Friday. The personal care aides work 12-hour shifts, either 7 a.m. to 7 p.m. or 7 p.m. to 7 a.m.

[8] According to Ms. Jones, Hill View Manor is owned or operated by one Heather Haupstein, under the name of Hill View Manor Ltd., but other persons may also be involved in the ownership of the facility. Ms. Haupstein, perhaps with associates, also owns or operates special care homes in Weyburn and White City. The day-to-day management of Hill View Manor is performed by Eunice Masset (sp.), who is not a member of the bargaining unit and is not listed as an employee on the statement of employment filed on behalf of the Employer.

[9] In paragraph 6 of the application the Applicants stated the reasons why the Applicants submit that the certification Order ought to be rescinded, as follows:

> *Due to a constant turnover in employees since the union certification, resulting in a change in staff and conflicting views on whether employees wish to be represented by a union, it is fair that all employees have an opportunity to vote on this decision.*

[10] Ms. Jones testified that, even before the Employer was certified, in fact from the first time she heard that some employees were in favour of unionization, she was vocally opposed to the idea. While she said she is not anti-union, she feels that the workplace is too small for union representation. Ms. Jones and Ms. Memory comprise the Union's negotiating committee.

[11] Ms. Jones stated that union representatives advised the employees they could expect a 2% to 3% wage increase, but that union dues are 1.5%, the implication being that she feels it is not worth their while financially.

[12] Ms. Jones testified that the Employer had neither influenced her with respect to making the application for rescission nor provided her with any advice on how

to go about it. She learned how to make the application by contacting the Board and requesting the necessary forms.

[13] Ms. Jones stated that, while several of the employees had consulted the manager, Ms. Masset, because "they did not know what to do" or were confused about the application, she had never seen any representative of the Employer influence any of the employees in that regard. She said that all the employees are constantly talking about it in the workplace. In cross-examination by Mr. Eyre, she said that she could not recall raising the matter of decertification with Ms. Masset.

[14] According to Ms. Jones, she and Ms. Memory drafted the support card form. In garnering support for the application, Ms. Jones posted a notice of a meeting at a local lounge on the staff bulletin board. She said that only two persons signed support cards at the meeting. She admitted that she spoke with and distributed support cards to employees at work while both they and she were on paid work time, leaving her work duties to do so. She admitted that Ms. Masset would have known what she was doing and she did not hide anything from her.

[15] With respect to declaring the application form itself, Ms. Jones stated that she and Ms. Memory attended upon a commissioner for oaths at her bank for this purpose while Ms. Memory was on a paid work break. She did not know whether Ms. Memory had obtained permission to leave the workplace.

[16] Ms. Jones had no opinion or comment to make with respect to the changes to the statement of employment proposed by the Union.

[17] Donna McGillicky was called to testify by the Union. She has been employed at Hill View Manor since it opened performing personal care, laundry and housekeeping duties.

[18] Referring to employee timesheet records produced by the Employer for the period July 1 through September 30, 2006, Ms. McGillicky testified that the records showed that Jim Yeaman worked no hours during the period. She believed that Mr.

Yeaman is the accountant for all of the personal care facilities owned or operated by Ms. Haupstein and that he is based at the facility in Weyburn.

[19] With respect to Marilyn Isabey, Ms. McGillicky testified that there was no time sheet record for her. She said that Ms. Isabey regularly works at one of the other care homes operated by Ms. Haupstein and very infrequently works some relief shifts at Hill View Manor.

[20] Jenifer Sinclair was called to testify by the Union. She has worked at Hill View manor as a full-time personal care aide since May 2006. Ms. Sinclair testified that she engaged in a conversation with Ms. Masset some time in July, 2006 during which Ms. Masset volunteered to Ms. Sinclair words to the effect that, “if the Union went out, [the employees] would all make $10.00 an hour.” At that time Ms. Sinclair was making $8.00 per hour. She said that another employee with her overheard the statement.

[21] Ms. Sinclair testified that, on the day when Ms. Memory went with Ms. Jones to sign the rescission application, Ms. Memory asked Ms. Sinclair to cover for her while she was gone and also stated that she had permission from Ms. Masset to leave work.

[22] Loreen Mason was called to testify by the Union. She had been employed by Hill View Manor until she was terminated on September 7, 2006. The Union has grieved the termination. Ms. Mason had been on the Union’s bargaining committee and, since her termination, the Applicants are the only members of the committee. Beyond an initial meeting, there has been no bargaining with the Employer.

Arguments:

[23] On behalf of the Applicants, Ms. Jones argued that she had never seen a representative of the Employer approach any employee with respect to representation by the Union.

[24] With respect to the composition of the statement of employment, Ms. Jones said that she was not sure whether Mr. Yeaman or Ms. Isabey was employed by Hill View Manor.

[25] Ms. Jones said that the members of the bargaining unit had voted her onto the Union's negotiating committee.

[26] On behalf of the Union, Mr. Eyre argued that, with respect to the composition of the statement of employment, while Mr. Yeaman may be employed to do accounting for the three special care properties operated by Ms. Haupstein, he apparently does not record his hours through Hill View Manor and it was not disclosed who pays him. Although Mr. Yeaman was present at the hearing, sitting at the counsel table with Ms. Jones, he was not called to testify. With respect to Ms. Isabey, Mr. Eyre pointed out that she worked infrequently and irregularly at Hill View Manor and that she is employed full-time at one of the other facilities. He asserted that she did not have a sufficiently tangible connection with the workplace to have any interest in the outcome of the application. With respect to Ms. Mason, Mr. Eyre argued that she had worked at Hill View Manor until soon before the application for rescission was filed and that, given that the Union had grieved her termination, she has a strong connection with the workplace and should be added to the statement of employment. Mr. Eyre stated that the Union was making no representations with respect to Robin Ruziuk.

[27] With respect to the Union's allegation of employer interference, Mr. Eyre argued that, given that Ms. Jones testified that she had always been against the presence of the Union in the workplace, her being on the Union's negotiating committee, along with the other Applicant, Ms. Memory, can only be for the purposes of subverting the bargaining process. Mr. Eyre pointed out that Ms. Jones admitted that Ms. Masset knew that Ms. Jones was garnering support for the application for rescission while both she and employees she approached were on paid work time. He submitted that the evidence also showed that Ms. Masset had given Ms. Memory permission to leave the workplace to sign the application. Finally, Mr. Eyre stated that Ms. Sinclair had credibly testified that, not long before the Applicants would have decided to make the application, Ms. Masset had told Ms. Sinclair that she would stand to earn a substantially higher wage if the Union were removed. Ms. Masset was not called to rebut this testimony, even though the panel chairperson suggested to Ms. Jones that she could consider doing so.

[28] Mr. Eyre argued that employer influence is rarely overt and often subtle and that, taking together all of the circumstances in the present case, the application ought to be dismissed.

[29] In the alternative, Mr. Eyre submitted that, if a vote is ordered, Ms. Mason ought to be allowed to vote and the counting of the vote suspended until the grievance of her termination is determined.

[30] In support of his argument, Mr. Eyre referred to the following decisions of the Board: *Arnold v. United Steelworkers of America, Local 5917 and Westeel Ltd.*, [2005] Sask. L.R.B.R. 5, LRB File No. 275-04; *Walters v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Dimension 3 Hospitality Corporation o/a Days Inn*, [2005] Sask. L.R.B.R. 139, LRB File No. 238-04; *Desjarlais v. International Union of Painters and Allied Trades, Local 739 and L.J. Woodley Painting and Decorating Ltd.*, [2006] Sask. L.R.B.R. ---, LRB File No. 062-06; *Hilderman v. Saskatchewan Government and General Employees' Union and Twenty Four Hour Child Care Co-operative*, [2001] Sask. L.R.B.R. 518, LRB File No. 097-01.

Analysis and Decision:

[31] The issue to be determined is whether the Board ought to order a vote of the employees on the rescission application, given ostensible majority support for the application (see the discussion of the composition of the statement of employment, *infra*). In determining whether to grant a rescission vote, the Board must balance the democratic rights of employees to select a trade union of their own choosing (or whether to be represented by a union at all) against the need to ensure that the employer has not used its authoritative position to improperly influence the decision: *Shuba v. Gunnar Industries Ltd., et al.*, [1997] Sask. L.R.B.R. 829, LRB File No. 127-97.

[32] Such influence is rarely overt and is most often subtle, being tacit approval and support for the activities of the applicant such that the employer cannot be said to be neutral and detached: In *Nadon v. United Steelworkers of America and Xpotential Products Inc., o/a Impact Products*, [2003] Sask. L.R.B.R. 383, LRB File No. 076-03, application for judicial review dismissed, [2004] Sask. L.R.B.R. c-1 (Sask. Q.B.), the Board stated as follows at 387:

> *[18] It is necessary to be vigilant regarding the exercise of influence by an employer in such cases, because the cases are legion that such influence is seldom overt but often may be inferred from unusual circumstances and inconsistent events, meetings and conversations not adequately explained by innocent coincidence.*

[33] In the present case, while there is no evidence that the Employer initiated the application for rescission, in all the circumstances of the case, the Employer assisted or influenced the making of the application.

[34] The on-site manager, Ms. Masset, cannot be said to have been detached and neutral. She was regularly consulted by employees to discuss their confusion with respect to the garnering of their support for the application. A few weeks before the application was signed by the Applicants, Ms. Masset advised Ms. Sinclair that the employees could expect a substantial wage increase if the Union was removed. Ms. Sinclair struck us as a credible witness and Ms. Masset was not called to testify in rebuttal, although the panel chairperson suggested to Ms. Jones that could be done. Ms. Jones admitted that Ms. Masset knew that Ms. Jones was talking to and obtaining evidence of support from employees regarding the application while both she and they were actively at work – she was open about what she was doing; Ms. Masset appears to have at least tolerated, if not overtly encouraged, such activities. With the apparent permission of Ms. Masset, Ms. Memory was allowed to leave work to sign the application before a commissioner for oaths. Neither Ms. Memory nor Ms. Masset testified to rebut this assertion. The evidence was unclear as to whether Ms. Masset allowed Ms. Memory to prepare the application form on the equipment in her office – Ms. Jones asserted that she did not, while Ms. Sinclair maintained that she did – but, given the other uncontroverted evidence about Ms. Masset's attitude to the activities of the Applicants, it seems entirely possible.

[35] It is also somewhat strange, if not troubling, that Mr. Yeaman was included on the statement of employment by the Employer and was present throughout the hearing at the counsel table as instructing party to Ms. Jones, but did not testify to clarify the issues raised in the evidence about his connection with the Employer and his apparent role in relation to all the facilities operated by Ms. Haupstein.

[36] Added to these circumstances are the facts that there is no first collective agreement in place and there has been no bargaining and no request from the Union's negotiating committee of the Employer (or vice versa) to engage in bargaining. This may not be surprising in that the two Applicants are the only members of the Union's negotiating committee (following the termination of Ms. Mason). It is a rather unusual, if not irrational or bizarre, state of affairs. Certainly, the Employer has made no efforts in this regard despite the certification Order. The fact remains that the employees have had no opportunity to experience working life with union representation under a collective agreement. While this fact by itself is not enough for the Board to disallow a vote on an application for rescission, it is certainly a factor to consider, particularly where the Union's negotiating committee is comprised solely of the Applicants for rescission and neither they nor the Employer have made any effort to bargain in accordance with the certification Order. Ms. Jones made no effort to explain this state of affairs.

[37] On the whole of the evidence and the circumstances described above, we are of the opinion that we ought to exercise our discretion to dismiss the application for rescission pursuant to s. 9 of the *Act*, in that it was made in whole or in part on the advice of, or as a result of influence of or interference by the Employer.

[38] In the event we are wrong in our determination with respect to the foregoing issue, then the issue of the composition of the statement of employment for the purposes of determining whether there is majority support for the application would remain. We wish to point out that, notwithstanding any combination of excluding Jim Yeaman or Marilyn Isabey from, or including Loreen Mason on, the statement of employment, the Applicants have filed ostensible majority support and a vote would have been ordered. On the evidence, we would have decided that the names of Jim Yeaman and Marilyn Isabey are not properly on the statement and should be removed.

[39] In our opinion, while Mr. Yeaman may be employed in some capacity in association with the facilities operated by Ms. Haupstein, there is no evidence that he is in the employ of Hill View Manor – the records produced by the Employer show no hours worked by him for Hill View Manor during approximately 3 months prior to the filing of the application. We draw a negative inference in this regard from the fact that he was

represented at the hearing as an instructing party to Ms. Jones, was present with her throughout the hearing and was not called to testify to clarify his status.

[40] With respect to Ms. Isabey, we agree with the Union that her connection with Hill View Manor is so tenuous that she has no real or sufficient interest in the outcome of the application.

[41] With respect to whether Loreen Mason ought properly to have been included on the statement of employment and the counting of the vote delayed until after the grievance of her termination is determined, the precedent cited by Mr. Eyre in *Hilderman*, *supra*, was an exceptional case where the scheduling of the arbitration proceeding was imminent. In that circumstance, the Board suspended the counting of the vote for a period of about ten weeks. In the present case, if the arbitration of the grievance were scheduled for hearing or heard prior to a vote being taken, then application could be made to accommodate that circumstance.

[42] In any event, in all the circumstances, if we had ordered a vote in this case, we would have delayed the vote until at least 180 days after a first collective agreement had been concluded.

[43] In the foregoing circumstances, we have determined that, in the exercise of our discretion pursuant to s. 9 of the *Act*, the application is dismissed.

DATED at Regina, Saskatchewan, this **8th** day of **November, 2006**

LABOUR RELATIONS BOARD

James Seibel
Chairperson