



THE SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 496, Applicant v BEELAND CO-OPERATIVE ASSOCIATION LIMITED, Respondent

LRB File No. 042-18 & 065-18; August 22, 2018

Chairperson, Susan C. Amrud, Q.C.; Members Brenda Cuthbert and Maurice Werezak

For the Applicant: Gary L. Bainbridge, Q.C.

For the Respondent: Robert Frost-Hinz

Unfair labour practice – Board finds that Employer committed unfair labour practice by hiring pharmacy manager prior to obtaining either agreement with the Union or Board Order determining whether the position would be in-scope or out-of-scope.

Amendment of certification order – Board excludes Pharmacy Manager from scope of bargaining unit – Pharmacy Manager not an employee under Part VI of the Act.

Amendment of certification order – Board denies Employer’s application to exclude pharmacists from scope of bargaining unit – Pharmacists are employees as defined in Part VI of Act – Community of interest is not a test for excluding employees from bargaining unit.

REASONS FOR DECISION

Background:

[1] **Susan C. Amrud, Q.C., Chairperson:** The Beeland Co-operative Association Limited (“Employer”) is building a new store that, unlike its current grocery store, will include a pharmacy. For that purpose, it intends to hire a pharmacy manager, one or two other pharmacists and an unstated number of pharmacy clerks. It plans to open the store in October or November, 2018. The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 496 (“Union”) represents the Employer’s unionized employees. The Employer advised the Union of its

plans and attempted to obtain the Union's agreement to amend the scope clause in the collective bargaining agreement to exclude the pharmacy manager and pharmacist positions from the bargaining unit. No agreement was reached.

[2] On or about January 29, 2018, the Employer posted job advertisements for these two positions. The advertisements did not indicate whether the positions were in-scope or out-of-scope. The Union took issue with this action, and on February 15, 2018 it filed an Unfair Labour Practice Application¹. On March 12, 2018, the Employer filed an Application to Amend the Certification Order to exclude the pharmacy manager and pharmacists from the bargaining unit².

Argument on behalf of the Parties:

[3] Both parties filed written submissions that the Board has reviewed and found helpful. The parties agree that the burden of proof respecting the Unfair Labour Practice Application lies with the Union, while the burden of proof for the Application to Amend the Certification Order lies with the Employer.

[4] The Employer is of the view that it followed the proper procedure in this matter: it attempted to reach an agreement with the Union respecting these positions, failing which it made the Application to Amend the Certification Order. In its view the Union's application is premature: the Union thought the Employer was going to commit an unfair labour practice, but the evidence indicates that did not happen. With respect to the amendment application, the first question is whether there has been a material change of circumstances: the Employer argues that the construction of a new pharmacy, accompanied by the creation of two new positions constitutes a material change. The second question is whether it is necessary to amend the certification order to exclude these two positions from the bargaining unit. It is of the view that both positions should be excluded. The pharmacy manager's duties, it states, are of a managerial character; there is an inherent conflict of interest between that position and the members of the bargaining unit; the pharmacy manager will have decision-making authority over and power to discipline, hire and direct employees. The pharmacy manager will be responsible for operating the pharmacy and will be responsible for its labour relations, strategic planning and direction and regulatory compliance.

¹ LRB File No. 042-18.

² LRB File No. 065-18. The application requested other updates to the list of excluded positions; as those other changes are consented to by the Union, they will not be further mentioned.

The pharmacists should also be excluded because they do not share a community of interest with the members of the bargaining unit.

[5] Mr. Svenson, the Employer's general manager, testified for the Employer. He indicated that under the collective bargaining agreement the people he considered as comprising his whole management team are excluded from the bargaining unit. This includes assistant managers. In his view, in the pharmacy, the pharmacists would play an equivalent role to that played by assistant managers in the other departments, for example, supervisory duties respecting other staff; ensuring compliance with the regulatory requirements of the pharmacy; assisting in the preparation of the budget, business plan, strategic plan, goals and policies for the department; performance reviews, discipline and hiring. On this basis it was his opinion that they should be out-of-scope. He indicated that, unlike the pharmacists, there are no educational requirements for any members of the bargaining unit, other than a couple of positions that require a Grade 12. He also noted that when the Employer had a pharmacy in its grocery store prior to 2001, the pharmacists were excluded from the bargaining unit. In the Employer's view, there is a broad and deep divergence between the pharmacists, who are highly educated, highly paid and highly regulated, and the members of the existing bargaining unit, who are not.

[6] The Employer advised the Board that, because of the requirements of *The Pharmacy and Pharmacy Disciplines Act*, it needed to hire a pharmacy manager to assist it in completing the application for a permit for its new pharmacy, a process that would take several months. Given that it is situated in a small town, it also had recruitment concerns. Therefore, it decided that, for the pharmacist positions, it should focus on 2018 graduates from the College of Pharmacy, the general recruitment period for whom was January and February of 2018. The postings were made well in advance of the pharmacy being opened, in light of the permitting process and the recruitment cycle for graduating pharmacists.

[7] The pharmacy manager and pharmacist positions were advertised, with no mention of whether they would be in-scope or out-of-scope. A pharmacy manager has been identified and was expected to start work with Federated Co-operatives Limited in August or September 2018, taking training and assisting it in preparing the Employer's application for a pharmacy permit. Exhibit E-4, a letter signed by Mr. Svenson that was posted for the information of the other employees, states: "Note that as the Union wasn't willing to have this as an out of scope position,

we are currently waiting until it can be settled by the Labour Board. This hearing is set for July 9. With this in mind Angela will not be officially an employee of the Co-op until this is resolved”.

[8] Mr. Svenson stated that the Employer discussed the new positions with the Union during bargaining in 2016; the Union would not agree to talk about them until the new store was being built so the issue was tabled. Shortly after construction of the new store started in September 2017 the Employer raised the issue with the Union again. His recollection was that they met three times in December 2017 and January 2018, and exchanged numerous emails in January 2018. The Union would not agree to the exclusion of either position.

[9] Mr. Luchsinger, a Union representative, testified on behalf of the Union. He agreed that the Employer first raised this issue with the Union in mid-August 2016, when bargaining of the current collective bargaining agreement commenced. As the Union would not agree to the exclusions, the issue was tabled, and the agreement was ratified in July 2017 without any reference to a pharmacy manager or pharmacists. In late 2017 and early 2018 further discussions were undertaken between the Union and the Employer, but no agreement was reached. He indicated that the Union represents employees of the Prairie Sky Co-operative Association Ltd. in Weyburn, and that the pharmacists there are included in the bargaining unit. He indicated that as long as he has been employed by the Union (2000) the pharmacists in Weyburn have been union members and recruitment has not been an issue. He admitted that the job advertisements posted by the Employer in January 2018 did not say that the positions were out-of-scope; he made that assumption based on the previous discussions with the Employer.

[10] The Union argues that the law to be applied to these applications is well-established: any new position is assumed to be in-scope unless the Employer and Union agree or the Board orders otherwise. There is no compelling evidence in this case that the constitutional right to collectively bargain should be taken away from these employees. The list of duties for the pharmacy manager and pharmacists includes very few functions that are truly managerial; the core of their duties is pharmaceutical. The case law makes it clear that community of interest is not a test for excluding employees from a bargaining unit.

Relevant Statutory Provisions:

[11] The following provisions of *The Saskatchewan Employment Act* are applicable to this matter:

Interpretation of Part

6-1(1) *In this Part:*

(h) “employee” means:

(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;

Unfair labour practices – employers

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:*

(d) *to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;*

Board powers

6-104(2) *In addition to any other powers given to the board pursuant to this Part, the board may make orders:*

(f) *rescinding or amending an order or decision of the board made pursuant to clause (b), (c), (d) or (e) or subsection (3), or amending a certification order or collective bargaining order in the circumstances set out in clause (g) or (h), notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of the order or decision is pending in any court;*

(g) *amending a board order if:*

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

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

(h) *notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of a certification order or collective bargaining order is pending in any court, rescinding or amending the certification order or collective bargaining order;*

(i) *subject to section 6-105, determining for the purposes of this Part whether any person is or may become an employee or a supervisory employee;*

Provisional determination of employee

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.*

(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.

Analysis:

I. Application to Amend Certification Order

[12] The process to be followed by an Employer that intends to create a new position was set out by the Board in *Health Sciences Association of Saskatchewan v Unifor, Local 609*, 2015 CanLII 43776 (SK LRB), at paragraph 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.*

[13] In *Donovel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2006 CanLII 62948 (SK LRB), the Board also noted, in paragraph 29:

An employer is not entitled to act unilaterally by assigning the position as out-of-scope of the bargaining unit without obtaining the agreement of the union or, failing such agreement, without obtaining an order from the Board, or the employer will be in violation of its obligation to bargain collectively under s. 11(1)(c) of the Act: See, University of Saskatchewan, infra.

[14] The Union was first notified of the proposed new positions in 2016; the Employer and Union discussed the issue further in 2017 and in 2018. There was no agreement on the proper placement of the positions. The Employer applied to the Board to have the matter determined. In other words, the Employer followed the required procedure. While it might have been better practice for the Employer to give the Union advance notice of its intention to place the

advertisements, it has satisfactorily explained its rationale for placing the advertisements before the Board order had issued, in this unusual situation³.

[15] The next issue is whether the Employer has satisfied the Board that there has been a material change in circumstances. The Employer argues that its plan to commence operation of a pharmacy, requiring the recruitment of an entirely new type of employee, satisfies the test of a material change in circumstances. The Union took no issue with that argument. The Board agrees. This is not an “effort to circumvent a previous determination of the Board”⁴. These are entirely new positions with educational requirements and job duties unlike any of the existing employees in the bargaining unit.

[16] The next question, then, is whether an amendment to the description in the certification order of the scope of the bargaining unit is necessary. The creation of a new position will necessitate an amendment if that position is determined by the Board to fall outside the definition of employee. The decision is to be made on a case by case basis. The Board has stated on numerous occasions the purpose for the exclusion of persons from a bargaining unit in accordance with that definition:

- Authority and functions of a managerial character: To promote labour relations in the workplace by preserving clear identities for the parties to collective bargaining (and to avoid muddying or blurring the lines between management and the bargaining unit).
- Duties of a confidential nature: To assist the collective bargaining process by ensuring that the employer has sufficient internal resources to permit it to make informed and rational decisions regarding labour relations and, in particular, with respect to collective bargaining in the work place, and to permit it to do so in an atmosphere of candour and confidence⁵.

[17] The parties cited numerous cases that apply this test. A recent decision of this Board, issued after the enactment of the Act, states as follows:

³ See paragraph 6.

⁴ *Health Sciences Association of Saskatchewan v. Unifor, Local 609*, 2015 CanLII 43776 (SK LRB) at para 28.

⁵ See, for example, *Saskatchewan Human Rights Commission v. CUPE Local 1871*, 2011 CarswellSask 829 (SK LRB); *Saskatchewan Institute of Applied Science & Technology v. SGEU*, 2009 CarswellSask 897.

The Board has, on many occasions, been required to balance the independence of a union from management influence with the right of those employees to be represented for the purposes of collective bargaining. This Board, like most boards across Canada has taken the view that the exclusion of persons on managerial or confidential grounds should not be granted so liberally as to frustrate the objective of extending access to collective bargaining as widely as possible⁶.

[18] In *Saskatchewan Institute of Applied Science & Technology v. SGEU*, 2009 CarswellSask 897, the Board cautioned, at paragraph 58:

the question for the Board to decide is whether or not the authority attached to a position and the duties performed by the incumbent are of a kind (and extent) which would create an insoluble conflict between the responsibilities which that person owes to his/her employer and the interests of that person and his/her colleagues as members of the bargaining unit. However, in doing so, the Board must be alert to the concern that exclusion from the bargaining unit of persons who do not genuinely meet the criteria prescribed in the Act may deny them access to the benefits of collective bargaining and may potentially weaken the bargaining unit. As a consequence, exclusions are generally made on as narrow a basis as possible, particularly so for exclusions made because of managerial responsibilities.

[19] The two positions will be examined separately.

[20] First, the Employer submits that it is necessary to exclude the pharmacy manager on the basis that the person holding that position will not satisfy either part of the definition of employee in subclause 6-1(1)(h)(i) of the Act: this person's primary responsibility is to exercise authority and perform functions that are of a managerial character and this person's primary duties include activities that are of a confidential nature in relation to labour relations, business strategic planning, policy advice and budget implementation and planning that will have a direct impact on the bargaining unit. Based on Mr. Svenson's evidence and the job profile entered as Exhibit E-5, the Board agrees and orders that the pharmacy manager is excluded from the bargaining unit.

[21] Turning next to the pharmacists, the Employer noted that, like the out-of-scope Assistant Managers, they will provide backup to the pharmacy manager. It was, however, unable to mount a convincing argument that they should be excluded from the bargaining unit on the basis of managerial or confidential responsibilities. Based on the pharmacist's job profile filed as Exhibit E-6 and job advertisement filed as part of Exhibit E-3, the Board finds that the pharmacists will be

⁶ *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 544 v Battlefords and District Co-operative Limited*, 2015 CanLII 19983 (SK LRB), para 118.

employees within the meaning of subclause 6-1(1)(h)(i) of the Act. It cannot be said that their primary responsibility will be to exercise authority and perform functions of a managerial character. There is nothing in their job description that indicates that their primary duties will include activities of a confidential nature that will have a direct impact on the bargaining unit.

[22] The Employer focused most of its attention on the argument that the pharmacists should be excluded because they do not share a community of interest with the existing bargaining unit with respect to job duties, educational qualifications, regulation and wage expectations.

[23] As the Employer pointed out, the question of the applicability of community of interest to determination of this issue has already been decided by this Board. In *University of Saskatchewan v. Administrative and Supervisory Personnel Association*, 2007 CanLII 68769 (SK LRB)⁷, the Board stated the following:

[29] In response to the use of the factor of community of interest, the Association stated that such a factor is irrelevant as concerns whether a position should be excluded from all bargaining units, including its own. The Association submitted that "community of interest" is a test of inclusion, that is, its use is restricted to two situations: (i) determining whether, on a certification application, a position should be included in the bargaining unit proposed by a union; or (ii) determining, on an application for amendment, to which of two or more bargaining units a disputed position belongs.

[30] We agree with the interpretation advanced by the Union. The community of interest factor has been utilized by the Board to determine, on applications for certification or applications to "add-on" a group of employees to an existing certification order, whether the position in question should be included in the proposed or established bargaining unit (see for example, Centre of the Arts, supra, and St. Thomas More College, supra, cited by the University, both of which involved add-on applications). In Arch Transco, supra, the Board stated at 637:

[18] The concept of community of interest among employees is a tool that can be used to assess the viability of a proposed bargaining unit. In Southern Ontario Newspaper Guild Local 87 v. Harlequin Enterprises Ltd., OLRB Rep. 226, the Ontario Labour Relations Board described this relationship, at 232:

The question is not "is there a community of interest amongst the employees for whom the union seeks certification?" but "is there a sufficient community of interest amongst those employees for whom certification is sought that the resulting unit is viable for collective bargaining purposes?". The Board, in effect, assesses whether the bargaining unit sought is viable and viability reflects a sufficient community of interest

⁷ Confirmed on reconsideration: *University of Saskatchewan v. Administrative and Supervisory Personnel Association*, 2008 CanLII 87259 (SK LRB).

nexus amongst the employees to sustain collective bargaining. Thus, community of interest is not an independent, mechanical exercise but with (sic) rather, goes to the issue of viability.

[24] While the Employer urged the Board to ignore this precedent, the Board is of the view that it continues to be appropriate and applicable to this case.

[25] In paragraph 49 of the Employer's Brief of Law, it makes the curious comment: "Placing the Pharmacy Manager and Pharmacists in the larger unit would be a significant disadvantage to them". There is no explanation of whether "them" refers back to the pharmacy manager and pharmacists or the larger unit or of what that "significant disadvantage" would be. It is important to bear in mind that the question before the Board is not whether the pharmacists should be added to the bargaining unit; it is whether they should be removed from the bargaining unit, at the request of the Employer. This is not a step that should be taken lightly.

[26] The Employer has not satisfied the Board that the pharmacists should be removed from the bargaining unit. The pharmacist position falls within the definition of employee in the Act and should therefore not be excluded from this bargaining unit.

[27] An Order will issue amending the Certification Order to add to the list of exclusions from the bargaining unit, the pharmacy manager and the other positions previously agreed to by the Union and Employer.

II. Unfair Labour Practice Application

[28] The Union's application states:

f) On or about January 29, 2018, without discussion with the Union, the employer posted job openings for these two new positions in the workplace as out-of-scope positions, yet without securing the agreement of the Union that either new position was properly out-of-scope;

g) Notwithstanding that the employer had not reached agreement with the Union, and notwithstanding the absence of an order of this Board declaring the positions properly out-of-scope or amending the Certification Order, the employer posted the Pharmacy Manager and Pharmacists positions and unilaterally declared them out-of-scope of the bargaining unit; (emphasis added)

[29] The job postings for the two positions were entered as Exhibit E-3. At no place in either advertisement is there any mention of whether the positions are in-scope or out-of-scope. Mr. Luchsinger admitted this in his evidence.

[30] This case shares many similarities with *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 544 v Battlefords and District Co-operative Limited* (“*Battlefords Cooperative*”), 2015 CarswellSask 150 (SK LRB). At paragraph 71, the Board stated:

However, following our determination that the position of Human Resource Advisor must be taken as being within the bargaining unit until either agreement of the Union, or Board order, does not answer the question of whether or not the Employer has committed an unfair labour practice. Two subsidiary questions need to be considered. The first is, whether on the evidence provided, the Employer failed to bargain collectively with respect to the position being in or out of scope. Secondly, should the position be excluded from the bargaining unit. The answer to the first question will determine the validity of the application, while the answer to the second may impact on any remedy which may be ordered.

[31] Further, at paragraph 85 of *Battlefords Cooperative*, the Board added:

The duty to bargain collectively requires that the parties meet and bargain in good faith, making a genuine attempt to find a resolve to their disagreement over the status of this position. However, the duty to bargain collectively does not, as a corollary, require that the parties reach an agreement. They must only try to achieve a resolve to their disagreement.

[32] The evidence tendered by both the Employer and the Union establishes that a genuine attempt was made to bargain this issue, but that the parties were unable to agree. However, it is what occurred next that is most in contention between the parties. As previously noted, the Employer posted advertisements for both positions and “arranged for” a person to fill the position of pharmacy manager. That person is to be employed by Federated Co-operatives Limited pending a Board order on these issues. Mr. Svenson admitted, however, that the Employer will be paying at least a portion of her wages. Additionally, in Exhibit E-4 he stated: “I am pleased to announce that we have arranged for a Pharmacy Manager for the new store” and asked the other employees to help him welcome the new pharmacy manager to their team. The evidence indicates that no attempt was made to negotiate a rate of pay for the pharmacy manager pursuant to Article 8 of the collective bargaining agreement filed as Exhibit E-1.

[33] In *Battlefords Cooperative*, the Board held, in similar circumstances, that the employer had committed an unfair labour practice:

89) In this case, the Employer, admittedly in error, posted the position as an out-of-scope position, but engaged in collective bargaining when called upon by the Union to do so. That collective bargaining was not successful, and the Employer then proceeded to fill the position and to treat it as being out of scope.

*90) It is this later conduct by the Employer that causes concern in this case. As described by the Board in *Wascana*, unilateral action by an employer in treating a position as being out-of-scope, prior to a determination by the Board as to the status of the position, will constitute an unfair labour practice. As (sic) page 5 of that decision, the Board said:*

*Applying (sic) the above principles to the facts of this application, the Board finds that the Employer erred in treating the Assistant Director of Nursing and the Nurse Managers as out-of-scope before receiving this order from the Board. However, insofar as this is the first opportunity the Board has had to directly address the issue and delineate its policy, it would be inappropriate to find the Employer guilty of an unfair labour practice. **In the future, the Board will consider it to be an unfair labour practice for an employer to unilaterally declare a newly created position out-of-scope prior to a determination being so made by the Board, or agreement being reached between the parties.** [Emphasis added in *Battlefords Cooperative*]*

[34] While the Employer attempted to dance around the fact that it has hired a pharmacy manager, its evidence indicates that, in fact, it hired a pharmacy manager before receiving an Order of this Board determining whether the position would be in-scope or out-of-scope and is treating the position as an out-of-scope position. The issue for the Board is the appropriate relief.

[35] It should be noted that the Employer is correct when it stated that the Unfair Labour Practice application was premature. Because of the unusual circumstances in this case noted above, the Board does not find that placing the job advertisements was an unfair labour practice. However, between the date of the Union's application and the date of the hearing the Employer committed an unfair labour practice by hiring the pharmacy manager and treating the position as an out-of-scope position prior to obtaining an agreement with the Union or a Board order.

[36] Normally the Board would suggest that the Employer could have avoided this situation by starting the process sooner. However, the evidence of both parties is that the Employer first raised the issue in August 2016 and the Union refused to discuss the positions with the Employer until after the store was under construction (September 2017). Given that the pharmacy manager is required by law to submit the permit application, which takes three months to process (August 2018 filing deadline for a November 2018 store opening), this left the Employer with a very small

window to complete the required process for dealing with the scope issues, *i.e.*, attempt to negotiate an agreement with the Union, failing which, make application to the Board for an Order determining whether the position would be in-scope or out-of-scope. Accordingly, no further relief will be granted with respect to the Unfair Labour Practice Application beyond a declaration.

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

Order:

[38] In conclusion, the Board makes the following Orders:

- That the Certification Order issued by this Board on March 1, 1982 in LRB No 583-81 be amended to provide that the scope of the bargaining unit is described as follows:

All employees employed by Beeland Co-operative Association Limited, in the Town of Tisdale, Saskatchewan, except the General Manager, Controller, Accountant, Payroll/Human Resources Officer, Food Manager, Bakery/Deli Manager, Meat Manager, Produce Manager, Grocery Manager, Home Centre Manager, Shopping Centre Hardware Manager, Lumber Manager, Lumber Estimator, Agro Centre Manager, Assistant Agro Manager, Gas Bar Manager, Assistant Gas Bar Manager, Management Trainee and Pharmacy Manager;

- That there will be a declaration that Beeland Co-operative Association Limited committed an unfair labour practice contrary to clause 6-62(1)(d) of *The Saskatchewan Employment Act* by hiring a pharmacy manager and treating the position as an out-of-scope position before the issuance of this Order.

DATED at Regina, Saskatchewan, this **22nd** day of **August, 2018**.

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson