INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING & PORTABLE & STATIONARY, LOCAL 870, Applicant v. RURAL MUNICIPALITY OF ROSEDALE, No. 283, Respondent

LRB File No. 154-16, November 8, 2016

Chairperson, Kenneth G. Love, Q.C.; Members: Maurice Werezak and Laura Sommervill

For the Applicant: Mr. Corey Cowley and Mr. Bryce Unruh
For the Respondent: Ms. Danielle Hache and Mr. Norm Suderman

Section 6-62(1)(g), 6-62(4) and 6-62(5) of *The Saskatchewan Employment Act* – Board reviews previous jurisprudence under *The Trade Union Act* and finds jurisprudence applicable to revised provisions under *The Saskatchewan Employment Act.*

Reverse Onus – Board discusses Statutory requirements for implementation of Reverse Onus.

Good and Sufficient Reason for termination or suspension – Board reviews evidence and finds evidence establishes good and sufficient reason.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: The International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 (the "Union") brought an application for certification of the employees of The Rural Municipality of Rosedale, No. 283 (the R.M."). During the course of that certification application two employees, who were among the group for which certification was sought, were laid off by the R.M. The Union brings this application under section 6-62(1)(g) of *The Saskatchewan Employment Act*, S.S. 2013, c.S-15.1 (the

"SEA") seeking an order that these two employees were laid off as a result of their involvement in the Union's organizing drive.

Facts:

[2] The Board heard testimony from only one of the two employees who were laid off, Trevor Heagy. The other employee did not testify and the Board heard no evidence respecting his situation. The Union abandoned its claim with respect to the other employee, Martin Martinson.

[3] Mr. Heagy testified that he had been employed as a heavy equipment operator by the R.M for two years. His employment with the R.M was seasonal and that he was normally laid off by the R.M. at some time, but in this instance, he had been laid off much earlier than normal.

[4] Mr. Heagy further testified that he was involved in the Union's organizing drive and was responsible for obtaining support cards from other members and returning them to the Union. He testified that he told everyone he met that he was involved in organizing the workplace. Mr. Heagy also testified that both he and the other employee laid off by the R.M. were permitted to vote with respect to the representation question put to the employees by the Board.

[5] Mr. Heagy further testified that when he was laid off on June 27, 2016, he was provided a letter notifying him of the layoff by Deputy Reeve, Norm Suderman. He was paid two weeks pay in lieu of notice based upon his normal hours of work during the summer, which were 50 hours per week.

[6] Mr. Heagy also testified that he was not permitted to remain on the R.M.'s property following his lay off and was escorted off the property by the Deputy Reeve, Mr. Suderman.

[7] Mr. Heagy testified that he was not the most junior operator at the time of his discharge. He also testified that he had not received any prior discipline for insolence or insubordination.

[8] Mr. Heagy also testified that at the time he was laid off that he expected to be recalled from layoff. He was called back to work on September 1, 2016 and did return to work on September 6, 2016 to replace another worker who was injured. He testified that he did not collect Employment Insurance while off work and, did not even apply.

[9] Ms. Danielle Hache, the Administrator for the R.M., testified with respect to the layoff of Mr. Heagy. She testified that she was recently appointed as Administrator for the R.M. and was responsible to prepare the operating budget for the R.M. She testified that the preparation of the budget in 2016 was delayed because of a delay in the completion of the audit of the operations in 2015 and because of the lateness of the provincial budget due to the provincial election in 2016. She also testified that the R.M. was under some financial constraints due to prior years' expenditures, which had to be accounted for in 2016. The operating budget was prepared in June of 2016 and approved by council of the R.M. in July of 2016. That budget provided for a modest reduction in total wages paid for transportation services[1].

[10] Ms. Hache testified that on April 1, 2016 the R.M. hired a new foreman. As a result of this hiring, there was a shifting of some monies from the budget to accommodate this new position.

[11] Under cross-examination, she testified that the R.M. had purchased land for the operation of a gravel pit for the R.M. and had also leased a new end dump truck for use in road and utility maintenance.

[12] Ms. Hache testified that she was unaware that the two employees, including Mr. Heagy, were involved in the certification drive by the Union.

[13] Ms. Hache also testified, in cross-examination, that the termination of Mr. Heagy had been discussed by the council of the R.M. on three occasions as a result of three incidents of insubordination/insolence by Mr. Heagy in April, May, and June of 2016. She testified that she understood that the new foreman had spoken to Mr. Heagy about these incidents. She testified that ultimately, council decided not to terminate Mr. Heagy, but to lay him off in order that he might qualify for Employment Insurance.

[1] This is where this group of employees was accounted for in the budget.

Relevant statutory provision:

[14] Relevant statutory provisions are as follows:

> ***Unfair labour practices – employers***
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> ***6-62****(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
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> *. . .*
>
> *(g) to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat of termination 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 a proceeding pursuant to this Part;*
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> *. . .*
>
> *(4) For the purposes of clause (1)(g), there is a presumption in favour of an employee that the employee was terminated or suspended contrary to this Part if:*
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> *(a) an employer or person acting on behalf of the employer terminates or suspends an employee from employment; and*
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> *(b) it is shown to the satisfaction of the board or the court that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right pursuant to this Part.*

Union's arguments:

[15] The Union argued that the facts were clear that Mr. Heagy was involved in the exercise of his rights to join or form a trade union. It was also clear, they argued, that the reasons given for the termination were not believable. They argued the R.M. should be found guilty of an unfair labour practice under section 6-62(1)(g) and that Mr. Heagy should be paid for the work that he lost as a result.

R.M.'s arguments:

[16] The R.M. argued that they were not aware that Heagy was involved in the organizing drive. They argued that the layoffs were driven solely by financial considerations and not by any anti-union animus.

Analysis:

[17] The Board has not considered section 6-62(1)(g) since it was introduced into the *SEA*. While similar to section 11(1)(e) of *The Trade Union Act*[2], it is not identical. The changes, however, are not so great as to change the underlying purpose and intent of the provision which is to ensure that the right of employees "to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing."[3] Section 6-62(1)(g) makes it an unfair labour practice for employers to intimidate employees in the exercise of that right.

[18] That right is further reinforced by section 6-5 of the *SEA* which invokes a general interdiction against the use of "coercion or intimidation of any kind" which could "reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue to be or cease to be a member of a union".

[19] The Board's jurisprudence with respect to this provision, as adopted with respect to the similar provision of *The Trade Union Act* is well established. The Board reviewed that jurisprudence in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Sakundiak Equipment, a Division of WGI Westman Group*[4]. At paragraphs [100] – [103], the Board said:

> *[100] The Board has recently outlined its jurisprudence with respect to the application of s. 11(1)(e) of the Act in Canadian Union of Public Employees v. Del Enterprises Ltd. o/s St. Anne's Christian Centre. That decision referenced the Board's decision in Canadian Union of Public Employees, Local 3990 v. Core Community Group Inc., which decision referenced the Board's decision in Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Moose Jaw Exhibition Co. Ltd.*
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> *[101] In the Moose Jaw Exhibition case, supra, the Board quoted from para. 123 of its decision in Saskatchewan Government Employees Union v. Regina Native Youth and Community Services Inc. as follows:*
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> > *It is clear from the terms of Section 11(1)(e) of the Act that any decision to dismiss or suspend an employee which is influenced by the presence of trade union activity must be regarded as a very serious matter. If an employer is inclined to discourage activity in support of a trade union, there are few signals which can be sent to employees more powerful than those which suggest that their employment may be in jeopardy. The seriousness with which the legislature regards conduct of this kind is*

[2] R.S.S. 1978 c. T-17 (repealed)
[3] See section 6-4 of the *SEA*
[4] [2011] CanLII 72774 (SK LRB), LRB File Nos. 107-11 to 109-11 & 129-11 to 133-11

> *indicated by the fact that the onus rests on the employer to show that trade union activity played no part in the decision to discharge or suspend an employee.*

> *[102] In United Steelworkers of America v. Eisbrenner Pontiac Asuna Buick Cadillac GMC Ltd. the Board made this observation about the significance of the reverse onus found in s. 11(1)(e) of the Act. In that decision, the Board outlined two elements that the Board must consider as follows:*
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> > *When it is alleged that what purports to be a layoff or dismissal of an employee is tainted by anti-union sentiment on the part of an employer, this Board has consistently held, as have tribunals in other jurisdictions, that it is not sufficient for that employer to show that there is a plausible reason for the decision. Even if the employer is able to establish a coherent and credible reason for dismissing or laying off the employee…those reasons will only be acceptable as a defence to an unfair labour practice charge under Section 11(1)(d)if it can be shown that they are not accompanied by anything that indicates that anti-union feeling was a factor in the decision.*
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> *[103] Also, in The Newspaper Guild v. The Leader-Post, a Division of Armadale Co. Ltd., the Board noted that in making its analysis of the decision, it would not enter directly into an evaluation of the merits of the decision.*
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> > *For our purposes, however, the motivation of the Employer is the central issue and in this connection the credibility and coherence of the explanation for the dismissal put forward by the Employer is, of course, a relevant consideration. We are not required, as an arbitrator is, to decide whether a particular cause for dismissal has been established. … Our task is to consider whether the explanation given by an employer holds up when the dismissal of an employee and some steps taken in exercise of rights under The Trade Union Act coincide. The strength or weakness of the case an employer offers in defence of the termination is one indicator of whether union activity may also have entered into the mind of the Employer.*

[20] Before a terminated employee can have the benefit of subsection 6-62(4) of the *SEA*, which contains a reverse onus in favour of the employee, the Board must be satisfied that:

> *(a) an employer or person action on behalf of the employer terminates or suspends an employee from employment; and*
>
> *(b) it is shown to the satisfaction of the board or the court that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right pursuant to Part VI of the SEA*

[21] However, once those two conditions are satisfied, the burden of proof falls upon the employer to show that the employee was terminated for good and sufficient reason. The Board has required that the reason given by the employer must be both coherent and credible.

Has the Employee satisfied the Board that the reverse onus should be brought to bear on the Employer?

[22] The evidence from Mr. Heagy is uncontroverted that, at the time of the layoff, he was engaged in the exercise of his right to join or assist a trade union, or in choosing a bargaining representative. His evidence was that he was one of the organizers of the application for certification. His evidence was that he told everyone that he was involved in organizing a union. The R.M. denies any knowledge of his participation.

[23] The evidence is also uncontroverted that the employer did, at the time that he was involved in this organizing activity, layoff Mr. Heagy.

[24] Based upon this evidence, we are satisfied that the two conditions necessary to bring the reverse onus into play have been met.

Did the R.M., as Employer, satisfy the Burden of proof that the employee was terminated for other good and sufficient reason?

[25] The uncontroverted evidence from the R.M. was that the layoffs were due to financial considerations and had nothing to do with the organizing activity. The Union raises an issue with the Reply filed by the R.M. wherein it sought to justify the layoff of Mr. Heagy due to his insubordination and insolence, something which, in the final result, they did not rely upon. However, the Reply filed by the R.M. does also make reference to the budgetary restraint concerns in respect of Mr. Martinson.

[26] The Union took the view that Mr. Heagy should not have been laid off, rather a more junior employee should have been laid off instead. The R.M. responded to this by saying that the more junior employee was retained because he had better maintenance skills than Mr. Heagy.

[27] While it appears that Mr. Heagy was not to have been the best employee based upon the allegations of his insubordination and insolent behavior, it is clear to us from the evidence that the R.M., in the final analysis, determined not to terminate him for cause, but rather to lay him off, with the chance of recall, which it exercised to recall him in September.

We do not find that the R.M. sought to justify his layoff for these incidents which may, or may not, have been disciplinary.

[28] We accept the evidence of the R.M. that they were unaware of the involvement of Mr. Heagy in the organization drive. There was no evidence to show any anti-union animus in the reaction of the R.M. to the certification application. In fact, the evidence was that they took no exception to both Mr. Heagy and the other laid off employee from voting with respect to the application. The Form 20, Notice of Vote distributed by the Board's Returning Officer notes both names on the list of eligible employees. The vote was conducted by mail in ballot and was mailed on June 24, 2016, returnable on July 8, 2016.

[29] We are satisfied with the explanation provided by the R.M. that they did not lay off Mr. Heagy due to his involvement in the organizational activity. They have provided a good and sufficient other reason for his lay off, which was the financial considerations being faced by the R.M. The Board finds that the explanation given, based upon the evidence provided, was both credible and coherent.

[30] For these reasons, the application is denied. An appropriate Order will accompany these reasons.

[31] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **8th** day of **November, 2016.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson