Labour Relations Board
Saskatchewan

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 333, Applicant v. LUTHERAN SUNSET HOME OF SASKATOON, Respondent

LRB File No. 045-07; June 27, 2007
Chairperson, James Seibel; Members: Bruce McDonald and Clare Gitzel

For the Applicant: Drew Plaxton
For the Respondent: Larry Seiferling, Q.C.

Remedy – Interim order – Criteria – Interim order intended to be preservative rather than remedial – Even if facts alleged by applicant true, duty to bargain in these circumstances very far from clear – Applicant has not demonstrated arguable case – Board dismisses application for interim relief.

***The Trade Union Act*, ss. 5.3, 11(1)(a), 11(1)(c) and 18(r).**

REASONS FOR DECISION

Background and Facts:

[1] Lutheran Sunset Home of Saskatoon (the "Employer") is incorporated by a private act of the Legislature reported at S.S. 1967, c. 98. Under the registered business name of "Luthercare Communities" the Employer owns and operates several seniors' special care and low-income homes in Saskatoon, some of which are funded in whole or in part through the Saskatoon Health Region and others that are privately funded through rental and other payments by the residents of the facility (it is unclear whether the latter are subsidized by government). Luther Special Care Home (the "Home") is of the former type of facility, and Luther Tower (the "Tower") is of the latter type.

[2] Service Employees International Union, Local 333 (the "Union"), filed an application with the Board alleging that the Employer committed unfair labour practices pursuant to ss. 11(1)(a) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") in laying off or terminating the employment of certain employees working at the Tower. The Union also filed an application for interim relief pursuant to s. 5.3 of the *Act* seeking an order, *inter alia*, to have the Employer cease its activities and reinstate the affected

employees. In support of the interim application the Union filed two affidavits of Shawna Colpitts, a national representative of the Union, dated May 7 and May 16, 2007 respectively. In reply, the Employer filed the affidavit of B. J. (Bernie) McCallion, the Employer's CEO, dated May 9, 2007.

[3] The Union holds collective bargaining certificates in relation to several of the facilities operated by the Employer including the following certification Orders in relation to the Home and the Tower:

> *(1) June 12, 1985; LRB File No. 155-85: "…all employees of Lutheran Sunset Home of Saskatoon operating under the names and style of Lutheran Sunset Home and Luther Tower except [named exceptions]….";*
>
> *(2) October 28, 2002; LRB File No. 204-02: "…all health services providers employed by … Lutheran Sunset Home of Saskatoon …."*

[4] The second certification Order was issued as a result of reorganization in the health care sector pursuant to *The Health Labour Relations Reorganization Act*, S.S. 1996, c. H-0.03 and *The Regional Health Services Act*, S.S. 2002, c. R-8.2, following the so-called "Dorsey Report," creation of the health districts and, subsequently, the larger health regions. The term "health services provider" is a term of art pursuant to the former statute and regulations.

[5] Saskatchewan Association of Health Organizations ("SAHO") is the representative employers' organization that bargains collectively on behalf of employers in the health care sector. The Employer operating as Luther Special Care Home is an affiliate of SAHO and a party to the provincial collective agreement bargained by SAHO with the Union covering the Union's members employed by certain regional health authorities and affiliates. The present collective agreement is for the term April 1, 2005 to March 31, 2008 (the "collective agreement"). The collective agreement contains provisions covering lay-off and contracting out.

[6] For the past many years, the Tower contracted with the Home for unionized employees of the Home to work at and to provide certain services to the

Tower including food services, light housekeeping and maintenance. While the Home receives financing from the provincial government for a certain number of staff positions at the Home, it does not receive such funding in relation to the additional staff positions for employees of the Home who work at the Tower pursuant to this contractual arrangement. Approximately 40 employees are affected by this arrangement. The Employer considers this arrangement to be a "contracting in" of additional work to the Home as the Home performs more work and has more employees than are covered by its provincial funding.

[7] However, lately, due to certain labour cost increases under the collective agreement, the Employer alleges that the contractual arrangement with the Home to provide the employees to perform this labour is resulting in a monthly financial loss of several thousand dollars for the Tower. Rather than increasing the cost to residents to cover the losses, the Tower has cancelled the contract with the Home and retained an external contractor or contractors to provide the services at a lower cost.

[8] Recognizing that this would result in a reduction of the staff complement at the Home, the Employer opened discussions with the Union to manage the situation in accordance with the collective agreement. Before the parties achieved a negotiated resolution, the Employer commenced a staged lay-off of certain employees at the Home. The Union filed the present application with the Board and a grievance or grievances under the collective agreement.

[9] In the present application the Union alleges that the Employer has failed to bargain collectively as required by the *Act* by refusing to negotiate the impending organizational change and unilaterally implementing the reorganization of the work.

[10] The Union seeks an interim order pending hearing and determination of the application prohibiting further lay-offs and reinstating the affected employees. The Employer alleges that, if it is forced to cancel the agreements made with external contractors, it will suffer substantial economic loss.

Arguments:

[11] Counsel for each party filed a substantial book of authorities in support of their respective arguments which we have reviewed and appreciate. Prior to the commencement of arguments, Mr. Seiferling, counsel on behalf of the Employer, indicated that he intended to argue that the Tower was not a unionized workplace and was not bound by the collective agreement and that the Board did not have jurisdiction to determine the application where the issues fell under a collective agreement and had been grieved. Following are very brief summaries of the respective oral arguments advanced by each counsel.

[12] Mr. Plaxton, counsel on behalf of the Union, argued that the Employer had circumvented the Union and ignored its obligations under the collective agreement and the *Act* to negotiate the changes it had undertaken. While counsel recognized that the Board's jurisprudence regarding the disclosure of information affecting the Union and the represented employees during the term of the collective agreement and "mid-term bargaining" was not extensive or very well developed, he pointed out that an employer has a duty to negotiate with the union from time to time "for the settlement of disputes and grievances of employees covered by the agreement" (see, ss. 2(b) and 11(1)(d) of the *Act*).

[13] Counsel submitted that the Union was not asking the Board to enjoin the Employer from committing a breach of the collective agreement, but to return the parties to the status quo that existed prior to the Employer's alleged failure to bargain. He stated that the Employer's failure to respond to the Union's requests for information in a timely fashion was arguably a breach of s. 11(1)(c) of the *Act*.

[14] Counsel submitted that the Board has exclusive jurisdiction to determine whether any worker is an "employee" within the meaning of the *Act* and a member of a trade union, whether a collective agreement is in operation and whether any party is bound by a collective agreement (see s. 18(r) of the *Act*). Therefore, counsel submitted, the Board has the exclusive jurisdiction to determine whether the Employer has an obligation to negotiate with the Union respecting the termination or lay-off of the affected employees.

[15] Counsel referred to the two-part test used by the Board in determining whether to grant interim relief -- whether there is an arguable case and the balance of labour relations convenience or harm – and submitted that it was met in the present case.

[16] Counsel submitted that the Board ought not to defer to arbitration of the grievances because a collective agreement arbitrator could not compel the Employer to bargain collectively regarding the issues.

[17] Counsel argued that the Employer is in a better position to bear the economic loss that would be occasioned by granting interim relief as opposed to that which would be sustained by the affected employees if relief is refused. The economic loss occasioned to the Employer would be as a result of its precipitous actions that could have been avoided by negotiating with the Union in a timely fashion.

[18] Counsel for the Employer pointed out that the Union's application is only in respect of an alleged breach of ss. 11(1)(a) and (c) and not in respect of successorship (s. 37), technological change (s. 43) or unilateral change of terms and conditions of work (s. 11(1)(m)). Counsel argued that the Union's submissions focused on alleged obligations under the collective agreement rather than the *Act*. Counsel submitted that the affected employees were employees of the Home, were laid off by the Home not the Tower and were covered by the certification Order and collective agreement covering the Home -- their rights on lay-off would be determined by the collective agreement and any dispute about the application of the agreement would properly be the subject of grievance and arbitration. Conversely, counsel argued, if the affected employees were employees of the Tower (which was not admitted), they were not covered by a certification order nor did they have any collective agreement rights.

[19] Accordingly, counsel argued, the obligation to negotiate with the Union regarding contracting-in or contracting-out is an obligation that can only arise under the collective agreement – the issue is not, as the Union has presented it, whether there is an obligation to negotiate lay-offs or contracting out under the *Act* when there is no alleged technological change and the Board does not have the jurisdiction, or in any

event should not grant interim relief, to enjoin the Employer from contracting out work or laying off employees at the Home as these are collective agreement issues.

[20] Counsel submitted that in the circumstances the Union does not have an arguable case. If the issue is whether the Employer can contract out work at the Tower formerly performed by employees of the Home, it is clearly an issue regarding the interpretation of the collective agreement and ought to be left to an arbitrator. Even if the Board must ultimately determine whether the Tower is covered by the 1985 certification Order and it does so find then if the affected employees are employees of the Tower rather than the Home the contracting out still occurs under the collective agreement and the lawfulness of same is a matter for arbitration.

[21] Furthermore, counsel argued, the balance of labour relations harm lies in favour of the Employer: its ongoing financial losses, if forced to cancel the arrangements with external contractors, will be substantial not to mention the damage to its reputation in the business community. The Union has not agreed to pay for those losses in the event the application is not successful. Arguably, the Board cannot award damages to the Employer for those losses if the application is not successful. Conversely, however, if the Union's grievance on contracting out and improper lay-off is successful, an arbitrator clearly can award reinstatement and damages against the Employer.

[22] In rebuttal, counsel for the Union argued that the Union's application was not about the contracting out, but rather "the refusal to bargain mid-term regarding the fundamental change that was the contracting out." The Employer neglected or refused to bargain with the Union until its plans were well underway. Counsel further argued that economic loss was not labour relations harm *per se*. The real issue of labour relations harm in the present case is the undermining of the Union and its ability to negotiate with respect to major or fundamental workplace changes.

Statutory Provisions:

[23] 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;

. . .

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) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;

. . .

(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;

. . .

18. The board has, for any matter before it, the power:

(r) to decide any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether:

(i) a person is a member of a trade union;

> *(ii) a collective agreement has been entered into or is in operation; or*
>
> *(iii) any person or organization is a party to or bound by a collective agreement;*

Analysis and Decision:

[24] In the present case, we have determined that the application for interim relief ought not to be granted. An Order dismissing the interim application was issued on May 29, 2007, with these Reasons for Decision to follow.

[25] In the present case, the Union's application is limited to the issue of whether the Employer committed an unfair labour practice or practices in violation of ss. 11(1)(a) and (c) of the *Act*. More particularly, the Union alleges that the violation is due to a failure by the Employer to bargain collectively with respect to the treatment of the employees provided by the Home to the Tower under a contract to provide certain services at the Tower who are affected by a decision to cancel that arrangement and contract out that work to other parties. The Union has not applied with respect to the successorship or technological change provisions of the *Act.* The Employer takes the position that it has no duty to bargain such matters during the term of the collective agreement and that the treatment of the affected employees is covered by the provisions of the collective agreement. The Employer further submits that, as the Union has grieved the lay-off of certain affected employees, the issue of whether the Employer has followed the collective agreement ought to be left to arbitration. The Union seeks interim relief preventing further lay-offs, reinstating those employees already laid off and returning the parties to the status quo that existed prior to the Employer's actions.

[26] The test used by the Board in determining whether to grant interim relief pursuant to s. 5.3 of the *Act* and the rationale behind the test has been set out in numerous decisions of the Board. It was succinctly stated as follows 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, at 194:

> *The Board is empowered under ss. 5.3 and 42 of the Act to issue interim orders. The general rules relating to the granting of interim*

> *relief have been set down in the cases cited above. Generally, we are concerned with determining (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. (see Tropical Inn, supra, at 229). This test restates the test set out by the Courts in decisions such as Potash Corporation of Saskatchewan v. Todd et al., [1987] 2 W.W.R. 481 (Sask. C.A.) and by the Board in its subsequent decisions. In our view, the modified test, which we are adopting from the Ontario Labour Relations Board's decision in Loeb Highland, supra, focuses the Board's attention on the labour relations impact of granting or not granting an interim order. The Board's power to grant interim relief is discretionary and interim relief can be refused for other practical considerations.*

[27] Some cases where the Board has since reiterated and confirmed this test include the following: *Chelton Suites Hotel*, *supra*; *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 Government and General Employees' Union v. Saskatoon Group Home Inc.*, [2000] Sask. L.R.B.R. 22, LRB File Nos. 011-99 to 029-99; *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; *Heinze Institute*, *supra*; *Del Enterprises, o/a St. Anne's Christian Centre*, *supra*; *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; *Saskatchewan Joint Board, Retail, Wholesale and Department store Union v. Starbucks Coffee Canada*, [2005] Sask. L.R.B.R. 593, LRB File Nos. 183-05, 184-05 & 185-05.

[28] On an application for interim relief we are not charged with determining whether the allegations in the application have been proven but rather with whether the status quo should be maintained pending the final determination of the main application. This is in keeping with the principle that an interim order is intended to be preservative rather than remedial. As the Board observed in *Chelton Suites Hotel*, *supra*, an interim order must be consonant with the preservation and fulfillment of the objectives of the *Act* as a whole and of the specific provisions alleged to have been violated. The Board stated at 443:

> *Any interim order must first and foremost be directed to ensuring the fulfillment of the objectives of the Act pending the final hearing and determination of the issues in dispute. This includes not only the broad objectives of the Act but also the objectives of those specific provisions alleged to have been violated.*

[29] We agree with counsel for the Union as outlined in his oral submission at the hearing that whether or not there is a duty in any particular case to bargain certain issues during the term of a collective agreement is a relatively undeveloped concept in the Board's jurisprudence, aside from a duty to negotiate from time to time with respect to grievances.

[30] In the circumstances of the present case, where, for the purposes of argument, the parties seem content to agree that the affected employees are ostensibly covered by the collective agreement, but without our actually deciding so, logically their treatment is governed by the collective agreement. The issue of the alleged failure to bargain is a different matter but, even if the facts alleged by the Union in its application are true, the duty to bargain in these circumstances is very far from clear.

[31] We have determined that the issue raised by the Union does not demonstrate an arguable case. Further, had it been necessary to so determine, we would likely have found that the balance of labour relations harm favoured the Employer in the present case.

[32] The application for interim relief is dismissed.

DATED at Regina, Saskatchewan, this **27th** day of **June, 2007**.

LABOUR RELATIONS BOARD

James Seibel, Chairperson