HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN, Applicant v. UNIFOR, LOCAL 609, Respondent

LRB File No. 003-15; June 29, 2015
Chairperson, Kenneth G. Love, Q.C.; Members: John McCormick and Michael Wainwright

For the Applicant: Mr. Gary Bainbridge
For the Respondent: Mr. Larry Kowalchuk

Exclusion from the bargaining unit – Applicant applies to the Board to have a new position excluded from the bargaining unit – Applicant argues that position will have supervisory responsibilities and have access to confidential information received as part of an annual membership survey

Proper procedure when new position created – Board reviews previous jurisprudence detailing process to be followed when new position created – When new position created, position can be excluded only through agreement of the parties or Board Order.

Material Change in Circumstances required to be shown for amendment – Board discusses the rationale for the requirement to show material change, which is to avoid continuous review of previous decisions – Board determines that a change in the definition of "employee" sufficient to show material change.

Necessity for amendment – Material change is "one step" towards the demonstration of the necessity for an amendment – Board has wide discretion to determine necessity for an amendment.

Exclusion – Board reviews the purpose for exclusions from the bargaining unit – Board confirms that purpose for exclusions remains unchanged under *SEA*, but determines that the definition of "employee" has changed in the new legislation.

Management Exclusion – Board reviews facts in this case and determines that the position does not have primary responsibility to exercise authority and perform functions that are of a managerial character. Evidence supports some possible supervisory function for position – Board determines that supervisory function insufficient for exclusion of the position.

Confidentiality Exclusion – Board reviews facts and evidence in this case and determines that the position does not have primary duties which include activities that are of a confidential nature. Position having access to confidential data from Membership survey, and attending annual management retreat not sufficient to exclude position from bargaining unit.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Chairperson:** Unifor, Local 609, (the "Union") is the collective bargaining representative for the employees of the Health Sciences Association of Saskatchewan ("HSAS"). HSAS applied to the Board to amend the certification Order granted by this Board on August 21, 2000 to exclude the positions of Office Manager and Communications Coordinator from the bargaining unit. At the hearing, it was agreed that the position of "Office Manager" was the formerly excluded position of "Administrator" and that amendment was not opposed by the Union.

[2] After this application had been filed, but before the matter could be heard and a decision made, the Union (formerly the Communications, Energy and Paperworkers Union of Canada) changed its name by merging with the Canadian Auto Workers Union to form Unifor. The Board recognized this name change and re-issued its August 21, 2000 Order on March 23, 2015 (LRB File No. 012-15).

Facts:

[3] This application involves the creation of a new position within the Union bargaining unit for a Communications Coordinator. Prior to the decision to create this new position, the implementation of the communications strategy for HSAS was handled by the chair of the communications committee of HSAS with the assistance of one of the Labour Relations Officers ("LRO"), Kate Robinson. Ms. Robinson worked on communications approximately 50% of her time commencing sometime in 2012. Ms. Robinson was a member of the bargaining unit.

[4] Ms. Robinson left HSAS to work for the sister organization of HSAS in Alberta in July of 2014. Her position as an LRO was filled in August of 2014, but the person hired into that position was not given the communications responsibility that Ms. Robinson had engaged in.

[5] Ms. Natalie Horejva, the chair of HSAS's communications committee testified that when Ms. Robinson left, HSAS determined that it would be better to have someone who was dedicated to the communications role.

[6] HSAS was engaged in two major forms of communication. The first was communication with their membership on matters of interest to them such as collective bargaining. Secondly, was external communication, which had more political overtones which was coordinated through Mr. Gary Aldridge of Points West Consulting Inc. Part of the responsibilities assigned to Mr. Aldridge was an annual membership survey which Mr. Aldridge conducted. With the help of the internal support (Ms. Robinson when she was there) he also received the raw survey information and then compiled a summary of that information for presentation to the executive of HSAS at their annual planning retreat.

[7] Ms. Horejva testified that this annual survey often provided responses from the membership which was critical of staff of HSAS, and LRO's in particular. As a result, the executive of HSAS discontinued attendance by staff other than out of scope staff at their annual retreats.

[8] Access to the raw survey data and the summary data was tightly controlled. The President of HSAS did not have access to the raw data and only received a summary of that data as prepared by Mr. Aldridge.

[9] Ms. Horejva also testified that the communications committee also wished to have the communications person in attendance at the annual board retreat. However, with the responsibility assigned to Ms. Robinson, this was not possible.

[10] In concert with Mr. Aldridge, the communications committee drafted a job advertisement for a position of Communications Coordinator. That advertisement was published, applications were received, interviews undertaken and the job awarded. However, at the last minute, in September of 2014, the person who was offered the job decided to decline the offer.

[11] The Union was aware of the new position as a result of the advertising of it. On September 26, 2014, Ms. McKinley, a national representative of the Union, wrote to the then executive director of HSAS, Mr. Craik, objecting to the apparent unilateral creation of the position

and requesting that HSAS bargain collectively with respect to the position which they asserted was a part of their bargaining unit.

[12] Upon receipt of Ms. McKinley's correspondence, HSAS took legal advice, redrafted the job advertisement, but did not re-advertise the position. Rather, they forwarded the revised job bulletin to the union and asked that the Union consent to the position being placed outside the scope of the Union's bargaining unit. The Union declined HSAS's request that the position be determined to be out of scope. HSAS then filed this application to have the Board determine if the position fell outside the definition of "employee" in *The Saskatchewan Employment Act* (the "*SEA").*

[13] HSAS has not again advertised the position, nor has it been filled. The work of the communications coordinator has been contracted out on an interim basis.

Relevant statutory provision:

[14] Relevant statutory provisions are as follows:

> ***6-1****(1) In this Part:*
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> *. . .*
>
> *(h) **"employee"** means:*
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> *(i) a person employed by an employer other than:*
>
> *(A) a person whose primary responsibility is to exercise authority and perform functions that are of a managerial character; or*
>
> *(B) a person whose primary duties include activities that are of a confidential nature in relation to any of the following and that have a direct impact on the bargaining unit the person would be included in as an employee but for this paragraph:*
>
> *(I) labour relations;*
>
> *(II) business strategic planning;*
>
> *(III) policy advice;*
>
> *(IV) budget implementation or planning;*
>
> *(ii) a person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining; and*

> *(iii) any person designated by the board as an employee for the purposes of this Part notwithstanding that, for the purpose of determining whether or not the person to whom he or she provides services is vicariously liable for his or her acts or omissions, he or she may be held to be an independent contractor;*
>
> *and includes:*
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> *(iv) a person on strike or locked out in a current labour-management dispute who has not secured permanent employment elsewhere; and*
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> *(v) a person dismissed from his or her employment whose dismissal is the subject of any proceedings before the board or subject to grievance or arbitration in accordance with Subdivision 3 of Division 9;*

. . .

> ***6-105****(1) On an application made for the purposes of clause 6-104(2)(i), the board may make a provisional determination before the person who is the subject of the application actually performs the duties of the position in question.*
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> *(2) A provisional determination made pursuant to subsection (1) becomes a final determination one year after the day on which the provisional determination is made unless, before that period expires, the employer or the union applies to the board for a variation of the determination.*

Employer's arguments:

[15] HSAS filed a written Brief which we have reviewed and found helpful. The Employer made five (5) major arguments. These were:

1. The Employer followed the proper procedure with respect to making this application;
2. A material change of circumstances had occurred which required the application to be made;
3. The amendment to the scope of the bargaining unit is necessary;
4. The new position should be excluded to avoid impermissible conflicts within the bargaining unit; and

5. The exclusion should be done on a provisional basis.

Union's arguments:

[16] The Union also filed a written argument which we have reviewed and found helpful. The Union argued that the position was a newly created position and, as such, it fell within the jurisdiction of the bargaining unit unless excluded by negotiations between the parties or by Board order. The Union also argued that an amendment was not necessary because there had been no significant change that occurred which would make the amendment necessary. The Union argued that the onus was on the Employer to show a material change in circumstances which it had failed to do.

[17] The Union also argued that the position fell within the definition of "employee" as found in the *SEA* and should, therefore, not be excluded from the bargaining unit. The Union argued that the proposed duties for the position do not meet the criteria for exclusion of the position from the bargaining unit.

Analysis and Decision:

[18] The Board has most recently dealt with exclusion of employees from the bargaining unit in *RWDSU v. Battlefords and District Co-operative Limited*[1]. In that decision, the Board concluded that the purpose and nature of the exemptions from the definition of "employee" under the *SEA* had not changed from the previous legislation under *The Trade Union Act.* The Board also concluded that the factors which might justify an exclusion from the bargaining unit are fact dependent.

[19] In the *Battlefords Co-operative* decision, the Board also concluded that newly created positions fell within the scope of an all employee bargaining unit, until either the parties agree that the positions should be excluded from the bargaining unit, or this Board so orders.

[20] Furthermore, in *Battlefords Co-operative*, the Board also confirmed that the onus of proof falls upon the party seeking to include or exclude a position from the bargaining unit.

Was the Proper Procedure Followed by the Employer?

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[1] [2015] CanLII 19983 (SKLRB)

[21] The Board dealt with this issue in the *Battlefords Co-operative* decision. The proper procedure to be followed is, upon a determination being made by an employer to create a new position, the employer should either seek the approval of the union to its exclusion, or, alternatively, apply to this Board to amend the certification Order or have the position provisionally excluded from the bargaining unit.

[22] The required steps were clearly set out by the Board in its decision in *Donovel (Re:)*[2]. At paragraph 28, the Board outlined those steps as follows:

1. Notify the certified union of the proposed new position;

2. If there is agreement on the assignment of the new position, then no further action is required unless the parties wish to update the certification order to include or exclude the positions in question;

3. If agreement is not reached on the proper placement of the position, the employer must apply to the Board to have the matter determined…; and

4. If the position must be filled on an urgent basis, the employer may seek an interim or provisional ruling from the Board or agreement from the union on the interim assignment of the position.

[23] Somewhat fortuitously, in this case, the position was never filled due to the rejection of the job offer by the person to whom it was offered in September of 2014. Following that event, HSAS sought and obtained legal advice regarding the process to be engaged. After redrafting a job advertisement, HSAS wrote to the Union seeking its approval to the position being placed out of scope. When approval was not given, it commenced this application.

[24] One could be critical of the early attempt to fill the position without discussion with the Union as occurred in *Battlefords Co-operative.* However, here the position was never filled. While it would have been preferable to have first contacted the Union before placement of the original advertisement, this failure does not, in our opinion, flaw the whole process. Upon receipt of proper advice, HSAS approached the Union to have the position excluded. In the face of the

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[2] [2006] CanLII 62948 (SKLRB), S.L.R.B.D. No. 29, LRB File Nos: 086-06 & 087-06

Union's rejection of that proposal, HSAS was entitled to bring forward this application to have the matter determined. Since that time, the work to be performed has been performed by a contractor.

Was there a Material Change of Circumstances?

[25] Both HSAS and the Union dealt extensively with this requirement in their arguments. HSAS argued that the creation of a new position was an exception to the requirement that a material change be demonstrated to support the application, citing *Re: SIAST*[3]. At paragraph 50, the Board says:

> *The rationale for the requirement for material change in instances other than where a provisional determination is sought for a newly created position is simple. It imposes a requirement that a material change be demonstrated in the duties or responsibilities in the position with respect to which the scope amendment is sought. However, in the case of a newly created position, there are no previously reviewed duties or responsibilities which the Board has considered as to whether the position met the criteria in s. 2(f) of the Act.*

[26] This comment is in keeping with the requirement to show a material change on applications for amendment. The material change requirement was adopted by the Board as a check against recurrent applications to have the Board review its previous decision regarding the scope of the bargaining unit. That sentiment was outlined by former Chairperson Sherstobitoff in *Re: Federated Co-operatives*[4], as follows:

> *It can be inferred that some persons might make applications for amendment in the hope that a new panel will view the matter in a different light. The Board wishes to make it clear that it will not sit in appeal on previous decisions of the board and it therefore determines in this application, as in all applications for amendment, the applicant must show a material change in circumstances before and amendment will be granted.*

[27] As noted in *Re: SIAST,* at para. 49, the provisions for a provisional determination by the Board were enacted to allow management to react to changing circumstances which necessitated the creation of new positions.

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[3] [2012] CanLII 65539 (SKLRB), S.L.R.B.D. No. 11, 216 C.L.R.B.R. (2d) 299, LRB File Nos: 188-11 & 190-11
[4] [1978] July Sask. Labour Rep. 45, LRB File No. 502-77

[28] The threshold requirement to show a material change is, as described by Abella J. in *Theratechnologies Inc. v. 121851 Canada Inc.*[5] "more than a "speed bump" and the courts must undertake a reasoned consideration of the evidence to ensure that the action has some merit." In the context of applications for amendment or provisional determination, the Board must , as cautioned by former Chairperson Sherstobitoff, ensure that the application is more than an effort to circumvent a previous determination of the Board and that there is merit to the application. It does not mean that the application must, necessarily, be successful, but there must be some factor which brings the Board to reassess or re-evaluate the position under review.

[29] Even if this application did not engage Section 6-105 of the *SEA*, the Board has held in *Liquor Board of Saskatchewan v. SGEU*[6] that a change in the definition of "employee" as occurred with the proclamation of the *SEA* and the repeal of *The Trade Union Act* "could amount to a 'material change' justifying review of a previous exclusion".

Is the Amendment Necessary?

[30] As noted in *Battlefords Co-operative,* the demonstration of a material change is "one step along the road to an applicant demonstrating the necessity for an amendment". As noted in paragraph 98 of that decision, the Board has wide discretion to determine if an amendment is necessary. The test to determine the necessity of an amendment is an objective test.

[31] Necessity may be shown by effluxion of time from the date of the Order, changed circumstances or material change, changes in business organization or mandate, or other facts which tend to show that the amendment is required. The creation of a new position which was not dealt with by the Board at the time of certification would, in our opinion, necessitate an amendment to the order if that position is determined by the Board to fall outside the definition of "employee". That is particularly true when, as here, there has been a change in the definition by the legislature since the certification Order was made.

Should the Position be excluded from the Bargaining Unit or Provisionally Excluded?

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[5] [2015] SCC 18 (CanLII)
[6] [1984] Nov. Sask. Labour Report 38, LRB File No. 083-84 @ para. 28

[32] As noted in *Battlefords Co-operative*, the purpose for the exclusions from the definition of "employee" is twofold. Firstly, it excludes management domination of the union and its activities by precluding involvement of management within the bargaining unit. Secondly, it provides management with resources to meaningfully engage in collective bargaining.

[33] HSAS argued that the Communications Coordinator position should be excluded from the bargaining unit to avoid "impermissible conflicts" with the bargaining unit. In making that argument, HSAS suggested that the Board had, "in essence, ruled that its existing jurisprudence still applied to the new definition". That is not the correct interpretation of the Board's rulings in *Battlefords Co-operative*. What the Board determined in *Battlefords Co-operative* was that the **purpose** for the exclusions remained the same. However, there are significant differences between the definition of "employee" as found in *The Trade Union Act* and the definition now contained within the *SEA*.

[34] To be excluded from the bargaining unit, the position must fall within the exceptions set out in subsections (A) and (B) of section 6-1(h)(i) of the *SEA.* Those exclusions, for ease of reference are: (emphasis added)

> (A) a person whose **primary** responsibility is to exercise authority and perform functions that are of a managerial character; or
>
> (B) a person whose **primary duties include** activities that are of a confidential nature in relation to any of the following and that have a direct impact on the bargaining unit the person would be included in as an employee but for this paragraph:
>
> (I) labour relations;
> (II) business strategic advice;
> (III) policy advice;
> (IV) budget implementation or planning.

[35] This definition is markedly different from the previous definition of "employee' contained in section 2(f) of *The Trade Union Act.* Again, for ease of reference, exclusions in that section read as follows: (emphasis added)

(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;

Is the Position Managerial?

[36] The definition under the *SEA* no longer contains the requirement that the person "actually" exercise authority and "actually" perform functions that are of a managerial character. Also, the confidentiality capacity exclusion was modified to remove the requirement that the person be acting "regularly" and the legislature prescribed certain activities in respect of which the confidentiality exclusion was directed.

[37] HSAS argued that the communications coordinator should be excluded due to the performance of duties of a "managerial character". During her evidence, Ms. Horejva testified that this newly created position "might" have administrative support attached to the position, which administrative support would be directed and supervised by the communications coordinator. There was no mention of such supervisory responsibility in the job duties advertised by HSAS, nor was there any mention in the revised job duties description other than a general responsibility for delegation of work to and providing supervision for HSAS staff assisting with communications.

[38] For two principle reasons, we are unable to agree with HSAS's arguments regarding this position. Firstly, the *SEA* contains specific provisions dealing with supervisory employees. Section 6-1(o) defines "supervisory employee". The evidence before the Board appeared to try to place this supervisory responsibility within that definition. However, by virtue of Section 6-11(6) exclusion of supervisory employees can occur only after April 29, 2016. Until that time, supervisory employees continue to be permissibly included within the scope of a bargaining unit.

[39] Secondly, the supervisory responsibilities which may be attached to this position appear to be contrived for the purpose of showing management responsibility to this position. Ms. Robinson, when she performed the duties of this position, did not have dedicated administrative support and utilized administrative support in common with other LRO's. Additionally, the chain of command in the current structure of HSAS has the Executive Director being responsible for the management of the LRO's and the Office Manager being responsible

for the management of the Administrative support. This proposal, to provide administrative support managed directly by the communications coordinator would have administrative support answerable only to the communication coordinator and not to the other currently excluded management positions. There seems to be no reason for this organizational change other than to buttress this application for exclusion of the position.

[40] HSAS argued that a provisional determination by the Board would allow HSAS and the Union to "test drive" the position for a year. It further argued that the Union would not have to take HSAS's word as to the duties and responsibilities to be assigned to the position, but, the position could be tried out for a year. If the duties, in the opinion of the Union were not as proposed by HSAS, then the Union would have the opportunity to return to the Board to challenge the provisional determination.

[41] In our opinion, the proposed supervisory responsibilities are not sufficient to cloth this position with managerial authority. The *SEA* requires that the incumbent in this position **actually** perform managerial duties as a primary responsibility of the position. We cannot agree that the job, as described will include any responsibilities which are sufficient to place this position within the management exclusion.

[42] For the position to be excluded, the Board had consistently determined that the duties to be performed must create an insoluble conflict[7]. Supervisors have routinely, if their duties did not create an insoluble conflict, been included in the bargaining unit. No such conflict would exist here if the usual chain of command, that is that administrative support staff be directed by the Office Manager were followed. As noted above, no cogent rationale for departing from that supervisory norm was provided.

[43] For these reasons, we find that the managerial exclusion is not appropriate.

Will the Position Perform Duties of a Confidential Nature?

[44] The primary duty identified for this positon was "receiving, summarizing, and advising Executive Council" of HSAS on member polling data. This was described by Ms. Horejva as being sensitive information that would be available to the communications

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[7] See *City of Regina v. CUPE, Local 21and Regina Middle Management Association* [1995] 3rd Quarter Sask. Labour Rep. 153, LRB File No. 268-93; *Professional Institute of the Public Service of Canada v. Executive Branch of the Government of Saskatchewan and SGEU* [1997] Sask. L.R.B.R. 530, LRB File No. 018-97; and *SGEU v.*

coordinator in respect to performance issues which might be identified by members when responding to the survey. These performance issues could be with respect to the Executive Director, the Office Manager, the LRO's or other HSAS staff.

[45] The new definition within *SEA* provides that the duties of a confidential nature be performed in relation to:

(I) Labour relations;
(II) Business strategic planning;
(III) Policy advise;
(IV) Budget implementation or planning:

Furthermore, the duties must have a direct impact upon the bargaining unit.

[46] The concern expressed by HSAS was that the incumbent of this position would be privy to sensitive information concerning, particularly the LRO's, which could be negative, and might require the incumbent to have to approach the Executive Director about corrective action, which might include discipline.

[47] Ms. Horejva made it clear that Mr. Aldridge would remain involved in the preparation and analysis of the member survey. His involvement did not appear to be changed from his involvement during the period of time that Ms. Robinson performed the communications duties part time. The major change is that the communications coordinator would be invited to attend the annual HSAS board retreat during which meetings, confidential matters, including matters related to collective bargaining, strategic planning, and policy advice would be discussed. However, there was no indication that the communications coordinator would play any role in the provision of any confidential information (other than perhaps in relation to the member survey), be involved in collective bargaining, or provide strategic advice. It was clear from Ms. Horejva's evidence that Mr. Aldridge would continue to be involved in the presentation of the data from the member survey and would provide any strategic advice required in response thereto. The communications coordinator did not appear to have a significant role in this area.

Saskatchewan Liquor and Gaming Authority and Saskatchewan Liquor Store Managers' Association v. Saskatchewan Liquor and Gaming Authority [1997] Sask. L.R.B.R. 836, LRB File Nos. 037-95 and 349-96

[48] Nor, in our opinion, was there a direct linkage established between the role of the communications coordinator and that position having a direct impact upon the bargaining unit. The position has no responsibility described in respect of collective bargaining other than to maintain confidentiality, which would be expected in any event.

[49] The job advertisement proposed a strategic planning role, as a non-voting member, with respect to Executive Committee, Executive Counsel and its committees. However, the evidence did not address this role.

[50] There was no suggestion that this position would provide business advice or budget implementation or planning advice.

[51] HSAS, however, argued that the position would be conflicted if communications were required in the event of a strike by the Union. With respect, this is precisely the impact of a strike, to deny the employer the availability of the work of its employees in furtherance of collective bargaining. As with other in scope functions which would not be available to the employer, such as, in this case, the servicing of its members, management would have to undertake those responsibilities during the course of the strike.

[52] We cannot agree that this position should be excluded from the bargaining unit based upon the evidence presented and for the reasons outlined above.

[53] The application is dismissed. An appropriate order amending the position of Administrator to Office Manager will accompany these reasons.

DATED at Regina, Saskatchewan, this **29th** day of **June**, **2015.**

LABOUR RELATIONS BOARD

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Kenneth G. Love, Q.C.
Chairperson