



EARLY CHILDHOOD INTERVENTION PROGRAM, REGINA REGION INC., Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent

LRB File No. 093-13; August 20, 2013

Vice-Chairperson, Steven D. Schiefner.; Members: Donna Ottenson and Mike Wainwright

For the Applicant: Ms. Bonnie L. Ozirny
For the Respondent Union: Ms. Crystal L. Norbeck

Employees – Exclusion from bargaining unit – Employer seeking provisional determination as to whether newly created position of “supervisor” ought to be excluded from bargaining – Position created to assist the Employer’s only out-of-scope position following growth in employer’s operations - Board satisfied that position contains a sufficient combination of managerial and confidential characteristics to justify exclusion from bargaining unit – Board grants provisional Order excluding disputed position.

The Trade Union Act, ss. 2(f)(i), 5(j), 5(m) & 5.2

REASONS FOR DECISION

Background:

[1] **Steven D Schiefner, Vice-Chairperson:** The Applicant, the Early Childhood Intervention Program, Regina Region Inc. (the “Employer”), seeks a provisional determination from the Saskatchewan Labour Relations Board (the “Board”) as to whether or not the newly created position of “Supervisor” is (or will become) an employee within the meaning of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the “Act”). The Employer takes the position that the functions to be performed by this new position will be of a managerial character or that the position is expected to regularly act in a confidential capacity or that the position includes a sufficient combination of both characteristics that it ought to be excluded. The Respondent, the Saskatchewan Government and General Employees’ Union (the “Union”), disputes the Employer’s characterization of the duties and responsibilities that are anticipated to be

performed by the new position and argues that the position properly falls within the scope of its bargaining unit.

[2] The Employer's application was heard by the Board on July 18, 2013 in Regina, Saskatchewan. In support of its application, the Employer called Ms. Charmaine Styles, a member of the Employer's board of directors and Ms. Debra McDonald, who was, until recently, the Employer's Executive Director. In reply, the Union called Ms. Nicole Smith, an employee of the Employer.

[3] Having considered the evidence and argument of the parties, we are satisfied that the Employer has demonstrated that a provisional exclusion of the disputed position of "Supervisor" is justified and appropriate under the circumstances. Simply put, we are satisfied that the disputed position displays a sufficient combination of managerial/confidential characteristics that it ought to be provisionally excluded from the Union's bargaining unit pursuant to s. 5.2 of the *Act*. Our reasons for that determination are set forth in these Reasons for Decision.

Facts:

[4] The Employer is a non-profit corporation established for the laudable and valuable purpose of providing specialized services to young children with developmental delays and concomitant support to their families. The Employer is one of fourteen (14) regional providers in Saskatchewan and provides services to children (and their families) in both the City of Regina and surrounding area. The Employer's services are provided by interventionists, who are trained professionals in the early childhood needs of developmentally delayed children (and their families). At the time of application, the Employer employed approximately ten (10) early childhood interventionists, who each carried a case load of approximately fifteen (15) children. These interventionists fall within the scope of the Union's bargaining unit.

[5] Children in the Regina region who are believed could benefit from the Employer's services are referred to the Employer by medical professionals, social workers and others. Upon receiving a referral, an individual assessment is conducted to determine whether or not that particular child met the criteria for the Employer's programs and services. Typically, these assessments are conducted by the Employer's Executive Director through home visits. However, these assessments have also been performed in the past by experienced

interventionists. If qualified, the children would then be placed on a waiting list until a vacancy occurred on one of the interventionist's case load, typically one (1) to three (3) months. Obviously, there is a direct correlation between the number of children (and their families) that can be assisted and the number of interventionist employed by the Employer. The number of interventionists available within the Employer's region is primarily a factor of available funding.

[6] Since the Employer was first certified in December of 1990, the size of its operations has doubled and a satellite program has been added. The Employer has grown from a staff of approximately six (6), including four (4) interventionists, a part-time administrator and the Executive Director (then known as the "Program Coordinator"), to the current staff complement of twelve (12), including ten (10) interventionists, one (1) full-time administrative support position, and the Executive Director, who was the Employer's only out-of-scope position at the time of the hearing.

[7] The growth in the Employer's operations has been the result of growth in available funding. The Government of Saskatchewan, through the Ministry of Education, is the primary funder of the Employer's activities. Other sources of funding include donations from the United Way and fee for services agreements with or through either Touchwood Child and Family Services Inc. or Aboriginal and Northern Affairs Canada. These fee for service agreements relate to the provision of the Employer's services on five (5) First Nations.

[8] Like most non-profit organizations, available funding is scarce and the Employer struggles to operate within the limits of its resources, while at the same time, attempting to meet the not-insignificant needs of the community it services. Among her many other duties, one of the responsibilities of the Executive Director is to maintain relationships with the Employer's funding partners, pursue additional funding, and comply with the various requirements imposed upon the Employer by its funders. The expectations imposed upon the Employer by its funding partners are not-insignificant. Most of the funding received by the Employer is pursuant to service agreements that include detailed reporting obligations wherein the Employer is required to demonstrate the efficacy of its programs and a focus on quality assurance in the delivery of its services. To comply with these requirements, interventionists have increased performance and reporting responsibilities and management has increased supervisory and reporting responsibilities. In addition, the Employer's funding partners expected personal attendances by

representatives of the Employer's board and its Executive Director at various interagency meetings.

[9] Both Ms. Styles and Ms. MacDonald testified that the volume of work expected of the Executive Director grew to a point where it exceeded the capacity of the incumbent or any other person to complete. The Employer's auditor noted that the Executive Director was working a significant amount of overtime. While some duties were delegated to in-scope staff, including some home evaluations, most of the work was not of the nature that could be appropriately delegated to a member of the bargaining unit, including preparing and/or revising job descriptions, research proposals for collective bargaining, and participating in collective bargaining. As a result, a number of these managerial duties were directly assumed by members of the Employer's board of directors.

[10] By early 2012, after having assumed these duties for a period of time, the board of directors resolved that an additional out-of-scope position should be created; a position known as the "Supervisor". As the name would imply, one of the anticipated duties of this new position was assume responsibilities for supervision of the interventionists. However, this was not the sole purpose of the position. The board of directors envisioned this position as having a very broad range of duties; duties ranging from managerial (i.e.: acting in the place and stead of the Executive Director) to performing the duties of a part-time interventionist (i.e.: carrying a partial case load if time permitted). Although the board envisioned a broad range of duties that could be performed by this new position, the reason it was created was because the Employer's board of directors wanted someone to provide human resource support to it to assist in completing the management duties the board had assumed and/or to have someone in management to whom these duties could be returned.

[11] A job description for this new position was prepared by a member of the board of directors and the Executive Director and a copy was provided to the Union. The parties attempted to negotiate, but were unable to agree on, whether or not the position ought to be excluded from the bargaining unit. As a result, the Employer made the within application seeking a provisional determination. The Employer seeks a provisional determination as the Employer was unwilling to staff the position without the Union's agreement or an Order of this Board.

Relevant statutory provision:

[12] The relevant provisions of *The Trade Union Act* are as follows:

2 *In this Act:*

(f) "employee" means:

(i) a person in the employ of an employer except:

(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character; or

(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer;

5 *The board may make orders:*

(j) amending an order of the board if:

(i) the employer and the trade union agree to the amendment; or

(ii) in the opinion of the board, the amendment is necessary;

...

(m) subject to section 5.2, determining for the purposes of this Act whether any person is or may become an employee;

5.2(1) On an application pursuant to clause 5(m), the board may make a provisional determination before the person who is the subject of the application is actually performing the duties of the position in question.

(2) A provisional determination made pursuant to subsection (1) becomes a final determination after the expiry of one year from the day on which the provisional determination is made unless, before that period expires, the employer or the trade union applies to the board for a variation of the determination.

Employer's arguments:

[13] The Employer argued that the duties and responsibilities of the disputed position are such that it would be inappropriate to place its new position within the scope of the bargaining unit. The Employer acknowledged that not all of the duties anticipated to be performed by this new position require it to be out-of-scope, including basic supervisory duties

and the potential that the position may carry a caseload (i.e.: function as an interventionist). However, the Employer argued that the bulk of the duties expected of this position are not duties that can appropriately be performed by a member of the bargaining unit, including acting in the place and stead of the Executive Director, providing human resource support on behalf of management, and performing research and providing support for collective bargaining. The Employer noted that the reasons this position was created in the first place was to perform this combination of managerial and confidential functions and that these duties and responsibilities were intended to both assist the Executive Director and to provide additional management resources for the board of directors.

[14] The Employer argued that it would not have adequate managerial resources if this position was not excluded from the bargaining unit. To which end, the Employer relied upon this Board's decision in *Canadian Union of Public Employees, Local 4928 v. Saskatchewan Society for the Prevention of Cruelty to Animals (Saskatchewan SPCA)*, [2009] 166 C.L.R.B.R. (2d) 230, 2009 CanLII 43954 (SK LRB), LRB File No. 198-08 as standing for the proposition that the relative small size of the workplace and the limited human resources available to management ought to be a factor in this Board's scope determination.

[15] The Employer provided a written Brief of Law which we have read and for which we are thankful.

Union's arguments:

[16] The Union, on the other hand, argued that the disputed position should not be excluded from the scope of its bargaining unit. The Union argued that the Employer's evidence was conflicting and deficient to clearly establish that the position would perform duties of either a managerial or confidential character. For example, the Union noted that the language of the job description for the position of supervisor indicates that the position was only responsible for "assisting" the Executive Director in various managerial functions and for "participating" in the development of strategic plans and for "participating" in the hiring, orientation, and evaluation of interventionists. As such, the Union argued that the Employer had failed to satisfy the evidentiary burden on it to establish that the duties and functions of this new position could not be performed by a member of its bargaining unit. In addition, the Union noted that the disputed position was intended to carry a part-time caseload, functioning as an early childhood interventionist. The Union argued that the supervisory functions intended of the position did not

justify exclusion and that it was unclear whether or not the other duties that the board of directors desired this position to perform would ever materialize.

[17] In addition, the Union noted that staffing of an out-of-scope position would have a negative impact on the bargaining unit because, unless additional funding could be secured, the staffing of an out-of-scope position would necessitate the loss of one of the interventionists. The Union also noted that this would have a direct and negative impact on the number of children (and their families) that could be helped and would increase the number of children on the Employer's waitlist. The Union argued that it would be inappropriate to create a new out-of-scope position at the expense of a current, in-scope position, when most of the duties of that position could be performed by a member of the bargaining unit.

[18] For these reasons, the Union argued that the Employer's application ought to be dismissed. The Union provided a written brief of law which we have read and for which we are thankful.

Analysis:

[19] In *The Saskatchewan Institute of Applied Science and Technology v. Saskatchewan Government and General Employees' Union*, [2009] 173 C.L.R.B.R. (2nd) 1, 2009 CanLII 72366, LRB File No. 079-06, this Board was called upon to determine whether or not certain disputed positions ought to be excluded from a trade union's bargaining unit either on the basis of the managerial exception (i.e.: where the primary responsibilities of a position involved the actual exercise of authority, and the actual performance of functions, that are of a "managerial" character) or on the basis of the confidential exception (i.e.: because a position regularly acts in a confidential capacity with respect to industrial relations of the workplace) or some sufficient combination of both. In doing so, the Board restated the established principles relative to such determination as follows:

[55] The Board has on many occasions articulated helpful criterion for the making of such determinations but has also concluded that there is no definitive test for determining which side of the line a position falls (i.e.: within or outside the scope of the bargaining unit). Simply put, the Board's practice has been to be sensitive to both the factual context in which the determination arises and the purpose for which the exclusions have been prescribed in the Act. The Board tends to look beyond titles and position descriptions in an effort to ascertain the true role which a position plays in the organization. See: Grain Services Union (ILWU Canadian Area) v. AgPro Grain Inc., [1995] 1st Quarter Sask. Labour Rep. 243, LRB File No. 257-94; Saskatchewan Joint Board, Retail, Wholesale and

Department Store Union v. Remai Investments Corporation, [1997] Sask. L.R.B.R. 335, LRB File Nos. 014-97 & 019-97; and University of Saskatchewan v. Administrative and Supervisory Personnel Association [2008] Sask. L.R.B.R. 154, LRB File No. 057-05.

[56] The purpose of the statutory exclusion from the bargaining unit for positions whose primary responsibilities are to exercise authority and perform functions that are of a managerial character is to promote labour relations in the workplace by preserving clear identities for the parties to collective bargaining (and to avoid muddying or blurring the lines between management and the bargaining unit). See: Hillcrest Farms Ltd. v. Grain Services Union (ILWU – Canadian Area), [1997] Sask. L.R.B.R. 591, LRB File No. 145-97.

[57] The purpose of the statutory exclusion for positions that regularly act in a confidential capacity with respect to industrial relations is to assist the collective bargaining process by ensuring that the employer has sufficient internal resources (including administrative and clerical resources) to permit it to make informed and rational decisions regarding labour relations and, in particular, with respect to collective bargaining in the work place, and to permit it to do so in an atmosphere of candour and confidence. See: Canadian Union of Public Employees, Local 21 v. City of Regina and Regina Civic Middle Management Association, [2005] Sask. L.R.B.R. 274, LRB Files Nos. 103-04 & 222-04.

[58] The Board has noted that, unlike the managerial exclusion, the duties performed in a confidential capacity need not be the primary focus of the position, provided they are regularly performed and genuine. In either case, the question for the Board to decide is whether or not the authority attached to a position and the duties performed by the incumbent are of a kind (and extent) which would create an insoluble conflict between the responsibilities which that person owes to his/her employer and the interests of that person and his/her colleagues as members of the bargaining unit. However, in doing so, the Board must be alert to the concern that exclusion from the bargaining unit of persons who do not genuinely meet the criteria prescribed in the Act may deny them access to the benefits of collective bargaining and may potentially weaken the bargaining unit. As a consequence, exclusions are generally made on as narrow a basis as possible, particularly so for exclusions made because of managerial responsibilities. See: City of Regina, supra.

[59] Finally, the Board recognizes that employers and trade unions often negotiate scope issues and come to resolutions that may not be immediately apparent to the Board. In accepting these determinations, the Board acknowledges that the parties are in a better position to determine the nature of their relationship. The determinations that have been made by the parties can be of great assistance to the Board in understanding the maturity of the collective bargaining relationship and kinds of lines that the parties have drawn between management and its staff. However, in the Board's opinion, when it is called upon to make determinations as to scope, the benchmark for our determinations must be s. 2(f)(i) of the Act (the definition of an "employee") and our understanding of the purposes for which the statutory exemptions were included. While we are mindful of the agreements of the parties as to the scope, the genesis for our determinations must be The Trade Union Act and the jurisprudence of the Board in interpreting that statute.

[20] It was apparent to the Board that the operations at the Employer's workplace have changed over the past thirteen (13) years since certification and that, with the growth in its operations, there has been a concomitant grown in managerial responsibilities. In addition, the expectations of the Employer's funding partners have also increased the work and responsibilities of management. In the Board's opinion, there has been a material change in circumstances at this workplace to justify revisiting the scope determinations of this Board contained in the Union's 1990 certification Order.¹

[21] During these proceedings, the Board heard evidence sufficient for it to be satisfied that the volume of work expected of the Executive Director currently exceed the capacity of one (1) out-of-scope staff to complete. The fact that members of the Employer's board had found it necessary to assume and perform the duties and responsibilities of management was indicative of insufficient managerial capacity in this workplace. The duties performed and responsibilities assumed by members of the Employer's board far exceeded any typical governance model for a non-profit corporation. While boards of directors of corporations may temporarily take on managerial functions or other duties typically performed by management and may do so for a variety of reasons, including lack of internal resources, they also have the right to cause the creation of new positions so that these responsibilities can be returned to management. In which case, such positions are not excluded from a bargaining unit merely because they have been created at the instigation of a board of directors or because that board envisioned that these new positions would fall outside the scope of the bargaining unit. Rather, to be excluded, the functions and duties to be performed by these positions must fall within either the managerial exception or the position must regularly act in a confidential capacity with respect to industrial relations (i.e.: the "confidential" exception) or the position must demonstrate a sufficient combination of both of these characteristics.

[22] In this regard, we note that the Employer's job description did not necessarily contain the kind of language that made this determination clear. The language of the job description would see the incumbent's duties ranging from well within to potentially outside the scope of the bargaining unit. In our opinion, the imprecision we saw in the Employer's job description is likely indicative of the limited depth of management resources available to the board of directors and/or the fact that the Employer operates without any internal human resource functions. In our opinion, it is necessary to look beyond the title of the disputed position

¹ See: LRB File No. 179-90.

and beyond the words set forth in its job description. In the present case, we have evidence as to both why the position was created and the functions and duties it was intended to perform. Simply put, we have evidence as to the operational deficient that the position was intended to rectify.

[23] In making our determinations, we have been mindful to ensure that the Employer was not merely “sprinkling” its new position with managerial duties and/or functions of a confidential nature merely for the purpose of obtaining an exclusion for a position that would otherwise fall within the definition of an “employee”. In the present case, we are satisfied that the core duties and responsibilities expected of this new position can not be performed by a member of the Union’s bargaining unit. It was apparent to the Board that the Employer wished to transfer back to management a broad variety of duties and functions that were being performed by members of its board of directors and that a large portion of these duties and functions clearly fall within the “confidential” exception, including research on collective bargaining proposals, the taking of minutes during the board of director’s *in camera* meetings, and various other labour relations functions, including participation in collective bargaining. While only time will tell whether or not or the extent to which the incumbent will perform these duties, these are clearly the kind of capacities that employer’s require for collective bargaining and labour relations with the Union to take place. As this Board has noted in numerous cases, management requires sufficient internal resources to make collective bargaining and labour relations possible. In the present case, we are satisfied that the duties and responsibilities expected of the position of “Supervisor” appear to be of a kind that can not be performed by a member of the Union’s bargaining unit without placing the incumbent into an insoluble conflict with other members. We are also satisfied that these duties are genuine and necessary for the proper functioning of collective bargaining and labour relations at this particular workplace.

[24] In addition, the goal of the Employer was to have this position assume generally supervisory responsibility over all of the Employer’s early childhood interventionists. Again, while only time will tell whether or not the incumbent actually performs functions and/or assumes duties sufficient to justify the managerial exception, we are satisfied that, for the purposes of a provisional determination, it is more likely than not that the incumbent will do so. While the duties and responsibilities of this position will likely evolve over time, we are satisfied that this position has the potential to assume the kind of managerial duties that would justify the managerial exclusion. Because of the relative small size of this workplace, when this position is

staffed, it will be supervising the bulk of the Employer's workforce. The evidence tended to indicate that more and more of the Executive Director's time was being called upon to manage the Employer's external relationships with its funding partners. As such, it is reasonable to assume that the disputed position will come to play a central role in the management of the Employer's human resources and in labour relations involving members of the bargaining unit on behalf of the Employer. However, as indicated, only time will tell whether or not such is the case. Certainly, the potential that the position of "Supervisor" will justify a managerial exclusion in the long run is not as clear as the probability that the position will justify the confidential exclusion.

[25] In conclusion, we are satisfied, based on the evidence we heard, that the goal of the Employer was to create a position that could perform the functions and responsibilities that had recently been assumed by its board of directors; functions and responsibilities that bear a sufficient combination of managerial/confidential characteristics to justify the position's exclusion from the bargaining unit on a provisional basis. We are also satisfied that these duties are genuine and necessary. A provisional determination allows both parties the opportunity to reevaluate the disputed position after it has been staffed and after the incumbent has begun performing the duties and responsibilities expected of the position. However, at the present time, we are satisfied that the Employer has satisfied the onus with respect to the exclusion sought.

[26] For the foregoing reasons, an Order shall issue pursuant to s. 5.2 of *The Trade Union Act* provisionally determining the position of "Supervisor" to be outside the scope of the Union's bargaining unit on the basis that the duties expected to be performed by this position do not satisfy the definition of an "employee" as set forth in para. 2(f) of the *Act*.

DATED at Regina, Saskatchewan, this **20th** day of **August, 2013**.

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson