Labour Relations Board
Saskatchewan

NICOLE WHALLEY, Applicant v. SEIUWEST.CA, Respondent and OAK TREES AND ACORNS CHILD CARE CENTRE INC., Employer

LRB File No. 014-09; April 13, 2009
Chairperson, Kenneth G. Love, Q.C.; Members: Clare Gitzel and Bruce McDonald

For the Applicant: Nicole Whalley and Deb Loehndorf
For the Certified Union: Keir Vallance
For the Employer: Scott Newell

Decertification – Interference – Union alleges Employer interference and influence in bringing application, but provides no evidence of same – Board allows application and orders vote pursuant to s. 6 of *The Trade Union Act*.

***The Trade Union Act*, ss. 3, 5(k), 6 and 9.**

REASONS FOR DECISION

Background:

[1] Nicole Whalley (the "Applicant") applied for a rescission of the Order of the Board dated January 22, 2004, designating Service Employees International Union, Local 333 (the "Union") (as the Union was then constituted) as the certified bargaining agent for all employees employed by Oak Trees and Acorns Child Care Centre Inc., (the "Employer") in Saskatoon, Saskatchewan, except the director and the assistant director. The effective date of the collective agreement in force between the Union and the Employer was April 1, 2006. The application was filed on February 23, 2009, during the open period mandated by Section 5(k)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), along with evidence of support from more than 45% of the employees in the bargaining unit. In the application, the Applicant stated numerous reasons why she brought the application for decertification.

[2] In response to the application, the Employer filed a Statement of Employment listing eight (8) individuals in the bargaining unit.

[3] In its reply to the application, the Union alleged that there were nine (9) employees in the collective bargaining unit, it denied the allegations of the Applicant

regarding its representation of employees, and alleged breaches of confidentiality by the Union, and it alleged that the application was 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.

[4] The application was heard on March 19, 2009 in Saskatoon.

[5] The Applicant was assisted at the hearing by a number of her co-workers. Their evidence related to a number of situations in the workplace where they had not been properly informed by their union, and lead evidence that the results of a secret vote concerning ratification of a wage change following provision of additional government funding to community based organizations and a raise in fees charged to day care parents had been released by the Union shortly after it having been conducted. The Applicant also testified that she no longer wished to be represented by the Union and felt that the working environment had changed in a negative fashion since the introduction of the Union.

[6] The Board appreciates that it takes a good deal of fortitude for employees to take on their Union and to appear without counsel before the Board in a hearing where the Union and the Employer are both represented by experienced and able counsel.

[7] Both the Applicant's and Deb Loehndorf's testimony was consistent concerning situations in the workplace where they had not been properly informed by their Union, and lead evidence that the results of a secret vote concerning ratification of a wage change following provision of additional government funding to community based organizations and a raise in fees charged to day care parents had been released by the Union shortly after it having been conducted.

[8] The Union also called Leta Atkinson and Shari Leachman as witnesses. Ms. Atkinson was the current service representative for the employees. Ms. Leachman was a co-worker of the Applicant and Ms. Loehndorf and was the Secretary-Treasurer for the bargaining unit. Both witnesses denied the allegations concerning representation by the Union as alleged by the Applicant and her witness.

Relevant Statutory Provisions:

[9] Relevant statutory provisions include ss. 3, 5(k), 6 and 9 of the *Act*, which provide as follows:

> 3 *Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
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> *. . .*
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> *5 The board may make orders:*
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> *. . .*
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> *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*
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> *(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or*
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> *(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;*
>
> *notwithstanding a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
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> *. . .*
>
> *6(1) Subject to subsections (1.1) and (2), in determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board must direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.*
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> *6(1.1) No vote shall be directed pursuant to subsection (1) unless the board is satisfied, on the basis of the evidence submitted in support of the application and the board's investigation in respect of that evidence, that at the time of the*

> *application at least 45% of the employees in the appropriate unit support the application.*
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> *. . .*
>
> *9 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.*

Analysis and Decision:

[10] In *Hutchinson v. United Food and Commercial Workers Union, Local 1400*, 2009 CanLII 7784 (SK L.R.B.) (LRB file No. 006-09), the Board dealt with a similar situation to the present case.

[11] As noted in the *Hutchinson* case, *supra*, Employees' s. 3 rights have now been buttressed by the Legislature in the recent amendments to the *Act* and require that the Board "must" order a secret vote when the support threshold of 45% is reached. This threshold applies equally to certification applications and decertification applications.

[12] Therefore, unless the Board is satisfied that s. 9 applies, and the application should be rejected or dismissed because the application "is made in whole or in part on the advise of, or as a result of influence of or interference or intimidation by, the employer or the employer's agent", a vote must be ordered.

[13] In this case, no evidence has been provided to the Board which would satisfy it that s. 9 should be invoked.

[14] Absent other considerations, where s. 9 does not apply, the Board is now required to order a vote when "the board is satisfied, on the basis of evidence submitted in support of the application, and the board's investigation in respect of that evidence, that at the time of the application at least 45% of the employees in the appropriate unit support the application." That threshold of support has been met in this case.

[15] The Union cited a number of decisions of the Board which were directed to rebuttal of the employees allegations regarding breach of confidentiality by the Union and it failure to represent them or to keep them informed in respect of matters which affected them. Those cases are of little assistance in this case, since the reasons for wishing to be decertified, as outlined by the Applicant, are that it does not wish to continue to be represented by the Union for the purposes of collective bargaining.

[16] The Union also cited cases where the Board had found the employees reasons for seeking decertification to be implausible or not borne out by the evidence. Such was not the case here. In *James 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, the Board outlined the types of circumstances to be examined to make this determination, at 167 and 168:

> *[85] In order to determine whether there is such employer involvement, the Board has typically examined a number of circumstances, the significance or importance of which will vary from case to case. One of the factors which is often examined and bears relevance to this case is the applicant's reasons for bringing the application. When those reasons are not plausible or credible, the Board may also go on to examine other suspicious or unusual circumstances including, but not limited to, the circumstances surrounding the applicant's hiring, aspects of the applicant's relationship with the employer, the timing of the application and how the application was financed. Once the Board has examined the whole of the circumstances it can determine whether it will draw an inference that the employer has intimidated, interfered with or influenced the bringing of the application.*

[17] The Union did not provide any evidence which suggested any unusual or suspicious circumstances in the bringing of the application. While it sought to discredit the Applicant's reasons for bringing the application, the wish by the Applicant and Ms. Loehndorf not to continue to be represented by the Union was clear.

[18] Again, there was no evidence presented of any involvement by the Employer, no evidence of anti-union animus, nor past unfair labour practices.

[19] In *Wells v. Remai Investment Corporation and United Food and Commercial Workers, Local 1400*, [1996] Sask. L.R.B.R. 194, LRB File No. 305-95, the Board stated that it "will generally assume that all employees are of sufficient intelligence

and fortitude to know what is best for them and is reluctant to deprive them of an opportunity to express their views by way of a secret ballot vote." The Legislature has now provided further express direction to the Board that they must, where sufficient support has been provided, order a secret vote.

[20] Also, as noted on page 100 of the decision in *Betty L. Wilson v. Remai Investment Corporation and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union,* [1990] Fall Sask. Labour Rep. 97, LRB File No. 088-90, the Board quoted from its decision in *Reese v. Holiday Inn Ltd.,* [1989] Summer Sask. Labour Rep. 84, LRB File Nos. 207-88 & 003-89, wherein the Board stated:

> *When the Board dismisses an application for decertification under Section 9, it generally hears evidence connecting the employer in some way to one or more of the employees who initiate or pursue the application, or to the gathering of evidence of employee support.*

[21] Again, in this case, there has been no such evidence linking the Employer in any way to the gathering of support for the application by the Applicant or her supporters.

[22] As in an application for certification, the overarching reason for wishing to decertify a union is founded in the provisions of s. 3 of the *Act,* and the *Canadian Charter of Rights and Freedoms*, that is, a honestly held desire to either associate with other employees to be represented by a Union for the purpose of collective bargaining, or, the converse of that, in the case of a decertification, the honestly held desire not to associate with other employees for the purpose of collective bargaining. In this case, as testified to by all of the Applicant witnesses, they held an honest desire not to be represented by the Union and said that they enjoyed the support of other members of the bargaining unit in this desire.

[23] Based on the evidence provided by the Union, there is nothing in the employees' reasons for bringing the application, nor is there any suspicious or unusual circumstances which would allow the Board to draw any inference that there was Employer involvement with the application.

[24] The Board, pursuant to sections 5(k) and 6 of the *Act*, hereby orders that a vote by secret ballot be conducted among all employees, who were employed within the said unit as of February 9, 2009, and who remain employed as of the date of the vote, to determine whether or not the said employees wish to continue to be represented by the Union, for the purpose of bargaining collectively with their Employer.

DATED at Regina, Saskatchewan, this **13th** day of **April, 2009.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson