HANNAH CROWDER, Applicant v. SEIU-WEST, Respondent, and THE SASKATOON SOCIETY FOR THE PROTECTION OF CHILDREN INC., Respondent Employer

LRB File No. 023-16; July 28, 2016
Chairperson, Kenneth G. Love, Q.C.; Members: Joan White and Maurice Werezak

For the Applicant:	Self Represented
For the Respondent:	Drew Plaxton
For the Respondent Employer	Scott Wickenden

Rescission – Union alleges that application brought by employer was influenced by employer or that employee intimidated by employer – Board reviews evidence and finds that Union did not provide any evidence to justify the Board interfering in the right of employees to choose their bargaining representative.

Section 6-106 of *The Saskatchewan Employment Act* – Board reviews prior decisions and notes that changes to the former *Trade Union Act* which were incorporated into *The Saskatchewan Employment Act* provide employees with the right to a secret ballot vote regarding their desire to be represented or not to be represented for collective bargaining.

Rescission – Union alleges that Board should scrutinize employee support evidence as it alleged that the support evidence was obtained under misrepresentation as to the effect of the signing of the support evidence. Board reviews both evidence and support documents and finds nothing to suggest that the support evidence was improper or that employees were under misapprehension as to the effect of the signing of the support document.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love Q.C., Chairperson:** Hannah Crowder, (the "Applicant") on her own behalf and on behalf of other employees of The Saskatoon Society for the Protection of Children Inc. (the "Employer") has applied to the Board to cancel the certification order made by this board certifying SEIU-West (the "Union") as the collective bargaining representative for the employees of the Employer. The Union opposes the application.

[2] During the hearing, the Union removed any objections it had taken to the list of employees who were determined by the Board to be eligible to vote on the representational question. The Board therefore directed, following the hearing, that the vote should be tabulated and the results of the vote be made known to the parties. The result of the vote was as follows:

No. of Eligible Voters	24
No. of Votes for Union	15
No. of Votes against Union	7
No. of Spoiled Ballots	0
No. of Ballots Cast	22
No. of Employees Not Voting	2

As the employees have voted in favour of retaining the Union as their bargaining representative, the application for rescission is dismissed. However, the Union raised an issue of Employer interference or influence in respect of the application. These reasons relate to that question as well as a question regarding the support evidence raised by the Union..

Facts:

[3] The Union was certified to be the bargaining representative for the employees of the Employer by Board Order No. 076-99 issued on May 5, 1999. At the time of the application for rescission, there were approximately 25 employees.

[4] The Applicant was cross-examined by the Union in respect of her application. In her testimony, the Applicant described the reasons for her application as well as the process by which she gained support for her application from her co-workers. She testified that she, and a co-worker, Bobbi Foster, had originally determined to investigate the process whereby a union could be decertified. She testified that through an internet search, she discovered a website called "Labour Watch" which she utilized to gain information regarding the process. She also

testified that she spoke with employees of the Board with respect to the process for an application.

[5] In her testimony, she acknowledged that she had, prior to reading all of the information on the Labour Watch website, spoken to the acting director of the Employer to seek assistance. She testified that she was advised that the Employer could not participate in any application for decertification and that the Employer could not speak to her about the process. After that conversation, she testified that she read further the materials on the Labour Watch website and found all of the information that she needed.

[6] The Applicant also testified that she gathered the necessary support from her co-workers herself and did that after hours. She utilized the support form she found on the Labour Watch website which she provided to her co-workers who completed the form and returned it to her by mail, by dropping it off in her mailbox, or in some cases she picked it up at their home.

[7] Upon obtaining the statutorily required 45% support from her co-workers she filed the application with the Board.

[8] In her evidence, she also identified several communications from the Employer which were posted in the workplace concerning the status of collective bargaining between the Union and the Employer as well as one communication regarding the application for rescission.

[9] The Union called Julene Rawson, the Unit Chair[1] for the Union. She described in her testimony that the staff was divided concerning union representation. She also described some incidents which she felt showed that the Employer was opposed to the union in the workplace.

[10] She also testified that she had been told by a third party that the executive director of the Employer and Bobbi Foster were friends out of the workplace. She also testified concerning two meetings held by the Union which were also described by the Applicant. The first of those meetings was held in January of 2016 to discuss negotiations with the Employer. The second meeting was held in February to discuss the union's response to the rescission application. The Applicant was present at both of these meetings.

[1] She testified that this position was the equivalent to the position of shop steward.

[11] During the meeting in January, she testified that the Applicant was opposed to the collective bargaining position taken by the Union with respect to having a union presence at disciplinary meetings with the Employer. The second meeting included several staff reps from the Union as well as the Union President, Ms. Barb Cape, in addition to some of the employees.

Relevant statutory provisions:

> ***Application to cancel certification order – loss of support***
>
> ***6-17****(1) An employee within a bargaining unit may apply to the board to cancel a certification order if the employee:*
>
> > *(a) establishes that 45% or more of the employees in the bargaining unit have within the 90 days preceding the date of the application indicated support for removing the union as bargaining agent; and*
> >
> > *(b) files with the board evidence of each employee's support that meets the prescribed requirements.*
>
> *(2) On receipt of an application pursuant to subsection (1), the board shall direct that a vote be taken of the employees in the bargaining unit.*
>
> *(3) If a majority of the votes cast in a vote directed in accordance with subsection (2) favour removing the union as bargaining agent, the board shall cancel the certification order.*
>
> *(4) An application must not be made pursuant to this section:*
>
> > *(a) during the two years following the issuance of the first certification order; or*
> >
> > *(b) during the 12 months following a refusal pursuant to this section to cancel the certification order.*
>
> . . .
>
> ***Power to dismiss certain applications – influence, etc., of employers***
>
> ***6-106*** *The board may reject or dismiss any application made to it by an employee or employees if 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.*

Applicant's arguments:

[12] The Applicant argued that the application should be allowed to proceed and that she had had no assistance or intimidation from the Employer in respect to the application. She acknowledged that she had spoken to the Executive Director early on, but that she was

rebuffed and thereafter relied upon her own resources to investigate how to make the application for decertification and to obtain the necessary support therefor. The Applicant relied upon the Board's decision in *Williams v. United Food and Commercial Workers, Local 1400*[2] as well as *Button v. United Food and Commercial Workers, Local 1400*[3] as cited therein.

Union's arguments:

[13] The Union argued that the application was tainted by employer influence and should be rejected or dismissed pursuant to section 6-106 of the *SEA*. In support of its position, the Union relied upon *Martyn Arnold* v. *United Steelworkers of America*[4], *Mandziak v. Remai Investment Co. Ltd.*[5], *Nadon v. United Steel Workers of America*[6], *Paproski v. International Union of Painters and Allied Trades, Local 739*[7], *Janzen v. Service Employees International Union, Local 336*[8], and *Schaeffer and Lang v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*[9].

[14] The Union argued that the communications from the Employer amounted to intimidation of its employees, relying upon *Schan v. Little-Borland Ltd.*[10]

[15] The Union also challenged that the support evidence filed by the Applicant was obtained through misrepresentation or misapprehension as to the effect of the document signed by the individuals who provided support for the application, relying upon *Janzen v. Service Employees International Union, Local 336*[11].

Employer's Arguments:

[16] The Employer argued that it had not in any way assisted or influenced the application by the Applicant. It was argued that the Employer took no position regarding the employee's choice to have a bargaining agent or not. It also argued that the Union's argument

---

[2] [2014] CanLII 63996 (SKLRB), LRB File No. 262-13
[3] [2010] CanLII 100501 (SKLRB)
[4] [2005] Sask. L.R.B.R. 5, LRB File No. 275-04
[5] LRB File No. 162-87
[6] [2003] Sask. L.R.B.R. 383, LRB File No. 076-03
[7] [2008] Sask. L.R.B.R. 1, LRB File No. 173-06
[8] [2007] S.L.R.B.D. No. 6, 134 C.LR.B.R. (2d) 173, CanLII 68753, LRB File No. 004-07
[9] [1998] Sask. L.R.B. 573, LRB File No. 019-98
[10] LRB File Nos. 221-85 & 275-85

concerning the support evidence may cause a flood of similar applications in other cases if the Board endorsed that argument.

[17] The Employer argued that the Union had failed to provide any evidence with respect to its allegations of employer influence. The Employer also noted that the evidence concerning the friendship between Bobbi Foster and the Executive Director of the Employer was hearsay evidence from a third party.

Analysis:

[18] The Union raised two issues with respect to this application. The first was that the application was brought "in whole or in part on the advice of, or as a result of influence or intimidation by, the employer or the employer's agent"[12]. The second was that the support evidence filed by the Applicant was obtained through misrepresentation or misapprehension as to the effect of the document signed by the individuals who provided support for the application.

Was the Application Tainted by Employer Influence?

[19] The Union did not produce any direct evidence[13] of such influence or intimidation, but urged the Board to rely upon circumstantial evidence which it argued, pointed to employer influence in the filing of the application. The Applicant denied any such influence was exerted upon her or her co-workers who supported the application.

[20] All of the cases cited by the Union were decided by the Board prior to the amendments to *The Trade Union Act* in 2008 that provided for a secret ballot vote by employees to determine their true wishes with respect to the representational question. If an applicant is able to show 45% support from his or her co-workers, the Board is required by section 6-17(2) of the *SEA* to conduct a secret ballot vote of all employees in the bargaining unit to determine their wishes.

[21] The impact of a secret ballot vote by employees is to minimize any potential influence or intimidation of employees in their choice to be represented or not to be represented

---

[11] [2007] S.L.R.B.D. No. 6, 134 C.LR.B.R. (2d) 173, CanLII 68753, LRB File No. 004-07
[12] See section 6-106 of the *SEA*.
[13] The "smoking gun" as it was referred to by Mr. Plaxton in his argument

by a trade union for collective bargaining. Employees may, in secret, and without fear of reprisal, make their choice.

[22] That was not so under the legislation which existed prior to 2008. Under that legislation, an applicant for rescission would first have to show that there had been no intimidation or influence in the making of their application before a vote would be ordered by the Board. This process was manifestly unfair to applicants who bore an unnecessary burden to satisfy the Board that they had not been influenced or intimidated rather than the Union being required to show evidence of influence or intimidation. This patronizing attitude towards employees and their desire to be represented or not was displaced by the amendments to *The Trade Union Act* to allow employees to make their choice by secret ballot.

[23] As was noted by the Board in *Williams v. United Food and Commercial Workers, Local 1400*[14], previous cases before the Board have generally fallen into two (2) categories:

> ***[31]*** *Generally speaking, the cases where this Board has invoked s. 9 of The Trade Union Act have generally fallen into one of two (2) categories:*
>
> 1. *Circumstances where the Board had compelling reason to believe that the real motivating force behind the decision to bring a rescission application was the will of the employer rather than the wishes of the employees. Examples of such cases include Wilson v. RWDSU and Remai Investment Co., supra; Larry Rowe and Anthony Kowalski v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Canadian Linen and Uniform Services Co., [2001] Sask. L.R.B.R. 760, LRB File No. 104-01; Tyler Nadon v. United Steelworkers of America and X-Potential Products Inc., [2003] Sask. L.R.B.R. 383, 2003 CanLII 62864 (SK LRB), LRB File No. 076-03; and Paproski v. International Union of Painters and Jordan Asbestos Removal, supra.*
>
> 2. *Circumstances where the Board lost confidence in the capacity of the employees to independently decide the representational question because the nature of an employer's improper conduct was such that it likely impaired them of their capacity to freely do so. Examples of such cases include, Schaeffer v. RWDSU and Loraas Disposal Services, supra; and Patricia Bateman v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Empire Investments Corporation (Northwood Inn & Suites), 2009 CanLII 18238 (SK LRB), LRB File No. 149-08.*

[14] [2014] CanLII 63996 (SKLRB), LRB File No. 262-13

[24] Additionally, since many of the cases relied upon by the Union were decided, the constitutional right of association guaranteed by the Canadian Charter of Rights and Freedoms[15] and the *SEA*[16] has evolved and strengthened by our Courts so as to insure that employees fully enjoy the right to "form, join or assist unions and to engage in collective bargaining through a union **of their own choosing**". (Emphasis added).

[25] This right cannot and should not be interfered with lightly by the Board. The Board must not act on speculation or innuendo as to what might have occurred. Employees have the right to be represented by or through a union which they have freely chosen to be their representative.

[26] It is more than a little self-serving for a union to claim, in the face of an application by employees to remove them as the bargaining agent, that the employees have been influenced, mislead, or intimidated by an employer. That action by the union may, in and of itself, be considered to be a form of intimidation by the union against its members who wish to remove the union as the bargaining agent.

[27] It takes a great deal of courage for an employee, such as the Applicant, to stand up for herself and her co-workers against the power and authority of the Union and to withstand cross examination as to her motives and those of her co-workers who are merely seeking to avail themselves of their constitutional and statutory right to choose who, if anyone, represents them.

[28] As was noted by the Board in *Williams*, the test is an objective one.

> *… the Board starts from the presumption that employees are possessed of reasonable fortitude and are capable of receiving a variety of information; of evaluating that information, even being aided or influenced by that information; without necessarily losing the capacity for independent thought or action. Employees are not presumed to be timorous minions cowering in fear of their masters. Rather, the Board presumes that employees are capable of deciding what is best for them and that they will weigh any information they receive, including information from their employer, and will make rational decisions in response to that information. For this reason, not every impugned statement made or action taken by an employer will necessarily lead to the conclusion that a rescission application has been made as the result of improper influence, interference, assistance or intimidation by the employer. See: Ray Hudon v.*

[15] *The Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11
[16] See section 6-4

> *Sheet Metal Workers International Association, Local 296 and Inter-City Mechanical Ltd., [1984] Aug. Sask. Labour Rep. 32, LRB File No. 105-84.*

[29] In *Williams,* the Board went on to say:

> *In exercising the discretion granted pursuant to s. 9 of the Act¸ the democratic rights of employees should not be withheld merely because employees have received information from their employer and that information may have assisted them. See: Button v. United Food and Commercial Workers, Local 1400 and Wal-Mart Canada, supra. Rather, the impugned conduct of the employer must approach a higher threshold; it must be of a nature and significance that the probably impact of that information will be to compromise the ability of employees (of reasonable fortitude) to freely exercise their rights under the Act. See: Shane Reese v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Holiday Inn Ltd., [1989] Summer Sask. Labour Rep. 84, LRB File Nos. 207-88 & 003-89.*

[30] The only evidence before us, and which the Applicant admitted, was that early on in the process, she had contacted the Executive Director of the Employer regarding the process for decertification, but was rebuffed by the Executive Director, who advised that she could not be involved in the process and that the Applicant should do her own research as to the process. This response was entirely appropriate by management and cannot be considered to be in any way attempting to influence the Applicant (and would have not had any impact on those who supported the application as there was no evidence that the comments were passed on). Nor can such statements be considered to be intimidating to the Applicant or any of the supporters of the application. The Applicant was subjected to a rigorous cross-examination by the Union and she did not, in her evidence, suggest that the Employer had in any way, by comment or otherwise, influenced her or intimidated her.

[31] The Union also pointed to several communications posted by the Employer in the workplace. One of these was an update on negotiations dated November 17, 2015. It is difficult to understand how the Union can claim that this communication influenced or intimidated the Applicant since it was posted well before the Applicant and her main supporter, Bobbi Foster began their investigation as to how to effect a decertification of the Union.

[32] Similar communications were issued and posted on January 4th and 8th of 2016. Again, they were bargaining updates from the Employer. The Union and the Applicant gave evidence that they had held a meeting in January to discuss bargaining. The evidence was that

there was considerable discord amongst the Union membership with respect to those proposals, particularly with respect to a proposal that union participation in disciplinary proceedings be mandatory rather than the current collective bargaining provision which allowed an employee to choose if he or she wished to have the Union present.

[33] In 2008, *The Trade Union Act* was also amended[17] to confirm the right of employers to communicate "facts and opinions" to its employees. The communications of November 17, 2015, January 4, 2016 and January 8, 2016 clearly fall within the purview of this provision. Additionally, read objectively, these communications cannot, in our opinion, be taken to have influenced or intimidated any reasonable employee from the exercise of their right to choose their bargaining representative.

[34] The final communication was a notice posted in March of 2016 following the application for decertification being filed by the Applicant. Given that the application was already made, and support had been filed by the Applicant, the only possible impact, if any, of this communication would be to influence employees in the secret ballot vote being conducted by the Board. Again, however, this communication is factual in its nature and directs those with questions to this Board. It maintains the Employer's neutral position in regards to the representational question.

[35] The Union relied upon *Schan v. Little-Borland Ltd.*[18] to support its argument that the employer communications were sufficient to allow the Board to invoke section 6-106 of the *SEA*. The facts of that case were far different from the evidence in this case. In *Schan*, the employer's communication was a "Notice of Lay Off". In that notice, the following statement was made:

> *Due to financial implications of the grievance filed against our company by the United Brotherhood of Carpenters and Joiners…you will be laid off*

[36] Even in the face of this notice, the Board did not invoke section 9 of *The Trade Union Act* and proceeded to order a vote on the rescission application to proceed. If such actions by the Employer in *Schan* do not justify the Board's intervention, then the Employer's actions here clearly cannot be sufficient to justify any intervention in this case.

---

[17] Now continued as section 6-62(20 of the *SEA*.
[18] LRB File Nos. 221-85 & 275-85

[37] The Union also questioned the motivation of the Applicant in respect of her reasons for making the application. They encouraged the Board to find a link between the reasons stated for the application and the Employer's positions at the bargaining table. This argument must also fail. Both the Applicant and the Union gave evidence that the membership was divided over mandatory representation by the Union at disciplinary proceedings. It was not just the Applicant who had issues with this bargaining proposal. Moreover, the employee is not required to have any reason other than it does not wish to continue to be represented by the Union. The *SEA* provides employees with the right to choose to be represented or not and the Board should not look beyond that right, subject to section 6-106 influence or intimidation being shown by the Union.

[38] There is nothing in the evidence to show that the Board should be concerned that "the real motivating force behind the decision to bring this rescission application was the will of the employer rather than the wishes of the employees". The evidence from the Applicant was clear in that regard. Furthermore, the Union has failed to demonstrate that any employee was in any way influenced or intimidated by any of the factual postings by the employer. The only evidence we have of any relationship with management was the hearsay testimony of Julene Rawson, that there was an out of the workplace relationship between Bobbi Foster and the executive director. The fact of a friendship outside the workplace, even if it were proven to be true, does not lead to a conclusion of employer interference. Some better evidence would be required, in our opinion.

[39] This is particularly true when the evidence of the Applicant is considered. It was her evidence that although she and Ms. Foster started the process, it was left to her to both file the application and collect the necessary co-worker support because Ms. Foster left the workplace to live in China for a period of at least two years[19].

[40] Nor do we have a loss of confidence that the capacity of employees to independently decide the representational question, due to improper conduct by the employer has been shown. There has been no improper conduct on the part of the employer demonstrated, and certainly no conduct which has impaired the employees in their capacity to independently decide the representational question. The Board has conducted a secret ballot vote of the employees and no evidence of employer influence or intimidation of employees with respect to their free vote has been shown.

[41] In our view, the Union has failed to provide any evidence sufficient to justify this Board limiting or denying the employee's rights to choose their bargaining representative. Section 6-106 should only be used by the Board in exceptional circumstances where, as directed by the legislation, "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". In this case we are far from satisfied that we should invoke section 6-106 to deny employees the rights which are accorded to them by the *SEA* and *The Charter of Rights and Freedoms*.

Was the Support Evidence Obtained Through Misrepresentation or Misapprehension?

[42] The Union alleges that the Applicant misinformed her supporters as to the effect of the support document which they signed, arguing that the Applicant had advised that the effect of their signature on the support document was not for the purpose of decertifying the union, but merely for the purpose of obtaining a vote of the employees.

[43] Counsel for the Union argued that section 6-17(1)(a) of the *SEA* required that employees must show that they support the removal of the union as bargaining agent for the employees not for the ordering of a vote by employees.

[44] This argument must also fail. As noted by the Board in *Janzen v. Service Employees International Union, Local 336*[20], the Board must subject evidence of support to a high degree of scrutiny because the evidence remains confidential. This was particularly true in *Janzen*, when there was no automatic secret ballot vote upon sufficient evidence of support being filed. While less important due to the curative nature of a secret ballot vote, it is nevertheless necessary for the Board to be satisfied that those filing support for an application for certification or decertification clearly demonstrate their support for the application to obtain or remove bargaining rights.

[45] That scrutiny, however, is done prior to the Board making an order for the conduct of a vote with respect to the application. The Board issued a Direction to Vote on February 23, 2016 with respect to this application. That Order was made by the Executive

---

[19] See paragraph 5(h) of the Union's reply to the application
[20] [2007] S.L.R.B.D. No. 6, 134 C.LR.B.R. (2d) 173, CanLII 68753, LRB File No. 004-07

Officer of the Board in the exercise of authority delegated to him under section 9-93(3)(c) of the *SEA*. Pursuant to section 6-97(2) the Union should have applied for a review of that order if it considered that the support evidence was not sufficient. That was not done.

[46] However, notwithstanding this procedural defect, the argument must also fail for other reasons. The Union brought no evidence that any reasonable employee had been misled as to the nature of the support evidence that was provided, nor was there any request to the Board to have any evidence of support withdrawn. Furthermore, the form of document filed with the Board clearly says, on the face of it, in bold large type “This document indicates that I no longer want to be represented by the following union”. On the face of the support document, we can only conclude, especially given there is no evidence to the contrary, that a reasonable employee signing this document was aware of what he or she was signing and in so doing expressed his or her desire to no longer be represented by the Union.

[47] The Union took issue with the Applicant’s statement that the purpose of gaining support was to allow for a secret ballot vote of the employees. This statement was a true statement insofar as it is a necessary prerequisite for a vote to be ordered that the employees show sufficient support for the application. Once that support is demonstrated, the Board “shall” order a vote to be held.

Decision:

[48] The Application for rescission is dismissed based upon the secret ballot vote by the employees. An appropriate order will accompany these reasons.

DATED at Regina, Saskatchewan, this 28th day of July, 2016.

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.
Chairperson