AMENITY HEALTH CARE L.P., Applicant v. WORKERS UNITED CANADA COUNCIL, Respondent

LRB File No. 160-17; April 20 , 2018

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

This decision has been completed pursuant to section 6-94 of *The Saskatchewan Employment Act*

For the Applicant: Kevin Wilson Q.C.
For the Respondent: Heather Jensen

Application for Non-suit – **Requirement for an** election - Union applies to Board to bring application for non-suit following presentation of Applicant Employer's evidence. Board confirms that it has the discretion to permit applications for non-suit without the necessity of an election not to call evidence.

Application for Non-suit – Board reviews test on applications for non-suit and confirms its jurisprudence that applications for non-suit will be determined using the test of whether the applicant has raised an arguable case.

Application for Non-suit – Board reviews Applicant's evidence and finds that Applicant has raised an arguable case. Board notes that at this stage of proceedings, it would not provide a detailed analysis of the evidence presented so as not to provide any advantage to either party in the presentation of their evidence.

REASONS FOR DECISION

Background:

[1] Amenity Health Care L.P. ("Amenity") brought an application to the Board alleging that the Workers United Canada Council (the "Union") engaged in an unfair labour practice, contrary to section 6-63(1)(a) and (h), in respect to an application by the Union to

represent employees employed by Amenity at a Tim Hortons franchise restaurant in Canora, Saskatchewan.

[2] The Board heard evidence concerning the alleged unfair labour practice in Saskatoon, Saskatchewan on January 30th and 31st, 2018. At the close of Amenity's case, the Union moved for a non-suit, without the necessity of making an election not to call evidence, that is, reserving the right to call evidence if its non-suit was unsuccessful.

[3] The Board permitted the Union to make its application for a non-suit without making an election not to call evidence. The Board then proceeded to hear arguments from the parties regarding the application for non-suit. These reasons relate to the Board's decision to permit the application for non-suit without an election not to call evidence, as well as the application for non-suit by the Union.

Facts:

[4] The Board heard evidence from Melanie Hill and Donna Fisher, both employees of Amenity at the time of the organizing campaign by the Union. We will refer to that testimony and the evidence provided as necessary during the analysis portion of these reasons.

Relevant statutory provision:

[5] The following are the relevant statutory provisions related to this decision:

> **Unfair labour practices – unions, employees**
>
> **6-63**(1) It is an unfair labour practice for an employee, union or any other person to do any of the following:
>
> (a) subject to subsection (2), to interfere with, restrain, intimidate, threaten or coerce an employee with a view to encouraging or discouraging membership in or activity in or for a labour organization;
>
> …
>
> (h) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to a union or an employee.

Union's arguments:

[6] In its application for non-suit, the Union relied upon *Atco Structures and Logistics Ltd. v. Unite Here, Local 47*[1], *Cowessess First Nation #73 (Re:)*[2], *D.M. v. CUPE*[3], *Koop v. SGEU*[4], *Re: Tucker*[5], *Travel West (1987) Inc. v. Langdon Towers Apartments Ltd.*[6] and *Watergroup Canada Ltd*[7]

[7] The Union argued that the test for non-suit should be as described by Mr. Justice Zarzeczny in *Travel West*, which he adapted from the Court of Appeal's decision in *Reid v. Krause*[8] as being "is there sufficient evidence, which left uncontradicted, would lead a reasonable trier of fact, properly instructed, to find for the plaintiff".

[8] The Union also argued that the evidence presented did not satisfy the objective test to show that the facts or actions shown by the evidence had a coercive and intimidating effect on an employee of average intelligence and fortitude. In furtherance of this argument, the Union analyzed the evidence presented and argued that it did not meet the required standard.

Employer's arguments:

[9] The Employer argued that the test to be applied by the Board was the same test as is used by the Board in determining if a matter should be summarily dismissed. The Employer cited the Board's decision in *Communications, Energy and Paperworkers Union, Local 922 v. Potash Corporation of Saskatchewan*[9].

[10] The Employer argued that the evidence presented through its two witnesses clearly showed that there were issues with how the vote was conducted. Secrecy was not provided for, as ballots that were cast were completed in a public forum, subject to peer pressure, and what the Employer described as the "Stockholm Syndrome. Additionally, there

---

[1] 2015 SKGB 275
[2] 2015 CIRB 801, 294 C.L.R.B.R. (2d) 227
[3] 2009 CanLII 2049(SKLRB)
[4] 2009 CanLII 53732 (SKLRB)
[5] [2001] SLRBD No, 52 (QL) (SKLRB)
[6] 2000 SKQB 294, [2000] S.J No 418 (QL)
[7] [1993] S.L.R.B.D. No 40.
[8] [2000] S.J. No 142, 2000 SKCA 32
[9] LRB File No. 167-11, July 27, 2012

was evidence that one employee was told to "rip up her ballot" and who did not, in the final result, vote in respect of the certification application.

[11] The Employer argued that section 6-22(1) of the *SEA* requires that votes be conducted in secret which was not the case here.

Analysis:

Should the Board Require Non-suit Applicants to make an Election?

[12] In the Board's decision in in *Communications, energy and Paperworkers Union, Local 922 v. Potash Corporation of Saskatchewan*, the Board reviewed its jurisprudence with respect to both the requirement to elect not to call evidence on an application for non-suit and on the threshold test to be utilized in reviewing such requests.

[13] In that decision, the Board reviewed its earlier decision in *Saskatoon (City) v. CUPE*[10]. In that decision, the Board reviewed its previous jurisprudence with respect to applications for non-suit. In that decision, at paragraph [47] *et seq.*, the Board says:

> ***[47]*** *The Board discussed the issue of non-suits and the Board's policy concerning whether an election should be required or not in the Lee Brock v. Retail Wholesale and Department Store Union, Local 539 and Sherwood Co-operative Association . In that case, the Board considered the rationale for the requirement for an election as well as the distinction between cases where there had been no evidence advanced versus cases where the sufficiency of evidence is at issue. In that decision, the Board clearly distinguished between the two situations.*
>
> ***[48]*** *The Board in Brock, supra, also reviewed the history of the current provision in Rule 278A of The Queen's Bench Rules of Saskatchewan which provides for an application for non-suit without an election as to whether or not the applicant will call evidence. That rule, the Board suggested in its decision in Brock, supra, arose from the Judgment of the Court of Queen's Bench in Bank of Nova Scotia v. Omni Construction.*
>
> ***[49]*** *In Brock, supra, the Board was not sure whether the wording in Rule 278A was intended to cover both of the possible grounds for motions to dismiss. The Board did take the view that the distinction between the two grounds which had been expressed by the BC Industrial Relations Council in Western Versatile Construction Corp. and United*

[10] 2009 CanLII 67430 (SK LRB)

Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry had some merit. In that case, the BC Board says, at p. 62

> *In conclusion, therefore, the panel approves of the procedure that is utilized before the civil courts in British Columbia and by both the Canada Labour Relations Board and the English Tribunals; where a motion is brought to the effect that there is no evidence then the panel has a discretion whether or not to put the applicant to his election. Where the motion is one of insufficient evidence the panel would normally put the applicant to an election.*

[50] *The determination by the Board in Brock, supra was a departure from the Board's former practice as outlined in Belfour et al v. Beaver Foods Limited and CVC Services and Hotel Employees and Restaurant Employees, Local 767 which was that the Board would, in all cases, require an election to be made before considering an application for non-suit.*

[51] *The Board again canvassed the issue in Saskatchewan Government and General Employees' Union v Mitchell's Gourmet Foods Inc. et al. The Board quoted with approval from p. 941 of the Ontario Labour Relations Board decision in Hurley Corporation where the Ontario Board says:*

> *The Board is satisfied that it has a discretion to decide whether or not to put a party making a motion for non-suit to its election, prior to entertaining the motion itself. Provided its discretion is exercised in a fair manner, consistent with natural justice, the Board is entitled, in given circumstances, to decline to put the party to its election. In this regard, the Board will no doubt consider all of the circumstances, including the need for fair, efficient and expeditious proceedings before the Board. In our view, fairness and natural justice do not demand that, in every case, the moving party must make its election. To so conclude would be to fetter our discretion…*

[52] *At paragraph 16 of the Mitchell Gourmet Foods case, supra, the Board also considered another Ontario decision which had expended the factors the Board should consider. It says:*

> *In <u>Martel v. Labourers' International Union of North America, Local 493</u>, [1996] O.L.R.D. No 1119 (April 4, 1996), the Ontario Board identified several factors that tribunals have considered in determining whether it is fair and reasonable to put a party to its election, including: whether permitting the non-suit without an*

> *election will either delay or expedite the proceedings; the impact of any decision in terms of the costs of the proceedings; the policy against requiring a party to respond to allegations of wrongdoing where there is no case for it to meet; whether hearing the non-suit without requiring an election would give either party an unfair or undue advantage; and, the interest in making a decision based on hearing all of the evidence. It described the function of the Board on a non-suit motion as the function of the Board at the non-suit will be to determine whether the applicant has adduced sufficient evidence to sustain any or all of his complaints. Where the Board finds that the applicant has failed to satisfy that test, it would appear to be fair and just to terminate those aspects of the complaint, if any, without putting the respondent to the unnecessary expense of mounting a defence to an unproved allegation.*
>
> *In order not to permit any advantage to the responding party, the Board will confine its ruling to the non-suit to a declaration whether or not there is some evidence upon which the complaint(s) could be sustained. Accordingly, the responding party will not be given any guidance on how to present its case.*

[53] *These guiding principles seem to have been forgotten in the ensuing years. In the Board's decision in Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Retail, Wholesale and Department Store Union, Local 568 and Retail, Wholesale and Department Store Union, Local 558 v. Canadian Linen and Uniform Service Co. at paragraph [23], the Board says:*

> *After the close of the case for the Union, Ms. Torrens, of counsel on behalf of the Employer,* ***made a motion for non-suit without election, as is the practice before the Board****. The Board heard the arguments of the parties, summarized as follows, and reserved decision on the motion. [Emphasis added]*

[14] At paragraph [55], the Board confirmed its policy regarding applications for non-suit as follows:

> ***[55]*** *The Board wants to restate and emphasize the Board's policy as stated in Mitchell's Gourmet Foods,[15] that the Board has a discretion as to whether or not it will allow an application for non-suit to proceed without election. In so doing, it will consider, inter alia, the factors referenced by the Board therein.*

[15] The factors identified in *Mitchell's Gourmet Foods*, as noted in paragraph [52] of the *Saskatoon (City)* decision *supra* were not offended in this case. Accordingly, the Board exercised its discretion to allow the application to proceed without the necessity of the Union making an election not to call evidence.

The Test on a Non-Suit Application.

[16] The Union argues that the test for determination of whether or not a non-suit should be granted is as enunciated by Mr. Justice Zarzeczny in *Travel West (1987) Inc. v. Langdon Towers Apartments Ltd.*[11] as being "is there sufficient evidence, which left uncontradicted, would lead a reasonable trier of fact, properly instructed, to find for the plaintiff".

[17] Amenity argues for the test established by the Board in the *Communications, energy and Paperworkers Union, Local 922 v. Potash Corporation of Saskatchewan* decision should be the test relied upon by the Board. Simply put, that test is whether or not a *prima facie* case had been made out by the Applicant. This was also the test utilized by the Board in two of the cases cited by the Union, *Koop v. SGEU*[12] and *D.M. v CUPE*[13].

[18] It is clear from the decision in *Communications, energy and Paperworkers Union, Local 922 v. Potash Corporation of Saskatchewan* that the current test adopted by the Board is not the test utilized in the Court of Queen's Bench, but rather a test similar to the test applied by the Board to applications for summary dismissal. As noted in paragraph [58] thereof, the Board said:

> *[58] The Board dismissed the Union's application for a non-suit without the necessity of hearing from counsel for the City. The Board was satisfied based upon the test set out in Mitchell's Gourmet Foods, that the City had made out a prima facie case.* ***As noted in that case, a "motion for non-suit cannot succeed if there is some evidence upon which the Board could return a finding" that the alleged unfair labour practice has occurred.*** *In keeping with the admonition in Mitchell's Gourmet Foods, supra, the ruling by the Board was restricted to a declaration whether or not there is some evidence upon which the complaint(s) could be sustained,*

[11] Supra note 7
[12] Supra note 4
[13] Supra note 3

> *in order to permit no advantage to be gained by the applicant.*[emphasis added]

Should the Application for Non-suit be Granted?

[19] The Union argued that there was no evidence provided which would allow the Board to conclude that the vote had been compromised. Amenity argued that there was more than enough evidence that the vote had been compromised.

[20] At this stage of the proceedings, we must restrict our ruling to a declaration as to whether or not there is some evidence upon which the complaint could be sustained so as not to provide any advantage to either party in the presentation of their case. Accordingly, we will not engage in an analysis of the available evidence, but will restrict our determination to whether or not a *prima facie* case has been made out by Amenity. We have concluded that it has.

Decision:

[21] Accordingly, the non-suit application is dismissed. Dates for resumption of the hearing have been set for May 29th and 30th commencing at 9:30 AM in the Board's hearing rooms in Saskatoon.

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

DATED at Regina, Saskatchewan, this 20th day of April, 2018.

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.
Chairperson