The Labour Relations Board
Saskatchewan

UNITED FOOD and COMMERCIAL WORKERS, LOCAL 1400, Applicant v. THE WATROUS COOPERATIVE ASSOCIATION LIMITED, Respondent

LRB File Nos. 037-11, 038-11, 039-11 & 040-11; April 18, 2011
Chairperson, Kenneth G. Love Q.C.; Members: Bruce McDonald and Clare Gitzel

For Applicant Union: Mr. Drew Plaxton
For Respondent Employer: Mr. Scott Newell

Interim Relief – Board applies two part test for interim relief – Board finds Union's factual basis strained and without sufficient factual basis – facts as plead do not warrant the Board's interference by way of summary relief – Board exercises discretion against providing extraordinary relief requested – Board not satisfied that balance of labour relations harm favours granting interim relief.

The Trade Union Act, ss. 5.3 and 43.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson**: The United Food and Commercial Workers, Local 1400 (the "Union") applied to the Board to be certified to represent the employees of The Watrous Cooperative Association Limited (the "Employer") in 2010. In accordance with the provisions of s. 6(1) of *The Trade Union Act* (the "*Act*"), the Board conducted a vote amongst those employees. The results of the vote did not support the application by the Union and the Board dismissed the application by its Order[1] dated August 12, 2010**.**

[2] On March 4, 2011, Mr. Ken Airey, an employee of the Employer, was terminated by the Employer, without cause. The Union filed these applications on his behalf claiming that his termination was in violation of s. 11(1)(e) of the *Act*. The Union also sought reinstatement of Mr. Airey, monetary loss and incidental relief as outlined in their application to the Board made March 10, 2011.

[1] LRB File No. 059-10

[3] Also on March 10, 2011, the Union applied to the Board for Interim Orders pursuant to s. 5.3 of the *Act*, LRB File No. 037-11. In summary, that application requested the following relief:

- Reinstatement of Mr. Airey;
- An order requiring posting of the Board's decisions and notices in the workplace;
- An order compelling the employer to provide access for the Union and/or the Department of Labour to employees of the employer;
- An order prohibiting the employer from communicating with its employees;
- An order prohibiting the employer making any payments to its employees out of the ordinary course of its business;
- An order for an expedited hearing of this matter;
- An order abridging time for service of documents or for substitutional service; and
- Such further and other relief.

[4] On March 24, 2011, the Employer filed its Reply to the within application, denying the allegations contained within the application made by the Union.

[5] The Union's interim application was heard on March 28, 2011 in Saskatoon, Saskatchewan. In support of their application, the Union filed the Affidavits of Christopher Dennis and Ken Airey. In response, the Employer filed the Affidavit of Graham Getz. At the hearing of this matter, the Union was given leave to file supplemental affidavits from both Mr. Dennis and Mr. Airey.

Facts:

[6] As noted above, the Union applied to be certified to represent the employees of the Employer in 2010. The results of a Board ordered vote did not support the application and it was denied.

[7] Mr. Airey commenced working with the Employer on or about February 27, 2008. Mr. Airey worked part-time at an hourly rate of $13.35. Mr. Airey worked approximately 20 hours per week from (19.4 hours per week between January 1, 2011 to March 4, 2011 according to the Reply filed by the Employer). He was terminated without cause by the Employer on March 4, 2011.

[8] Mr. Airey deposed that he had been involved in the organizing drive by the Union in 2010 and "spoke to a number of co-workers in an effort to gain support for the union". He also deposed that after the 2010 application went against the union that he was contacted in late 2010 by various employees expressing dissatisfaction with management and asking about getting the union back into the workplace.

[9] He deposed that he contacted Mr. Dennis of the Union with respect to re-applying for certification on behalf of the employees. He deposed that the union advised him that "it was best to wait the six month period prior to renewing an application for certification".

[10] Mr. Dennis, who is a national representative for the Union, in his affidavit, confirms that he was contacted by Mr. Airey in the month of January, 2011. He also confirmed that he advised Mr. Airey that "it would be best to wait for 6 months after the last application was filed before filing again."

[11] Mr. Airey deposed that he was aware of the fact that the employer was advertising for a position in the meat department where he worked. He deposed that he did not recall seeing a job posting for the new position, nor, he deposed, was he aware that as a result of the position being filled, that there would be an impact on his employment.

[12] On March 4, 2011, he deposes that he was called into a meeting with the store manager, Denise Morris and the Meat Manager, Rob Dobbs where he was terminated from his employment. He was provided a letter dated March 4, 2011 which read, in part, as follows:

> *The Watrous Co-op has hired a full time meat supervisor to fill the position that was posted in the Co-op Careers bulletin dated January 20, February 3, and February 17, 2011.*

> *Unfortunately, at this time, the Watrous Co-op wishes to notify you that your part time meat cutters position has been eliminated. Please consider this as your notification that your services are no longer required at the Watrous Co-op.*

[13] No cause was alleged for the termination. The letter also advised that a severance cheque calculated based on 4 weeks pay at an average of 20.25 hours per week would be paid to Mr. Airey.

[14] Mr. Getz, the General Manager of the Employer, deposed that the Employer had been seeking to engage a full-time meat cutter since mid 2009. He deposed that the Employer needed more coverage in the meat department "throughout the day and particularly in the afternoon and evening", because the meat department had "experienced a significant increase in sales during the last four years."

[15] He deposed that the Employer advertised for a "meat supervisor" on January 20, February 3, and February 17, 2011. He deposed that no internal applications were received for the advertised position. He deposed that on February 13, 2011, the Employer hired Mr. Justin Vavra as a fulltime Meat Supervisor.

[16] He deposed that with the hiring of Mr. Vavra on a full time basis, that the meat department had added sufficient coverage and that Mr. Airey, being the employee with the least tenure with the employer became redundant and was chosen for layoff, for the reason that "he had less tenure than Mr. Strueby [another part time meat cutter] and not because of any union activities."

[17] In response to vague comments contained in the affidavit of Mr. Airey concerning gift cards being given to employees, Mr. Getz deposed that the Employer "has had an employee rewards program since approximately April, 2009. This involves the distribution of $10.00 "Excellence Through People" gift cards, golf passes and drive-in movie passes. The purpose of this program is to recognize employees who go "above and beyond their daily duties."

[18] Mr. Getz also deposed that he was not aware of any activity concerning a union certification drive in 2011.

Argument of the Parties:

[19] Mr. Plaxton filed a book of authorities which the Board has reviewed.

[20] Mr. Plaxton argued, on behalf of the Union, that the test to be applied in applications for interim relief was as set out by the Board 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*[2] (the "Regina Inn" case)). The test in that case, he argued, was a two part test which required the Board to determine (1) if the application proper expresses an arguable case and (2) the labour relations harm of not granting the interim relief exceeds the labour relations harm of granting such relief.

[21] Mr. Plaxton pointed to several decisions of the Board which confirmed and dealt with the evidentiary basis needed to obtain the extraordinary relief provided for by way of an Interim Order. In particular, he cited *Canadian Union of Public Employees v. Del Enterprises Ltd. operating as St. Anne's Christian Centre*[3] , *Saskatchewan Insurance Office and Professional Employees' Union (COPE), Local 397 v. Saskatchewan Government Insurance*[4], and *United Food and Commercial Workers Union, Local 1400 v. D & G Taxi Ltd. operating as Capital Cab 2000*[5].

[22] The Union also filed with the Board a copy of its decision in *Grain Services Union (ILWU Canada) v. Startek Canada Services Ltd.*[6] and a copy of Practice Note No. 1 which outlines the procedure to be followed with respect to applications for interim orders.

[23] The Union asserted that the affidavit evidence clearly established that there was an organizing campaign underway in which Mr. Airey was a key participant. It argued that Mr. Airey's involvement in the campaign, as corroborated by Mr. Dennis' Affidavit showed that he was attempting to exercise his s. 3 rights of association under the *Act*. His termination, the Union argued was a direct consequence of that involvement and was intended to create a "chill" in the workplace to avoid another attempted certification application.

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[2] [1999] Sask. L.R.B.R. 190, LRB File No. 131-99
[3] [2004] Sask. L.R.B.R. 156, LRB File No. 087-04
[4] [2007] Sask. L.R.B.R. 114, LRB File No. 003-07
[5] LRB File Nos. 244-04, 245-04 & 246-04
[6] [2004] Sask. L.R.B.R. 15, LRB File No. 032-04

[24] The Union argued that it was suspicious, as noted in Mr. Airey's affidavit that employees were given gift cards "just prior to the vote being undertaken" with respect to the 2010 certification application. Furthermore, it was suspicious that Ms. Morris, the store manager, was noted to be standing in line to buy something, which Mr. Airey concluded was more gift certificates.

[25] The Union argued that the balance of labour relations harm, being the damage which would attend the Employer's firing of a leader of the revised certification campaign and the chilling effect on other employees resultant therefrom outweighed the potential harm to the employer in having an employee returned to the workplace for which it had no work.

[26] Mr. Newell, on behalf of the Employer argued that the affidavits upon which the Union relied were flawed. He relied upon the Board's decision in *Canadian Union of Pubic Employees, Local 4836 v. Luthercare Communities, c.o.b. as Lutheran Sunset Home of Saskatoon, Regina Lutheran Care Society Inc. and Broadway Terrace Inc.*[7].

[27] The Employer argued that the affidavits filed by the Union contained statements which were based solely on information and belief, were speculative, vague, or drew conclusions not supported by facts alleged in the affidavits.

[28] He pointed to the statements regarding gift cards in the affidavit filed by Mr. Dennis. In particular, he pointed to paragraph 6, portions of which were hearsay, paragraph 7 where the last line was based on information and belief, paragraph 8 where there was speculation concerning a "chilling" effect, and paragraphs 9 & 10 which were opinion and speculation by Mr. Airey.

[29] He also referenced paragraph 9 of Mr. Airey's affidavit which contained hearsay regarding the gift cards. He pointed to paragraph 15 of that affidavit which he argued was speculative and hearsay. He also argued that paragraph 10 of that affidavit was vague.

[30] He argued that when stripped of the offending portions, the affidavits did not provide strong evidence of union activities as argued by Mr. Plaxton. He noted that the

[7] [2009] CANLII 22876, LRB File No. 043-09

reference to “one or more” union cards having been signed was intentionally vague. Nor, he argued were there any details of the alleged organizing campaign.

[31] Based upon the affidavit evidence, he argued that there was insufficient evidence before the Board that there was any organizing campaign underway. He argued the Board should disregard the Dennis affidavit. Nor, he argued should we accept any evidence regarding the gift cards.

[32] In contrast, he noted the affidavit from Mr. Getz on behalf of the Employer was based on his personal knowledge, or was based on facts which he came to learn and rely upon with respect to the decision to terminate Mr. Airey. He argued that the Getz affidavit made it clear that the only motivation was a business decision by the Employer to obtain the services of a full time meat cutter, which decision meant one of the part time meat cutter positions would become redundant. Mr. Airey was the least senior meat cutter, therefore he was the one terminated.

[33] He argued that the Union was seeking extraordinary remedies which were not clearly supported by facts. He argued that the balance of labour relations harm favours the Employer because it provided payment in lieu of notice to Mr. Airey, which notice period had not even expired at the date of the hearing. He argued the Union was trying indirectly, by the relief it was seeking to obtain an unfair advantage in a second certification drive.

[34] Mr. Plaxton, in reply, took the position that where there was any organizing activity demonstated, and an employee involved in such activity is terminated, then the Board should automatically reinstate that employee pending a full hearing of the matter.

[35] He argued that even if the offending material was stripped away that there was sufficient evidence to invoke the reverse onus in s. 11(1)(e) so as to justify the Board making the interim order.

Relevant Statutory Provisions:

[36] The relevant provisions of the *Act* are as follows:

> *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.*
>
> *. . .*
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> *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:*
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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 an 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 reasons 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;*

Analysis:

[37] In a recent decision of the Board, Vice-Chairperson Schiefner made a point which deserves to be restated here. In *Saskatchewan Government and General Employees' Union v. The Government of Saskatchewan*[8]

> *Interim applications are utilized in exigent circumstances where intervention by the Board is thought to be necessary to prevent harm from occurring before an application pending before the Board can be heard. Because of time constraints, interim applications are typically determined on the basis of evidence filed by way of certified declarations and sworn affidavits without the benefit of oral evidence or cross-examination. As such, the Board is not in a position to make determinations based on disputed facts; nor is the Board able to assess the credibility of witnesses or weigh conflicting evidence. Because of these and other limitations inherent in the kind of expedited procedures used to consider interim applications, the Board utilizes a two-part test to guide in its analysis: (1) whether the main application raises an arguable case of a potential violation*

[8] LRB File No. 150-10 at paragraph 30

> *under the Act; and (2) whether the balance of convenience favours the granting of interim injunctive relief pending a hearing on the merits of the main application. See: Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Property Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn), [1999] Sask. L.R.B.R. 190, LRB File No. 131-99. See also: Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre, 2010 CanLII 42668, LRB File No. 083-10. As with any discretionary authority under the Act, the exercise of the Board's authority to grant interim or injunctive relief must be based on a sound labour relations footing in light of both the broad objectives of the Act and the specific objectives of the section allegedly offended.*

[38] In that paragraph, Vice-Chairperson Schiefner makes two important points which are often overlooked when the Board is dealing with applications for interim relief, particularly in cases where a breach of s. 11(1)(e) is alleged. Firstly, he notes that "Interim applications are utilized in exigent circumstances where intervention by the Board is thought to be necessary to prevent harm before an application…can be heard". Secondly, he notes that the use of the discretionary authority given to the Board in s. 5.3 of the *Act* "must be based on a sound labour relations footing in light of both the broad objectives of the *Act* and the specific objectives of the section allegedly offended." In every case, these two factors must also be considered in addition to the factual underpinnings of each case as well as the tests set out in the Regina Inn case[9]

[39] In *UFCW v. Walmart*[10], Vice-Chairperson Schiefner also noted that interim relief would not be granted by the Board when the result of granting such relief would provide the applicant with the relief it sought on the final application. At para 31, he says:

> *In addition, the Board had enunciated certain policy restrictions on when interim relief should be granted (or rather should not be granted). For example, the Board has stated that the relief sought may not be granted were doing so would have the practical effect of granting what the applicant might hope to obtain on the main application. See: Tai Wan Pork Inc., supra.*

[40] In the first part of the Regina Inn test, the Board is called upon to give consideration to the merits of the main application but, because of the nature of an interim application, we do not place too fine a distinction on the relative strength or weakness of the applicant's case. Rather, the Board seeks only to assure itself that the main application raises,

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[9] *Supra*, footnote 2
[10] LRB File No. 184-10

at least, an "arguable case". As noted by the Board in in *SGEU v. Saskatchewan*[11] at paragraph 31:

> *[31] Simply put, an applicant seeking interim relief need not demonstrate a probable violation or contravention of the Act as long as the main application reasonably demonstrates more than a remote or tenuous possibility.*

[41] The Board described the second part of the *Regina Inn* test in paragraph 32 of its decision in *SGEU v. Saskatchewan*[12] as follows:

> *[32] The second part of the test – balance of convenience - is an adaptation of the civil irreparable harm criteria to the labour relations arena. See: Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suite 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. In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy. See: Grain Services Union, Local 1450 v. Bear Hills Pork Producers Ltd. Partnership, [2000] Sask. L.R.B.R. 223, LRB File No. 079-00. The Board will also balance the relative labour relations harm that is anticipated to occur prior to the hearing of the main application without intervention by the Board compared to the harm that could result should a remedy be granted. See: Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Regina Exhibition Association Limited, et. al., [1997] Sask. L.R.B.R. 667, LRB File No. 266-97; United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Con-Force Structures Limited, [1999] Sask. L.R.B.R. 599, LRB File No. 248-99; and International Association of Fire Fighters, Local 1318 v. South Saskatchewan 911, [2001] Sask. L.R.B.R. 97, LRB File No. 037-01. In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm. See: Retail, Wholesale and Department Store Union, Local 455 v. Tai Wan Pork Inc., [2000] Sask. L.R.B.R. 219, LRB File No. 076-00.*

[42] The Board went on to say at paragraphs 33 & 34 of *SGEU v. Saskatchewan*[13]

> *[33] In addition, the Board had enunciated certain policy restrictions on when interim relief should be granted (or rather should not be granted). For example, the Board has stated that the relief sought may not be granted were doing so would have the practical effect of granting what the applicant might hope to obtain on the main application. See: Tai Wan Pork Inc., supra.*
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> *[34] While the Board uses a two-part test to aid in its consideration (and for ease of reference), each application for interim relief involves a matrix of considerations involving the factual circumstances of the application, the general goals of the Act, the policy objectives of the particular provision alleged to have been violated, and the nature of the relief being sought.*

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[11] *Supra,* Note 8
[12] *Supra*, Note 8
[13] *Supra*, Note 8

[43] In the instant case, the policy objective of s. 11(1)(e) of the *Act* is to ensure that employees who wish to be represented by a trade union for the purposes of collective bargaining be able to do so without discrimination, coercion or intimidation. This section furthermore provides a reverse onus which places the onus (presumption in favour of the employee) which requires the employer to justify the termination of any employee, if "it is shown to the satisfaction of the Board that employees of the employer were exercising or attempting to exercise a right under this *Act*." However, this provision has never been interpreted by the Board as a total interdiction on an employer acting in a *bona fide* manner in discharging an employee where proper explanation is made by the Employer.[14]

[44] However, when stripped to its essentials, the factual basis for the Union's application and the correlation between the termination of Mr. Airey and his union activity is not clearly demonstrated. If indeed there was a membership drive in progress, the evidence concerning that drive would not be so vague. The Board is not satisfied that there was, in fact, a membership drive underway. The Affidavits of both Mr. Airey and Mr. Dennis provide direct evidence only that Mr. Airey contacted the Union, but was told that it was best to wait until six months from the dismissal of the previous application. That period would have expired around or about February 12, 2011.

[45] If the intention of the Union was to wait until after the expiry of the six month waiting period, and if an organizing campaign to file a renewed certification application was, in fact, being initiated after February 12, 2011, direct evidence of the steps taken in furtherance of that campaign would have been expected. Such evidence was not provided. Instead, the Board was provided only the vague statement that "one or more union cards have been signed in support of a new application." Mr. Dennis does not provide specific details of the number of cards signed, which is understandable since he would not presumably wish to either identify supporters, or indicate the current level of support. However, he also fails to indicate over what period the card or cards were signed or what steps lead to signatures being collected or provided.

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[14] See *SEIU Local 336 v. Chinook School Division No. 211 of Saskatchewan*, [2008] CANLII 47051, LRB File No. 045-08

[46] The affidavit evidence concerning the "gift cards" is also of no assistance. While it may be an attempt by the Union to suggest that the previous vote was impaired by the employer providing inducements to the employees not to vote in favour of the union, the evidence provided is far from satisfactory to allow the Board to draw any factual conclusions in that respect. It is, as suggested by Mr. Newell, vague, based on hearsay, is speculation, or is based upon unsupported conclusions.

[47] The application has failed to satisfy the first test in the *Regina Inn* case. However, the Board is also not satisfied that there was sufficient labour relations harm demonstrated to justify the interim relief sought. There was no direct evidence that there would be a "chilling" effect caused by the termination, and, although it may be open to the Board to draw that conclusion, in the circumstances of this case, we decline to do so. In the absence of a finding that there was an organizing campaign in effect, that conclusion cannot logically be supported. Therefore, absent direct evidence, (the Affidavit of Mr. Dennis provided only his opinion which was, we believe, premised upon his assertion that there was an organizing campaign in effect) the harm alleged by the Union cannot be found.

[48] As noted above, the Board will exercise its authority under s. 5.3 in clear cases where intervention by the Board is thought to be necessary to prevent harm from occurring before an application pending before the Board can be heard. This case would not be one of those instances. Firstly, as noted above, the evidentiary basis does not satisfy the Board that an organizing campaign was underway. Secondly, there was little urgency for the application to be made on an interim basis as Mr. Airey had been provided payment in lieu of notice, and, that notice period had not even expired. This application could have more properly have been dealt with through an expedited hearing by the Board, something the Employer's counsel requested at the interim hearing.

[49] Practice Note 1 makes the following statement:

> *It is important to remember in this context that the Labour Relations Board is intended as a forum for the expeditious resolution of the matters brought before us, and that we attempt to establish hearing dates and issue decisions with this in mind. Most, if not all, of the applications brought before us are time-sensitive, and the parties are understandably anxious to have them dealt with as swiftly as possible. Applications for injunctive or interim relief, therefore, should not be seen and cannot be accommodated, as a means of getting to the head of the lineup for hearings before the Board.* ***They should be brought only where there is some issue of a crucial nature which cannot be properly addressed***

> ***by means of the ordinary expeditious procedures of the Board.*** *[Emphasis added]*

Conclusion:

[50] For all of these reasons, the Union's application for interim relief is denied. However, it should be understood that these Reasons do not apply to the application proper, which is not being dismissed as the merits of that application are not dealt with herein. Furthermore, the evidentiary difficulties referred to above might be capable of being remedied.

[51] This panel will not remain seized of this matter.

DATED at Regina, Saskatchewan, this **18th** day of **April, 2011.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson