SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. AARON'S FURNITURE, Respondent

LRB File Nos. 265-15 & 268-15; January 12, 2016
Chairperson, Kenneth G. Love, Q.C.; Members: Ken Ahl and Bert Ottenson

For the Applicant Union: Ms. Ronni Nordal
For the Respondent Employer: Mr. Daniel Kwochka

Interim Application – Union applies for interim order re-instating employees terminated while organizing drive underway in workplace – Employer counters application by providing explanation of terminations unrelated to union organizing drive.

Interim Application – Union applied for re-instatement of employees and for lost wages due to termination of employees during organizing drive.

Interim Application – Balance of Convenience – Union applies for interim order seeking re-instatement and lost wages – Employer provides explanation of terminations unrelated to union organizing drive – Board considers balance of convenience in denying application – Board determines that employees will be made whole in the event the Union succeeds in its principal application – Board determines that re-instatement and monetary loss at this stage of proceedings would negatively impact Employer more than employees.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") has brought applications for interim relief against Aaron's Furniture (the "Employer"), alleging that (2) two employees, Mr. Sean Flint[1] and Mr. Austin Merle[2] were wrongfully terminated from their employment with the Employer as a result of them having engaged in efforts to organize employees of the Employer. The application

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[2] LRB File No. 268-15

for interim relief requested that both employees be re-instated to their positions and awarded compensation for any monetary loss suffered by them.

[2] The Employer countered the application by claiming that the employees had been terminated either without cause (in the case of Mr. Flint) and with cause in the case of Mr. Merle. The Employer alleged that Mr. Flint's work performance was unsatisfactory and that a decision had been made to terminate him and replace him prior to the Employer having any knowledge of the organizing efforts by their employees. In the case of Mr. Merle, the Employer argued that he was terminated because he failed to renew his driver's license, which was required for him to perform his duties.

Facts:

[3] Mr. Flint provided an Affidavit in support of his application. In that Affidavit, he set forth the history of his employment with the Employer as well as the events that led to his termination. He deposed that he met with union officials on November 27, 2015, along with Mr. Merle, to discuss the prospects of the Union representing the employees of the Employer.

[4] Mr. Flint deposes that following the meeting on November 27, 2015, that he and Mr. Merle met with various employees of the Employer to determine their interest in being represented by the Union and met with Union officials again on November 30, 2015. They both agreed to speak further to their co-workers and meet again with Union officials on December 2, 2015.

[5] Mr. Flint and Mr. Merle deposed that they were called to the office of the General Manager of the Employer, Mr. Steve Anderson on the afternoon of November 30, 2015. Mr. Flint deposes that he was told by Mr. Anderson to "bring in my partner in crime, Austin". Both employees attended to the office to meet with Mr. Anderson.

[6] Mr. Flint described the meeting with Mr. Anderson in his Affidavit. He indicated that he was aware from the comment concerning Mr. Merle being brought into the office as well that it was about the union organizing drive. Mr. Flint deposed that he advised Mr. Anderson that he did not wish to discuss the Union and left the office.

[7] Mr. Merle met with Mr. Anderson after Mr. Flint. In his Affidavit, he deposes that Mr. Anderson asked him something to the effect of "What is this union thing?" Mr. Merle deposed that he advised that he would not be a part of the Union so it did not have anything to do with him.

[8] Both Mr. Flint and Mr. Merle reported the meeting with Mr. Anderson to the Union. They continued to contact employees concerning representation, but did not experience much success following the meeting with Mr. Anderson.

[9] On December 4, 2015, Mr. Flint was advised that he was being terminated "without cause" and was advised that he would be provided with a severance payment of (2) two weeks salary. Mr. Merle deposed that he was contacted by Mr. Anderson, who advised him that he had just been advised that Mr. Merle did not possess a valid driver's license. On inquiry, Mr. Merle determined that his driver's license had expired on August 30, 2015 and he had failed to renew it.

[10] The Employer filed an Affidavit from Mr. Steve Anderson in reply. It his Affidavit, Mr. Anderson deposes that Mr. Flint had some issues in coming into work well in advance of his scheduled shifts. He deposed that Mr. Flint was directed not to attend work before his scheduled work times to avoid any distraction of other employees and to ensure that no payment would be required for additional time that Mr. Flint was at work.

[11] Mr. Anderson also deposed that Mr. Flint would attend his place of employment when no one else was in the store. He also deposed that Mr. Flint had set up an online storage account without permission, something that was contrary to company policy. He deposed that Mr. Flint was required to delete the account.

[12] He also deposed that Mr. Flint began contacting employees when they were off work, which generated complaints to him from some of those employees. He also deposed that he had had complaints from customers regarding rude or disrespectful comments made by Mr. Flint.

[13] Mr. Anderson deposed that on August 18, 2015, Mr. Flint refused to do collection calls to delinquent accounts, which became a problem going forward. He deposed that Darcy Hala met with Mr. Flint on August 18, 2015 to deal with these issues. He further deposed that on

November 5 and 6, 2015 Mr. Flint had utilized the Employer's vehicle to carry out some personal shopping and when confronted, initially denied the allegation.

[14] Mr. Anderson deposed that he met with Mr. Flint on October 16, 2015 and completed a "counselling form" in respect of Mr. Flint's behaviour. He deposed that during the week of November 23 to 27, 2015 he met with Darcy Hala with respect to termination of Mr. Flint's employment. He deposed that they determined to replace Mr. Flint and on the morning of November 30, 2015, and he asked Darcy Hala to post an advertisement for a replacement for Mr. Flint.

[15] Mr. Anderson deposed that he learned about the organizing drive by the Union and Mr. Flint's involvement at approximately 1:30 PM on November 30, 2015. He deposed that following the meeting described by Mr. Flint and Mr. Merle (albeit in a slightly different perspective) he met with Darcy Hala and determined to terminate Mr. Flint. He was unable to meet with Mr. Flint prior to December 4, 2015 due to Mr. Flint's work schedule and Mr. Flint's absence from work due to illness.

[16] In respect of Mr. Merle, he deposed that he was made aware by the Employer's insurer, on December 8, 2015, that Mr. Merle was driving without a valid driver's license, which was a requirement for his employment.

Relevant statutory provision:

[17] 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;*
>
> *. . .*

> *(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:*
>
> *(a) an employer or person acting 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 this Part.*

Union's arguments:

[18] The Union filed a written Brief and case authorities which we have reviewed and found helpful. The Union argued that an interim order should be granted in this case. The Union further argued that the requirements for the issuance of an interim order were summarized in *Saskatchewan Government and General Employees' Union v The Government of Saskatchewan*[3], which require that the Union show at least an "arguable case" and that the balance of convenience favours the granting of the interim order.

[19] The Union also argued that the termination of key organizing employees during an organizing drive must be carefully considered by the Board due to the potential chilling effect on the organizing drive resultant from the terminations.

[20] The Union argued that even if it would be disruptive to have Mr. Flint re-instated to his employment, that the Board could place him on paid leave pending the outcome of the application underlying the interim application as was done by the Board in *S.E.I.U., Local 336 v. Chinook School Division No. 211.*[4]

Employer's arguments:

[21] The Employer argued that the terminations were not motivated by anti-union animus. They argued that Mr. Flint was a disruptive force in the workplace and that the decision to terminate him had been made prior to the Employer being aware of any organizing drive.

[22] With respect to Mr. Merle, the Employer argued that having a valid driver's license was a job requirement which Mr. Merle failed to comply with, and that his continuing to drive with

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[3] [2010] CanLII 81339 (SKLRB)
[4] [2008] CanLII 47045 (SKLRB)

an expired license constituted a liability issue for the Employer. The Employer argued it had no choice but to terminate Mr. Merle.

Analysis:

[23] The most recent analysis of the Board's jurisprudence with respect to interim applications is contained within the Board's decision in *Amalgamated Transit Union, Local 615 v. City of Saskatoon*[5]. In that decision, the Board confirmed that its jurisprudence under the former *Trade Union Act* was applicable to the revised statutory provisions under *The Saskatchewan Employment Act*, S.S. 2013, c.S-15.1 (the "*Act*"). At paragraph [39] of that decision, the Board says:

> *In our opinion, the legislative purpose and the policy restrictions associated with the exercise of the discretion set forth in s. 6-103(2)(d) are the same as that which was articulated by this Board in the Government of Saskatchewan case, supra. Simply put, the Board's authority to grant interim relief, the factors we take into consideration on interim applications, and the test employed in exercising our discretion have remained essentially unchanged following the repeal of The Trade Union Act and the proclamation of The Saskatchewan Employment Act.*

[24] The Board also adopted the summary of the Board's jurisprudence regarding Interim applications from paragraphs [30] to [34] of its decision in *Saskatchewan Government and General Employees' Union v The Government of Saskatchewan,*[6] as follows:

> ***[30]*** *Interim applications are utilized in exigent circumstances where intervention by the Board is thought to be necessary to prevent harm from occurring before an application pending before the Board can be heard. Because of time constraints, interim applications are typically determined on the basis of evidence filed by way of certified declarations and sworn affidavits without the benefit of oral evidence or cross-examination. As such, the Board is not in a position to make determinations based on disputed facts; nor is the Board able to assess the credibility of witnesses or weigh conflicting evidence. Because of these and other limitations inherent in the kind of expedited procedures used to consider interim applications, the Board utilizes a two-part test to guide in its analysis: (1) whether the main application raises an arguable case of a potential violation under the Act; and (2) whether the balance of convenience favours the granting of interim injunctive relief pending a hearing on the merits of the main application. See: Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Property Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn), [1999] Sask. L.R.B.R. 190, LRB File No. 131-99. See also: Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre, 2010 CanLII 42668 (SK LRB), 2010 CanLII 42668, LRB File No. 083-10. As with any discretionary authority under the Act,*

[5] [2014] CanLII 63994 (SKLRB)
[6] [2010] CanLII 81339 (SKLRB)

the exercise of the Board's authority to grant interim or injunctive relief must be based on a sound labour relations footing in light of both the broad objectives of the Act and the specific objectives of the section allegedly offended.

[31] *In the first part of the test, the Board is called upon to give consideration to the merits of the main application but, because of the nature of an interim application, we do not place too fine a distinction on the relative strength or weakness of the applicant's case. Rather, the Board seeks only to assure itself that the main application raises, at least, an "arguable case". See: Re: Regina Inn, supra. See also: Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre, 2010 CanLII 42668 (SK LRB), 2010 CanLII 42668, LRB File No. 083-10. The Board has also used terms like whether or not the applicant is able to demonstrate that a "fair and reasonable" question exists (which should be determined after a full hearing on the merits) to describe this portion of the two-part test. See: Re: Macdonalds Consolidated, supra. Simply put, an applicant seeking interim relief need not demonstrate a probably violation or contravention of the Act as long as the main application reasonably demonstrates more than a remote or tenuous possibility.*

[32] *The second part of the test – balance of convenience - is an adaptation of the civil irreparable harm criteria to the labour relations arena. See: Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suite Hotel (1998) Ltd., [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00, 125-00, 139-00, 144-00 & 145-00. In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy. See: Grain Services Union, Local 1450 v. Bear Hills Pork Producers Ltd. Partnership, [2000] Sask. L.R.B.R. 223, LRB File No. 079-00. The Board will also balance the relative labour relations harm that is anticipated to occur prior to the hearing of the main application without intervention by the Board compared to the harm that could result should a remedy be granted. See: Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Regina Exhibition Association Limited, et. al., [1997] Sask. L.R.B.R. 667, LRB File No. 266-97; United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Con-Force Structures Limited, [1999] Sask. L.R.B.R. 599, LRB File No. 248-99; and International Association of Fire Fighters, Local 1318 v. South Saskatchewan 911, [2001] Sask. L.R.B.R. 97, LRB File No. 037-01. In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm. See: Retail, Wholesale and Department Store Union, Local 455 v. Tai Wan Pork Inc.,[2000] Sask. L.R.B.R. 219, LRB File No. 076-00.*

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

[34] *While the Board uses a two-part test to aid in its consideration (and for ease of reference), each application for interim relief involves a matrix of considerations involving the factual circumstances of the application, the general goals of the Act, the policy objectives of the particular provision alleged to have been violated, and the nature of the relief being sought*

Has the Union demonstrated an Arguable case?

[25] There is little doubt that the Union has demonstrated, at least, an arguable case. The termination of the key employee organizers factually raises precisely the policy rationale and addresses the mischief which Sections 6-59(1)(g) and 6-59(4) were enacted to prevent. The termination of these key employee organizers, in and of itself raises an arguable case to be determined.

Does the Balance of Convenience favour the issuance of an Interim Order?

[26] The second part of the test is whether or not the balance of convenience favours the issuance of an interim order. While there are other considerations, as noted above, this factor is one which the Board routinely examines to determine if interim relief should be granted. This factor is similar to the requirement that an applicant for interim relief must show that the labour relations harm in not issuing the interim order outweigh the labour relations harm in issuance of the requested order. At common law, this is generally regarded as the requirement to show irreparable harm if the interim order is not made.

[27] On this criteria, the application must fail. Any labour relations harm that may occur (and which has not been established) is that the Union may not now be able to obtain the necessary support for its certification. That harm is not suffered by the (2) two employees who seek the interim application to be re-instated and to recover monetary loss resultant from their terminations. This harm is not irreparable. In the event that the Union is successful in its underlying application, the employees will be re-instated and they will be compensated for monetary loss suffered from the time of their termination to the time they are re-instated.

[28] On the flip side, to order re-instatement of the employees and monetary loss at this stage of the proceedings, complicates the position of the Employer insofar as it is burdened with employees, which it alleges were properly terminated. In the final result, the re-instatement of the employees and the order of monetary loss at this stage of the proceedings would inflict greater harm on the Employer than on the affected employees who will be made whole if they are successful in their application.

[29] We should note, however, that the Employer has acknowledged that its employees have the right to choose a collective bargaining agent of their own choice. Furthermore, the Employer provided undertakings at the hearing to post an open letter to employees advising them of their right to organize and to be represented by a Union of their choice. Furthermore, the Employer undertook, subject to applicable privacy laws, to provide contact information for its employees to allow the Union to contact those employees regarding representation. We would ask that counsel for the Employer and counsel for the Union collaborate to ensure that these undertakings are complied with. Should the parties not be able to agree as to appropriate wording for the letter to employees, or the nature of the information to be supplied by the Employer pursuant to this undertaking, the Board will remain seized of this matter to the extent necessary to supervise those undertakings.

[30] Except as noted above, the applications for interim relief are dismissed. An appropriate order will accompany these reasons.

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

DATED at Regina, Saskatchewan, this **12th** day of **January, 2016.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson