Labour Relations Board
Saskatchewan

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 336, Applicant v. CHINOOK SCHOOL DIVISION NO. 211 OF SASKATCHEWAN, Respondent

LRB File No. 045-08, September 9, 2008
Chairperson, Kenneth G. Love, Q.C.; Members: Hugh Wagner and Ken Ahl

For the Applicant: Keir Vallance
For the Respondent: James McLellan

Certification – Practice and procedure – Statement of employment – In order to determine whether casual worker has sufficiently substantial employment relationship to be included on statement of employment, Board looks at real employment connection and monetary interest in outcome of certification application – Board applies test to casual employees, thereafter removing certain casual employees from statement of employment.

***The Trade Union Act*, ss. 5(a), 5(b) and 5(c).**

REASONS FOR DECISION

Background:

[1] Service Employees International Union, Local 336 (the "Union") has applied, pursuant to ss. 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), for an order to be designated as the certified bargaining agent of a unit of employees of Chinook School Division No. 211 of Saskatchewan (the "Employer").

[2] The description of the proposed bargaining unit is as follows:

> *All employees of the Chinook School Division No. 211 of Saskatchewan, in the following classifications: education assistants, youth workers, office managers, librarian technicians, and substitutes in any of the said classifications, employed at Oman School.*

[3] The Union estimated there were 23 employees in the proposed bargaining unit. In its reply to the application, the Employer stated there were 20 employees in the proposed unit, sought no other exclusions and did not dispute the appropriateness of the unit. The statement of employment lists 25 persons. The Union objected to three persons named on the statement of

employment. The parties agreed that one of those persons, Bev Argatow should be removed from the statement of employment, leaving only two employees at issue, Michelle Haugan and Barb Weibe, both of whom were substitutes.

[4] The parties provided one Exhibit, R-1 which was a list of casual support staff who worked at Oman School during the period September, 2007 to April, 2008. The parties agreed that this table provided all of the information the Board would need to determine the qualifications of the two disputed individuals to be included in the proposed bargaining unit.

[5] Exhibit R-1 provided the following information regarding the two individuals at issue:

Facility	Absent Date	Absent Employee	Absent Hours	Substitute Job	Substitute Name	Sub Hours
Oman School	4/18/2008	Springer, Louise	6	EA	Haugan, Michelle (Bonita)	4.5
Oman School	4/17/2008	Springer, Louise	6	EA	Haugan, Michelle (Bonita)	5.25
Oman School	11/30/2007	Hornung, Jolene	6	EA	Haugan, Michelle (Bonita)	6
Oman School	11/29/2007	Hornung, Jolene	6	EA	Haugan, Michelle (Bonita)	6
Oman School	1/30/2008	Rya, Shelley	3.5	Secretary	Wiebe, Barb	3.5
Oman School	12/14/2007	Rya, Shelley	3.5	Secretary	Wiebe, Barb	3.5
Oman School	9/26/2007	Rya, Shelley	7	Secretary	Wiebe, Barb	7
Oman School	9/7/2007	Rya, Shelley	7	Secretary	Wiebe, Barb	7

[6] The parties were not agreed as to the proper test the Board should apply to determine if the disputed employees should be included on the Statement of Employment. Mr. Vallance for the Union argued that the test should be the number of shifts worked by the employee in the 90 days prior to the application. He did not agree with the employer that the number of shifts the Board should consider as sufficient during that period, but noted that one employee, Rachel Wallace, was excluded from the statement of employment, with the agreement of the Employer, who had worked four shifts since September, 2007. However, Exhibit R-1 also listed Ms. Wallace as being an employee who was being replaced as an employee in April of 2008. No

explanation was provided by either party with respect to this other than the agreement that she should not be included on the statement of employment.

[7] James McLellan for the Employer argued that the test should be if the employee had worked three shifts during the school year which commenced in September of 2007.

[8] Little additional evidence was provided to the Board who were asked by the parties to choose between the two positions advocated by the parties. Because of the restricted nature of the evidence in this case, and hence the Board's ability to consider all of the factors which it would normally consider in respect of its determination of whether or not the disputed employees had a sufficient connection to the workplace to allow them to participate in the unit, this decision should not be relied upon as a precedent for any further decisions of the Board regarding whether or not a person is an employee for the purposes of a certification application.

[9] In support of his arguments, counsel for the Union referred to the following decisions of the Board: *Communications, Energy & Paperworkers Union of Canada v. Prairie Publishing Ltd.,* [1999] Sask. L.R.B.R. No. 44, LRB File No. 163-99; *Service Employees' International Union, Local 299 v. Vision Security and Investigation Inc.,* [2000] Sask. L.R.B.R. 147, LRB File No. 228-99; *Public Service Alliance of Canada v. Aramark Canada Ltd.*, [2001] Sask. L.R.B.R. 891, LRB File No. 202-01; *Service Employees International Union, Local* 333 *v. Bethany Pioneer Village Inc. (c.o.b. Birch Manor)*, [2007] Sask. L.R.B.R. No. 25, LRB File No. 036-06.

Analysis and Decision:

[10] The only issue in the present case is the status of the two persons disputed by the Union with respect to the question of majority support for the application. The question is essentially one of mixed fact and law depending upon the particular circumstances of each case. Whether a person is an "employee" within the meaning of the *Act* in respect of any kind of application made under the *Act* is within the exclusive jurisdiction of the Board.

[11] The test, and basis for the test, as to whether a person nominally identified as a "casual" worker has a sufficiently substantial employment relationship to be considered an "employee" for the purposes of determining the issue of the level of support for an application for certification was outlined by the Board in *Canadian Union of Public Employees, Local 3077 v. Lakeland Regional Library Board*, [1987] Oct. Sask. Labour Rep. 74, LRB File No. 116-86 as follows, at 74:

> *It has long been established that larger bargaining units are preferred over smaller ones, and that in an industrial setting all employee units are usually considered ideal. As a general rule the Board has not excluded casual, temporary or part-time employees from the bargaining unit.*
>
> *However, the Board has also applied the principle that before anyone will be considered to be an "employee", that person must have a reasonably tangible employment relationship with the employer. If it were otherwise, regular full-time employees would have their legitimate aspirations with respect to collective bargaining unfairly affected by persons with little real connection to the employer and little, if any, monetary interest in the matter.*

[12] Accordingly, the Board has looked particularly at two aspects: real employment connection and monetary interest in the outcome. This dictum has been applied since by the Board in numerous decisions including, to name a few, *Retail, Wholesale Canada, a Division of the United Steelworkers of America v. United Cabs Ltd.,* [1996] Sask. L.R.B.R. 337, LRB File No. 115-96*, Vision Security*, *supra*, and *Public Service Alliance of Canada v. Aramark Canada Ltd.*, [2001] Sask. L.R.B.R. 891, LRB File No. 202-01, where the standard was referred to as a "sufficiently tangible employment relationship."

[13] In *Aramark Canada Ltd.* and *Vision Security*, both *supra*, as in many other cases of this kind, the Board engaged in an analysis of the number of hours worked by the persons in dispute over a particular – but not necessarily the same in every case – period of time, as a significant measure of connection with the workplace in order to determine the tangibility of the employment relationship. In each case the Board determined what it deemed to be a reasonable ratio of hours worked over the period of time as evidence that a sufficiently tangible employment relationship existed and that the particular individual had a sufficiently reasonable monetary interest in the matter but recognized that, while this might be the best way to

determine the issue, it may appear to be somewhat arbitrary. In *Vision Security, supra*, the Board stated as follows at 125:

> *In Retail, Wholesale Canada, A Division of the United Steelworkers of America v. United Cabs Ltd., [1996] Sask. L.R.B.R. 337, LRB File No. 115-96, the Board acknowledged that the process for determining "employee" status for casual or on-call staff may be decided by criteria that appear somewhat arbitrary. Nevertheless, the Board is required to make the decision using some criteria that captures the majority of persons who have a tangible employment relationship with the employer.*

[14] In *Vision Security, supra*, at 155, the Board observed that different criteria may pertain in different cases depending on the facts, as follows:

> *The criteria adopted by the Board in each case must be responsive to the facts of each situation and the Board is not bound to adopt identical criteria in every case dealing with casual employees. Because of this uncertainty regarding employee status, parties are encouraged to seek a determination of employment criteria early in the process of a certification through a request for a preliminary determination.*

[15] In *Vision Security, supra*, the Board determined that the threshold should be 35 hours worked in the fourteen-week period prior to the filing of the application for certification, based on the nature of casual work in the security industry. The Board stated as follows at 154:

> *In this case, the Board has determined that any person who worked 35 hours in the 14 week period covered by the Ceredian documents filed by the Board should be included on the statement of employment. This would include employees who worked one football game every two week period. In our view, in this industry, this is a minimal standard. It takes into account the casual nature of the events work by including many casual employees, while not unfairly interfering with the legitimate aspirations of regular full-time and part-time employees to be represented by a trade union.*

[16] Similarly, after considering the nature of the industry, in *Lakeland Regional Library Board*, *supra*, the Board included substitute librarians, who replaced regular branch librarians during annual holidays, sick days, bereavement and other leaves who worked a

minimum of 30 hours in the calendar year of the application. However, in more casual labour markets, such as the taxi industry, the Board has set different criteria for determining employment status. In *United Cabs, supra,* the Board included employees who had worked at least two shifts per week over the three month period prior to the certification date.

[17] In *Bethany Pioneer Village, supra,* this Board refused to include employees who had a limited connection to the workplace. In that case, the employees which were in dispute worked between 0 hours to 12.5 hours. The employment records in that case disclosed that none of them earned more than $170.00 in total during this period. The Board ruled that:

> *[T]o include them on the statement of employment with respect to the representation issue would be to contribute to the potential defeat of the aspirations of legitimate employees with a real interest in the outcome.*

[18] To be included on the statement of employment, employees, as noted in the cases referred to above, must have more than a passing connection to the workplace. The factors that are important in this case, would be the norms, if any, within the industry under review regarding connection to the workplace *i.e:* a tangible connection to the workplace over time, as well as a financial stake in the outcome of the application.

[19] As in the *Lakeland* case, *supra*, the appropriate period to determine that connection to the workplace is the school year. That is the period of connection of substitutes, and the majority of employees in the workplace. They are engaged and work through the school year, with changes in employment normally occurring at the end of a school year or term.

[20] While both Michelle Haugan and Barb Weibe do not have a significant connection to the workplace over the period of the school term, it is apparent from Exhibit R-1 that they have both worked consistently as substitutes at Oman School during the whole of the school term. In each case they have worked on four occasions as replacements from September, 2007 to April, 2008. As a result, the Board finds, for the purposes of this decision, that they have a sufficient community of interest with the employees of Oman School to be included on the statement of employment.

[21] The Union has not filed evidence of support for the application for certification from a majority of the employees in the proposed bargaining unit, but has filed support with respect to more than twenty five percent of the employees in that unit. An order will issue directing a vote of the employees in the proposed bargaining unit.

DATED at Regina, Saskatchewan, this **9th** day of **September, 2008.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson