Government of Saskatchewan

Saskatchewan Labour Relations Board
1600, 1920 Broad Street
Regina, Canada S4P 3V2

August 10, 2019

Sachia Longo
Canadian Union of Public Employees, Local 5398
3731E Eastgate Drive
REGINA SK S4Z 1A5

Jana M. Linner
MLT Aikins LLP
1500 - 1874 Scarth Street
REGINA SK S4P 4E9

Re: LRB File No. 099-19; Interim Application
Canadian Union of Public Employees Local 5398 v Southwest Crisis Services Inc.

Background:

[1] The Canadian Union of Public Employees, Local 5398 ["Union"] was certified to represent certain employees of South West Crisis Services Inc. ["Employer"] on October 9, 2018[1]. On February 1, 2019, without first engaging in collective bargaining with the Union, the Employer informed its employees that, effective May 1, 2019, it was changing their hours of work. The person most affected by the proposed changes was Union Secretary-Treasurer Shirley Olson. Her hours before the proposed changes were Monday to Friday from 8:00 or 8:30 am to 12:00 pm. The proposed changes would have had her work two day shifts from 11:00 am to 9:15 pm and two night shifts from 9:00 pm to 7:15 am, on a rotating schedule of four days on and 12 days off. Despite subsequent discussions with the Union, on April 16, 2019 the Employer confirmed it was proceeding with the changes. On April 18, 2019 the Union filed an Unfair Labour Practice application against the Employer with respect to the proposed schedule changes[2] ["Main Application"].

[2] On April 18, 2019, the Union also filed an Application for Interim Relief. That application was heard on April 29, 2019 by Chairperson Amrud and Board members John McCormick and Mike

[1] LRB File No. 182-18: all employees except the Executive Director, Crisis Intervention Manager, Outreach Manager, Community Relations Coordinator and supervisors.
[2] LRB File No. 098-19.

Wainwright. At the conclusion of the hearing the Board granted all of the relief requested by the Union, as follows:

(a) that the Employer is prohibited from unilaterally changing the hours of work as outlined in its letter dated February 1, 2019, or otherwise;
(b) that the Employer is prohibited from making any other changes to the conditions of employment that have not been negotiated with the Union;
(c) that the Employer negotiate in a good faith manner with the Union, including with respect to the proposed changes to hours of work;
(d) that the Employer provide the Union with full disclosure of its rationale for the proposed changes to hours of work, including financial and other information, on or before May 13, 2019;
(e) that the Employer post a copy of this Order and forthcoming Reasons for Decision, upon receipt of each, in a conspicuous place until both have been displayed for a period of 30 days;
(f) that the Employer make whole Ms. Olson and any other employee who suffer loss in pay (or hours worked) as a result of the unilateral changes to their regular hours of work.

[3] As of the date of that hearing, the Union and Employer had yet to enter into collective bargaining for the purpose of reaching a first collective agreement. Accordingly, the Order included an additional requirement: "that the parties commence bargaining, on or before May 19, 2019, with a view to concluding a collective agreement".

Relevant Statutory Provisions:

[4] The provisions of *The Saskatchewan Employment Act* ["Act"] relied on by the Union in the Main Application are the following:

> ***Good faith bargaining***
> *6-7 Every union and employer shall, in good faith, engage in collective bargaining in the time and in the manner required pursuant to this Part or by an order of the board.*
>
> ***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;*
> *. . .*
> *(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;*
> *. . .*
> *(n) before a first collective agreement is entered into or after the expiry of the term of a collective agreement, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in a bargaining unit without engaging in collective bargaining respecting the change with the union representing the employees in the bargaining unit.*

[5] The power of the Board to make interim orders is set out in section 6-103 of the Act:

> ***General powers and duties of board***
> *6-103(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
> *. . .*
> *(d) make an interim order or decision pending the making of a final order or decision.*

Argument on behalf of the Union:

[6] With respect to the test to be applied by the Board in considering an application for interim relief, the Union referred to a number of the Board's decisions, including *Saskatchewan Government and General Employees' Union v Saskatchewan (Government)*[3] ["*SGEU v Sask*"], which describes the Board's approach 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, LRB File No. 083-10. As with any discretionary authority under the Act, 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.*

[3] 2010 CanLII 81339 (SK LRB).

> *[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, 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 [sic] 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.*

[7] With respect to whether the Main Application raised an arguable case of a potential contravention of the Act, the Union pointed out that it need only satisfy the Board that its Main Application demonstrates more than a remote or tenuous case. It said the arguable case was established by the following facts, which are undisputed:

- a first collective agreement had not been entered into;
- the Employer intended to unilaterally change employees' hours of work;
- the parties had not engaged in collective bargaining with respect to those changes.

[8] The Employer argued that implementation of the proposed schedule changes was consistent with its policies and past practices and therefore it was allowed to implement the changes without bargaining them with the Union. In response to that position the Union argued that this was not a question that could be decided at the interim stage, relying on the following finding in *Canadian Union of Public Employees Local 1949 v Legal Aid Saskatchewan*[4] ["*Legal Aid*"]:

> *The Board is persuaded that the question of whether Legal Aid's restructuring was an appropriate exercise of the management rights clause in the collective bargaining agreement or attracts the duty to bargain in good faith with the Union, is not one that can be determined definitively on an application for interim relief. As a consequence, we find that this question presents an arguable case for purposes of an application for interim relief.*

[9] The Union also quoted at length from *United Food and Commercial Workers, Local 1400 v Securitas Canada Limited*, 2015 CanLII 43767 (SK LRB), with respect to the proper interpretation of the "statutory freeze" imposed by clause 6-62(1)(n). The Board found the following comments particularly relevant to the facts of this case:

> *The purpose of the statutory freeze provision is to maintain the prior pattern and structure of the employment relationship while collective bargaining takes place. It provides a solid foundation and point of departure from which to begin negotiations towards a first agreement, preventing unilateral changes to the status quo which might allow an unfair advantage to one party in the bargaining process.*[5]
>
> . . .
>
> *Attempts to determine the extent to which terms and conditions of employment should be seen as "frozen" during a period when there is no collective agreement in force, and what may be the practical significance of such a freeze, have given rise to a number of complications and uncertainties in the interpretation of the jurisprudence of this and other labour relations boards. The complexity of this picture is compounded when the parties have not yet reached a first collective agreement.*
>
> *The critical question then becomes what represents the status quo in the employment relationship which is to be preserved pending the conclusion of a collective agreement through bargaining between the employer and the union.*
>
> *It is relatively easy to state a rationale for the preservation of the status quo between the parties under these circumstances. During the period which follows certification, the union is in a vulnerable position. It has yet to demonstrate that it can use the status it has gained through employee support to obtain improvements in the position of those employees. The employer cannot be allowed to use advantages accrued from the lopsided balance of power*

[4] 2018 CanLII 91940 (SK LRB), at para 37.
[5] At para 46, quote from *Canadian Union of Public Employees, Local 4152 v Canadian Deafblind and Rubella Association*, [1999] Sask LRBR 138, para 54.

> *which previously existed to punish employees for making the choice to support certification or to confer benefits on them in an attempt to show how little they need the union*.[6]
> . . .
> *The "business as before" standard allows for sensitivity to the exigencies of carrying on the employer's business while preserving the stability necessary to ensure good faith bargaining. An employer must operate the business in accordance with the pattern established before the freeze. The right to manage the business is maintained, circumscribed only by the condition that it be managed as before the freeze.*[7]
> . . .
> *The result of this interpretation is that Section 11(1)(m) preserves not merely the terms and conditions of employment in effect at the moment of certification, but also the practices, policies and processes by which the employer operates. The employer's right to manage is maintained, qualified only by the condition that the business be managed as before. Generally, a departure from the pre-certification pattern is a prohibited change whereas a change consistent with these policies represents maintenance of the status quo as required by Section 11(1)(m).*[8]

[10] In the Union's view, the Employer's attempt to make the proposed scheduling changes constituted a clear contravention of clause 6-62(1)(n) of the Act. The process used and the changes proposed were not in accordance with the Employer's previous practices, policies and processes. For example, previous changes to Ms. Olson's schedule were concluded by agreement, not unilaterally imposed by the Employer.

[11] The Union then turned to the issue of whether the balance of convenience favoured granting interim relief. In its view, the labour relations harm in not issuing an interim order outweighed the labour relations harm in issuing the requested order. Prejudice that could not be fairly addressed later would result if it was required to wait until the hearing of the Main Application to obtain a remedy for the employees affected by the proposed changes. The Union stated that the harm from having Ms. Olson's regular morning schedule unilaterally changed to night shifts is non-compensable. Any harm to the Employer was entirely speculative. It asked that the status quo be maintained pending the hearing of its Main Application.

---

[6] At para 46, quote from *United Steelworkers of America v Conservation Energy Systems Inc.*, [1993] 1st Quarter Sask Labour Rep 75 at 78-79.
[7] At para 46, quote from *Canadian Union of Public Employees, Local 4152 v Canadian Deafblind and Rubella Association*, [1999] Sask LRBR 138 at para 55.
[8] At para 46, quote from *Construction and General Workers' Union, Local 890 v Brekmar Industries Ltd.*, [1993] 1st Quarter Sask Labour Rep 126 at 129.

[12] The Union also addressed the issue of whether the application for interim relief should be dismissed because the interim relief requested is similar to the relief requested in the Main Application. The Union acknowledged that this is a relevant consideration, but submitted that it is only one factor to be considered in determining the balance of convenience. The Union also noted that the remedy requested on the interim application only addressed the alleged breach of clause 6-62(1)(n) of the Act. Remedies for the alleged breaches of section 6-7 and clauses 6-62(1)(d) and (g) were left to be determined at the hearing of the Main Application.

Argument on behalf of the Employer:

[13] The Employer argued that the Union did not establish an arguable case. It argued that as it was abiding by the terms and conditions of employment already in place, it was not in contravention of clause 6-62(1)(n) of the Act. The Employer can still operate its business in accordance with past practice. Changes to the Employer's operations have resulted in the rescheduling of shifts in the past. It regularly adjusts its employees' work schedules, on an annual basis and when needed. It is not required to bargain scheduling changes with the Union. Rescheduling is a regular response made to adjust for budget shortfalls. It argued that the proposed rescheduling was simply reverting back to the schedule as it was prior to May 1, 2017, except for Ms. Olson. With respect to her schedule, the changes simply made it consistent with the schedules of other part-time and full-time employees. The Employer argued that its policies gave it the right to "abolish or combine individual positions and to reorganize functions and workloads", and that is what it was doing here. The Employer was under no obligation to bargain the rescheduling with the Union, as it was acting in accordance with the terms and conditions of existing employment contracts and past practices, or "business as usual"[9].

[14] The Employer also argued that the Union did not establish an arguable case that the Employer failed to bargain with the Union, contrary to section 6-7 and clause 6-62(1)(d) of the Act or that it contravened clause 6-62(1)(g) by taking this action with respect to Ms. Olson because of

[9] *Canadian Union of Public Employees, Local 1486 v The Students' Union of the University of Regina Student Inc.*, 2017 CanLII 44004 (SK LRB) at paras 64 to 67; *United Steelworkers of America v Conservation Energy Systems Inc.*, [1993] 1st Quarter Sask Labour Rep 75 at 78-80.

her union activity. The Board notes that the application for interim relief does not address these issues or request a remedy for their alleged contravention at this time.

[15] With respect to whether the balance of convenience favoured the granting of interim relief, the Employer argued that the Union failed to present any factual basis of prejudice to the Union or any employee, or of irreparable harm that might result, if the interim Order was not granted. On the contrary, it alleged that it and the vulnerable members of the public it serves would suffer irreparable harm if the rescheduling did not occur as proposed. It suggested that proceeding with the proposed changes would maintain the status quo. It argued that the Union's decision to wait almost three months to bring its application for interim relief from the date the Union was first notified of the scheduling changes proved that there was no urgency that needed to be addressed by an interim order. It also argued that the interim relief requested by the Union is the same as that sought in its Main Application, and therefore the application should be dismissed on that basis.

[16] Finally, the Employer asked the Board, in the event it decided to grant interim relief, to require the Union to provide an undertaking to pay any and all damages experienced by the Employer if the Union is ultimately unsuccessful on the Main Application. It cited no cases in which the Board (or any other Labour Relations Board) has made such an order.

Analysis and Decision:

[17] Before turning to the two tests considered by the Board on applications for interim relief, the Board notes with approval the following comment from *SGEU v Sask*[10]:

> *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.*

[18] This comment is particularly relevant to this matter, where the provision alleged to have been contravened is the requirement that an employer not change terms and conditions of employment between the date of a certification order and the entering into of a first collective

[10] At para 34.

agreement. It is during this period of time that the Union and Employer are establishing their working relationship, and clause 6-62(1)(n) of the Act emphasizes the need for the Employer to recognize and respect the Union's role in the workplace.

[19] The first stage of the two-part test to be applied by the Board is whether the Main Application raises an arguable case of a potential contravention of the Act. The parties were in agreement that they had not yet entered into a first collective agreement, but that the Employer proposed to change the conditions of employment of its employees without first bargaining those changes with the Union. In other words, the Union established an arguable case. Whether there is a "business as usual" justification for the Employer's actions is a defence that may or may not be established at the hearing of the Main Application. It is not a matter to be determined on an interim application.

[20] The Board also notes, and adopts, the following comment in *Legal Aid*:

> *However, it is not necessary for the Union to demonstrate that each of its allegations when viewed critically rise to the level of presenting an arguable case. The Board has already concluded that the two (2) other bases advanced by the Union raise issues in dispute, and satisfy the arguable case requirement.*[11]

[21] The second stage of the analysis is whether the balance of convenience favours a granting of interim relief pending a hearing on the merits of the Main Application. In determining the balance of convenience, the Board will, as noted above, consider a number of factors.

[22] The Board agreed with the Union that the potential harm to Ms. Olson from the significant proposed change in her schedule would not be compensable after the fact. The Board also agreed with the Union that the labour relations harm cited by the Employer was speculative. Whether that harm occurs is completely within the Employer's control. Its goal is to find measures to ensure it is able to properly staff, train and retain casual employees, while still controlling its costs. In light of clause 6-62(1)(n), pending the hearing of the Main Application its options are to either find another

[11] At para 42.

way to do that, or engage in collective bargaining with the Union respecting the proposed scheduling changes.

[23] The interim Order granted maintains the status quo until the Main Application can be heard. Granting of the interim Order was considered urgent, as the proposed new schedule was to come into effect May 1, 2019. The Union's attempts to address its concerns with the Employer before filing the interim application is an approach the Board supports. The urgency arose when, on April 16, 2019, the Employer confirmed its decision to proceed with the proposed changes; the interim application was filed two days later.

[24] Another factor the Board considers, in determining where the balance of convenience lies, is whether making the requested interim Order would in effect provide the relief requested on the Main Application. It is arguable that the interim relief granted provides all of the relief the Union would request on the Main Application respecting the alleged contravention of clause 6-62(1)(n) of the Act. However, it does not address the issues raised in the Main Application respecting the alleged contravention of section 6-7 and clauses 6-62(1)(d) and (g). In addition, this is just one factor the Board applies in determining the balance of convenience and in this case it was insufficient to overturn the strong arguments that otherwise favoured a grant of interim relief.

[25] As a result, the Board granted the requested interim Order.

[26] At the conclusion of the hearing the Board also reminded the parties of their obligations pursuant to section 6-24 of the Act:

> ***Commencing collective bargaining – first agreement***
> *6-24 Authorized representatives of the union and the employer shall:*
> *(a) meet within 20 days after the board issues a certification order or any other period that the parties agree on; and*
> *(b) commence collective bargaining with a view to concluding a collective agreement.*

The evidence indicated that neither party was paying sufficient attention to this requirement. As of the date of the hearing, over 200 days had elapsed since the issuance of the Certification Order.

Accordingly, the Board included an additional paragraph in the Order, to require that the parties commence bargaining, on or before May 19, 2019, with a view to concluding a collective agreement.

[27] The Board draws to the attention of the Employer clause (e) of the Interim Order, which requires it to post these Reasons for Decision in a conspicuous place for a period of 30 days.

[28] The Board thanks the parties for the comprehensive arguments they provided, which the Board considered in making this decision.

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

Yours truly,

Susan C. Amrud, Q.C., Chairperson
Labour Relations Board