POS MANAGEMENT CORPORATION operating as KEYLEAF LIFE SCIENCES, Applicant v UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondent

LRB File No. 023-20; April 2, 2020
Vice-Chairperson, Barbara Mysko; Board Members: Aina Kagis and Laura Sommervill

Counsel for the Applicant,
POS Management Corp.: Kevin C. Wilson, Q.C.

Counsel for the Respondent, United Food
and Commercial Workers, Local 1400: Heath Smith

Application for Summary Dismissal – In Camera Panel – Technological or Organizational Change Application – Section 6-55 of *The Saskatchewan Employment Act* – Elimination of maintenance department – No notice of organizational change provided.

Definitions of "organizational change" and "significant" – Removal of work by employer – Four of "approximately" 30 employees in bargaining unit – Section 3 of Ministerial Regulations – Union argues that other employees impacted – Arguable case established – Not a plain and obvious case for a summary dismissal – Application dismissed.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an Application for Summary Dismissal, filed on February 13, 2020, by POS Management Corporation operating as KeyLeaf Life Sciences ["Employer"] against the United Food and Commercial Workers, Local 1400 ["Union"]. In its Application, the Employer asks the Board to summarily dismiss an organizational or technological change application filed by the Union on January 31, 2020. The Employer asks that its Application be considered by an *in camera* panel of the Board and without an oral hearing. Having considered this Application for Summary Dismissal in the manner requested, the Board has decided to dismiss it for the following Reasons.

[2] The Employer specializes in plant-based ingredient commercialization for food, nutraceuticals, cosmetics, and bio-products, with locations in Saskatoon and in the United States. On January 31, 2020, the Union filed an application for an Order pursuant to section 6-55 of *The*

Saskatchewan Employment Act ["Act"] alleging that the Employer carried out an organizational change in a manner that was non-compliant with the requirements of the Act. As per its Reply filed on February 13, 2020, the Employer denies the allegations, stating that there has been no organizational or technological change, and even if there has been an organizational or technological change, that change does not affect a significant number of employees.

Argument on Behalf of the Parties:

The Employer:

[3] The Employer says that the Union's application does not disclose an arguable case and should therefore be summarily dismissed. Prior to becoming KeyLeaf, POS Management Corporation operated as POS BioSciences. Due to low customer demand, the Employer sought opportunities to remain sustainable. When cannabis was legalized, POS BioSciences was acquired by Canopy Growth Corporation and rebranded as KeyLeaf. This was a change in business strategy and focus. KeyLeaf switched from a predominantly contract-based business to offering its own finished products. The changes resulted in a drastic reduction of maintenance work. Any maintenance work that remains can be performed by contractors if necessary.

[4] The Employer argues that the workplace changes do not meet the definition of "organizational change" as set out in section 6-54 of the Act. There has not been a removal of work "by an employer", as per *R.W.D.S.U. v Acme Video Inc.*, [1995] 4th Quarter Sask Lab Rep 134, 146 Sask R 224 (SK QB) ["*Acme Video*"]. The change here did not constitute work that was removed by the Employer. The change occurred due to a shortage of work and a major shift in operations.

[5] Second, the changes will not affect the terms, conditions, or tenure of employment of a "significant" number of the employees as required by subsection 6-54(2) of the Act. Subsection 3(4) of the *Ministerial Regulations Under Section 42 of the Trade Union Act, 1972*, Sask Reg 171/72 ["Ministerial Regulations"] defines "significant" for the purposes of section 42 of *The Trade Union Act, 1972.* For an employer who has 30 or more employees, "significant" is defined as 20 percent of the total employees. At the time of the layoff, KeyLeaf had 30 employees, which means that at least six employees would need to be laid off to satisfy the definition of "significant". If a layoff does not affect a significant number of employees, as defined by subsection 3(4) of the Ministerial Regulations then an order pursuant to section 6-55 of the Act is not available: *S.G.E.U. v Saskatchewan*, [2010] SLRBD No 20 ["*SGEU v Saskatchewan"*].

The Union:

[6] The Union and the Employer are currently parties to a collective bargaining agreement ["CBA"] that expires on April 30, 2020. The Union served the Employer with Notice to Bargain on January 3, 2020. On January 20, 2020, the Employer informed the Union that it was eliminating its maintenance department. The four employees within the department were terminated, not laidoff. The employees were not provided an opportunity to retain employment. After terminating the employees, the Employer retained the services of a private contractor for the provision of maintenance services.

[7] The Union says that, for the Employer to eliminate an entire department from its operations is very likely to affect the terms, conditions, and tenure of employment for a significant number of KeyLeaf's employees. This is an organizational change. The Employer did not provide advance notice to the Union of the organizational change and by failing to do so precluded the Union from participating in a workplace adjustment plan. The CBA does not contain a provision to assist employees affected by organizational changes.

[8] The Union says that the Regulations are ambiguous: first, it is unclear whether the "total number of employees" includes the total number of employees within the Employer's employ, the total number of employees within a facility, or the total number of employees within a single department. The Employer's unilateral organizational change has affected one hundred percent of the employees within the maintenance department. The elimination of an entire department creates a strong likelihood of affecting the terms, conditions, and tenure of employment for a significant number of KeyLeaf's employees. If all other employees are "forced to perform some basic maintenance functions" as a result of the elimination of the department, then one hundred percent of the employees in the facility would be affected.

Applicable Statutory Provisions:

[9] The following provisions of the Act are applicable:

> ***6-54****(1) In this Division:*
>
> > *(a) "organizational change" means the removal or relocation outside of the bargaining unit by an employer of any part of the employer's work, undertaking or business;*
> >
> > *(b) "technological change" means:*
> >
> > > *(i) The introduction by an employer into the employer's work, undertaking or business of equipment or material of a different nature or kind than previously*

utilized by the employer in the operation of the work, undertaking or business; or

(ii) A change in the manner in which the employer carries on the work, undertaking or business that is directly related to the introduction of the equipment or material mentioned in subclause (i).

(2) An employer whose employees are represented by a union and who proposes to effect a technological change or organizational change that is likely to affect the terms, conditions or tenure of employment of a significant number of the employees shall give notice of the technological change or organizational change to the union and to the minister at least 90 days before the date on which the technological change or organizational change is to take effect.

(3) The notice mentioned in subsection (2) must be in writing and must state:

(a) The nature of the technological change or organizational change;

(b) The date on which the employer proposes to effect the technological change or organizational change;

(c) The number and type of employees likely to be affected by the technological change or organizational change;

(d) The effect that the technological change or organizational change is likely to have on the terms, conditions or tenure of employment of the employees affected; and

(e) Any other prescribed information.

(4) The Lieutenant Governor in Council may make regulations specifying the number of employees that is deemed to be "significant" for the purpose of subsection(2) or the method of determining that number.

***6-55**(1) A union may apply to the board for an order pursuant to this section if the union believes that an employer has failed to comply with section 6-54.*

(2) An application pursuant to this section must be made not later than 30 days after the union knew or, in the opinion of the board, ought to have known of the failure of the employer to comply with section 6-54.

(3) On an application pursuant to this section and after giving the parties an opportunity to be heard, the board may, by order, do all or any of the following:

(a) direct the employer not to proceed with the technological change or organizational change for any period not exceeding 90 days that the board considers appropriate;

(b) require the reinstatement of any employee displaced by the employer as a result of the technological change or organizational change;

(c) if an employee is reinstated pursuant to clause (b), require the employer to reimburse the employee for any loss of pay suffered by the employee as a result of the employee's displacement.

(4) A board order made pursuant to clause (3)(a) is deemed to be a notice of technological change or organizational change given pursuant to section 6-54.

6-56*(1) If a union receives notice of a technological change or organizational change given, or deemed to have been given, by an employer pursuant to section 6-54 or 6-55, the union may serve notice on the employer in writing to commence collective bargaining for the purpose of developing a workplace adjustment plan.*

(2) The written notice mentioned in subsection (1) must be served within 30 days after the date on which the union received or was deemed to have received the notice.

(3) On receipt of a notice pursuant to subsection (1), the employer and the union shall meet for the purpose of collective bargaining with respect to a workplace adjustment plan.

(4) A workplace adjustment plan may include provisions with respect to any of the following:

> *(a) consideration of alternatives to the proposed technological change or organizational change, including amendment of provisions in the collective agreement;*
>
> *(b) human resource planning and employee counselling and retraining;*
>
> *(c) notice of termination;*
>
> *(d) severance pay;*
>
> *(e) entitlement to pension and other benefits, including early retirement benefits;*
>
> *(f) a biparte process for overseeing the implementation of the workplace adjustment plan.*

(5) Not later than 45 days after the union received a notice of technological change or organizational change pursuant to section 6-54, the employer or the union may request the director of labour relations to direct a labour relations officer to assist the parties in collective bargaining with respect to a workplace adjustment plan.

(6) If a union has served notice to commence collective bargaining pursuant to subsection (1), the employer shall not effect the technological change or organizational change with respect to which the notice has been served unless:

> *(a) a workplace adjustment plan has been developed as a result of collective bargaining;*
>
> *(b) the minister has been served with a notice in writing informing the minister that the parties have engaged in collective bargaining and have failed to develop a workplace adjustment plan; or*
>
> *(c) a period of 90 days has elapsed since the notice pursuant to subsection (1) has been served.*

. . .

6-111*(1) With respect to any matter before it, the board has the power:*

. . .

> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*
>
> *(q) to decide any matter before it without holding an oral hearing;*

. . .

[10] The following provisions of the Ministerial Regulations are applicable:

> ***2(1)*** *The number of employees deemed to be "significant" for the purpose of section 42 of The Trade Union Act, 1972 shall be:*
>
> > *(a) the number specified in writing in the collective bargaining agreement between the trade union representing such employees and the employer of such employees, or*
> >
> > *(b) the number determined by the method of determining the number of employees that shall be deemed to be "significant" as set out in writing in the collective bargaining agreement between the trade union representing such employees and the employer of such employees.*
>
> *(2) If a collective agreement between an employer and a trade union does not contain provisions specifying the number of employees or the method of determining the number of employees that shall be deemed significant for the purpose of the employees covered by that collective bargaining agreement, then section 3 of these regulations shall apply.*
>
> ***3*** *The number of employees deemed to be "significant' for the purpose of section 42 of The Trade Union Act, 1972 shall be:*
>
> *(1) where an employer has from 2 to 9 employees inclusive, 2 employees;*
>
> *(2) where an employer has from 10 to 19 employees inclusive, 3 employees;*
>
> *(3) where an employer has from 20 to 29 employees inclusive, 4 employees; and*
>
> *(4) where an employer has 30 or more employees, 20 per cent of his total number of employees.*

[11] These Regulations continue in force under the current Act.

Analysis:

[12] Clauses 6-111(1)(p) and (q) of the Act grant the authority to the Board to summarily dismiss an application and to decide any matter without holding an oral hearing, respectively.

[13] On an application for summary dismissal, the Board considers the main application, any particulars that have been provided, and the documents (referred to within the application) upon which the applicant relies to establish its case. The onus is on the applicant to provide sufficient particulars to disclose a violation of the Act, or to frame the main application in such a manner that the nature of the complaint is comprehensible.

[14] The Board is charged with determining whether the main application discloses facts that, if established, would form the basis of a violation of the Act. The test is whether, assuming the applicant proves the allegations, there is nevertheless no reasonable chance of success, or, no

arguable case.[1] In assessing whether there is an arguable case, the Board must be careful not to prejudge the case before it. It must exercise its power to summarily dismiss only in plain and obvious cases, or in cases where the application is patently defective. In deciding whether to summarily dismiss, the Board must avoid weighing evidence, assessing credibility or evaluating novel statutory interpretations.

[15] To this end, it is necessary to consider the elements of a violation of section 6-54 of the Act, which is the governing provision in this case. An employer is required to give notice in the following circumstances:

> *(2) An employer whose employees are represented by a union and who proposes to effect a technological change or organizational change that is likely to affect the terms, conditions or tenure of employment of a significant number of the employees shall give notice of the technological change or organizational change to the union and to the minister at least 90 days before the date on which the technological change or organizational change is to take effect.*

[16] The Union's application is not very detailed. However, it alleges that the Union represents employees who are or were employed by the Employer. It alleges that an organizational change has taken place, and that the organizational change is likely to affect the terms, conditions or tenure of employment of a significant number of the employees. It alleges that no notice of the organizational change was given. In summary, it discloses the "what" (a likely effect on terms, conditions, and tenure of employment), the "when" (January, 2020), and the "how" (no notice with respect to the elimination of the maintenance department).

[17] It is for the Board to determine whether the changes to the work constitute an "organizational change", defined as follows:

> ***6-54****(1) In this Division:*
>
> > *(a) "organizational change" means the removal or relocation outside of the bargaining unit by an employer of any part of the employer's work, undertaking or business;*

[18] The Employer asserts that the change does not constitute a "removal by" the Employer. The Employer has alleged a series of facts in support of this assertion. The Board may or may not make the same findings of fact. The Board may consider the Employer's argument after having made the relevant factual findings[2], at a hearing of the matter.

---

[1] *KBR Wabi Ltd v International Brotherhood of Electrical Workers, Local 529*, 2013 CanLII 47051, 2013 CanLII 73114 (SK LRB).
[2] See, for example, *R.W.D.S.U. v Acme Video Inc.,* [1995] 4th Quarter Sask Lab Rep 134, 146 Sask R 224 (SK QB).

[19] Likewise, the details around whether the work continues to be performed, whether the location of the work has been moved outside of the bargaining unit, and whether the work is now performed by employees in a different work location or by employees of a third party, will require factual findings at a hearing of the application.

[20] The Employer argues that, wherever the Board lands on the issue of a "removal by", there is no ambiguity in the meaning of "significant" under the Ministerial Regulations. Subsection 3(4) is clear that at least 6 employees out of 30 have to be affected:

> ***3*** *The number of employees deemed to be "significant" for the purpose of section 42 of The Trade Union Act, 1972 shall be:*
>
> *(1) where an employer has from 2 to 9 employees inclusive, 2 employees;*
>
> *(2) where an employer has from 10 to 19 employees inclusive, 3 employees;*
>
> *(3) where an employer has from 20 to 29 employees inclusive, 4 employees; and*
>
> *(4) where an employer has 30 or more employees, 20 per cent of his total number of employees.*

[21] The Union and the Employer disagree about whether the base number used for the calculation pursuant to section 3 is the number of employees in the bargaining unit. The Employer asserts that the case law is clear, relying on the following passage from *Saskatchewan Government and General Employees' Union, v Saskatchewan (Government)*, 2011 CanLII 100993 (SK LRB):

> *[23] With all due respect, we neither departed from the Board's jurisprudence nor erred in comparing the number of employees that the Union alleged had been affected by the changes implemented by the Employer to the whole of the Union's bargaining unit. Doing so was merely an application of the previous conclusions of this Board in both Saskatchewan Government Employees Union v. Department of Health of the Government of Saskatchewan, [1987] Sept. Sask. Labour Rep. 41, LRB File No. 146-87, and Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Westfair Foods Ltd, [1993] 3rd Quarter Sask. Labour Rep. 79, LRB File No. 156-93. Neither of these decisions, nor any other case offered by the Union, including Westfair Foods Ltd. v. Saskatchewan, 1992 CanLII 8327 (SK CA), [1992] S.J. 558, 109 Sask. R. 84 (Sask. Court of Appeal), support the assertion that the Board should measure the relative size of the impact of alleged technological changes implemented by an employer against any grouping of employees smaller than the whole of a bargaining unit.*

[22] The Union relies on the following passage from *Westfair Foods Ltd. v Labour Relations Board (Sask.) et al*., 1992 CanLII 8327 (SK CA) ["*Westfair*"]:

> *Although there may be an inconsistency in the decisions, a perusal of the previous decisions discloses that the Board has never purported to say that, as a matter of principle, the Regulations lay down a single definitive base that must be used in all cases irrespective of the circumstances. Furthermore, it is trite law that the Board is not bound to follow its previous decisions (although failure to do so is certainly something to be considered when determining whether a decision is patently unreasonable). Given all of these circumstances, along with the ambiguity in the Regulations,…*

[23] First, the Board notes that the Union's application states that there are "approximately" 30 employees in the bargaining unit. On those facts, the Board is not prepared to conclude that there are exactly 30 employees in the bargaining unit.

[24] Second, the Union argues that the change may affect other employees, in addition to the four key employees. While the Union's application was not very detailed, it extends to circumstances in which the organizational change is likely to affect the terms, conditions or tenure of employment of other employees. There is no obvious impediment to interpreting the statute in this manner.

[25] Lastly, the Union relies on the observations made by the Court of Appeal in *Westfair* that there is no "single definitive base that must be used in all cases irrespective of the circumstances". The Employer says that the Union's interpretation is totally contrary to the case law. First, given the foregoing conclusions, it is not necessary for the Board to decide the issue at this stage. Second, the Board's decision on this issue will benefit from full argument from counsel at a hearing of the matter. The Board must avoid evaluating even "novel" statutory interpretations when they arise. The Employer suggests that the Union's argument is not novel, but well-tread and decisively off track. At this stage, the Board is not prepared to conclude that it is plain and obvious that the Union's argument will fail.

[26] Lastly, the Employer argues that summary dismissal applications play an important role in the Board's process, as a way of redirecting resources away from matters that are otherwise meritless, and by encouraging applicants to fully plead their cases, thereby facilitating fairness for the responding party. Despite the Board's conclusions on this matter, this panel agrees with these observations about the value of summary dismissal applications generally.

[27] The Board is not persuaded that the Union's application fails to disclose an arguable case or has no reasonable chance of succeeding. Having concluded as much, the Employer's Application for Summary Dismissal is dismissed.

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

DATED at White City, Saskatchewan, this 2nd day of **April, 2020.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson