SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Applicant v SASKATOON DOWNTOWN YOUTH CENTRE INC., Respondent

LRB File No. 057-20; March 16, 2021
Chairperson, Susan C. Amrud, Q.C.; Board Members: Phil Polsom and Don Ewart

For Saskatchewan Government and General Employees' Union: Samuel Schonhoffer

For Saskatoon Downtown Youth Centre Inc.: Larry Seiferling, Q.C.

> **Unfair Labour Practice - Clause 6-62(1)(a) – Employer sent one memo by email to employees during organizing campaign – Application dismissed – Onus on Union - Union did not prove interference with employees of reasonable intelligence and fortitude in exercise of Part VI rights.**
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> **Unfair Labour Practice – Clause 6-62(1)(b) – Employer did not interfere with administration of Union - Integrity of Union not threatened – Application dismissed.**

REASONS FOR DECISION

Background:

[1] In 2019 and early 2020, Saskatchewan Government and General Employees' Union ["SGEU"] began working with employees of Saskatoon Downtown Youth Centre Inc. ["EGADZ"] to organize a bargaining unit. SGEU thought it was making progress toward signing up the necessary number of employees to apply for certification, until February 6, 2020. On that date, EGADZ emailed a memo to employees that read as follows:

> *In the past few days, many of you have received texts or emalls from a union (SGEU) that is trying to unionize the staff at EGADZ. A number of staff have been asking managers questions about this and I wanted to make some things clear to everyone.*
>
> *First, the union has the legal right to try to get you to join and support it. You have the legal right to choose to join and support it or not. EGADZ did not ask for this to happen. If the union succeeds, we will negotiate with it about your terms of employment. If it doesn't succeed, things will remain business as usual. EGADZ will not make the decision for you but we do not think a union here will improve your employment.*
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> *Second, we did not share your information with the SGEU and we do not know who did. If you are concerned about who gave out your information you must take that up with the union. We do want you to know, however, that an employee we recently fired has been threatening us with causing EGADZ to be unionized. We have the threats in emails sent to us. This employee was fired for poor attendance, not following instructions and unsuitability. It is our opinion that we have many very good employees here who work hard*

> *to help the youth we serve. We do not carry employees who are unsuitable and not serving our mission. The person we let go is motivated by revenge for being held accountable. That isn't saying much about caring for your best interests. The union is looking for new members who pay them new dues.*
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> *Third, we want to make it clear that while unions generally promise things when trying to sign up members, EGADZ is not flush with money and will not be in a position to offer additional raises to people or add new expenses like extra vacation or benefits. Employees who have been here a while know that we review our pay scales annually and if we get more funding from government, we pass it along to the staff. We cannot and will not pay what the Saskatchewan government pays its employees unless and until they fund us that way. To date, that hasn't happened.*
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> *What we can say is that if a union represents you, everything not already set in law will have to be negotiated. This means compromises will result and you may not get what you want from the negotiation. What will be guaranteed is that the union will take about 2-3% from your pay every pay period to pay for their services. You will still have a boss and you will still be held accountable for doing your job properly, attending work regularly, and meeting expectations. A union contract contains additional rules which have to be followed by EGADZ <u>and by employees</u>. Flexibility is traded off for rules that get applied just the way they are written down. If that certainty is worth it to you, then a union may be interesting to you. If you prefer the more informal approach we have tried to use here for some time, then the trade-off and the cost of union dues may not be your thing. It is up to you to decide.*
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> *Finally, you have the right to say yes or no to the union. You are not obligated to sign anything from the union, go to meetings they may ask you to attend or pass on information they may request. We will accept whatever the majority of staff choose, and we will not know what your personal decision is. It is important that you weigh the facts and decide what's really best for you.* (emphasis in original)

[2] SGEU claims that following the distribution of that memo to employees, its organizing drive stalled. As a result, less than seven weeks later, on March 25, 2020, SGEU filed an Unfair Labour Practice Application against EGADZ[1].

Argument on behalf of SGEU:

[3] SGEU argues that the memo interfered with, restrained, intimidated, threatened and/or coerced the employees of EGADZ in the exercise of their right to form and join a union of their choosing, contrary to clause 6-62(1)(a) of *The Saskatchewan Employment Act* ["Act"]. SGEU argues that the memo contained false and misleading information about SGEU, including the workplace rigidity imposed by union certification, the level of union dues and the suggestion that SGEU cannot obtain any benefits that EGADZ will not already provide to employees. It acknowledges that in *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of The United States and Canada, Local 179 v Reliance Gregg's Home*

[1] LRB File No. 057-20.

Services[2] ["*Reliance Gregg's*"], the Board found similar communications not to be an unfair labour practice. However, SGEU argues that those comments, combined with the following assertions by EGADZ, crossed the line:

> a. *It seriously, specifically, and groundlessly undermined and discredited the organizing campaign by associating it solely or primarily with a disgruntled former employee, who was apparently a poor employee;*
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> b. *It made statements associating the organizing campaign with an employee who was not fit to be an employee, and who was allegedly fired for poor performance;*
>
> c. *It suggested that employees who were associated with the campaign were the type were* (sic) *would be fired, or who were not fit to continue to be employees;*
>
> d. *It impugned the bona fides of the organizing drive;*
>
> e. *It suggested that the union or union organizers contacting employees was improper and directed employees to address that concern with the union organizers.*[3]

[4] SGEU argues that these statements cross the line because they falsely attack the personal motivations and character of the purported union organizers and suggest that the organizing drive is without *bona fides*. These comments in the memo, it says, contain an implied threat of termination and are completely false.

[5] SGEU was critical of the Board's findings in *Reliance Gregg's* and urged the Board to follow the dissent in that decision. It argues that *Reliance Gregg's* sets an unattainably high standard for unions to prove a contravention of clause 6-62(1)(a).

[6] SGEU relies on the following statement in *Saskatchewan Federation of Labour v Saskatchewan*[4]:

> *I also agree with the trial judge that permitting an employer to communicate "facts and its opinions to its employees" does not strike an unacceptable balance so long as the communication is done in a way that does not infringe upon the ability of the employees to engage their collective bargaining rights in accordance with their freely expressed wishes.*

It argues that this means that the constitutionality of subsection 6-62(2) of the Act depends on the Board's vigilance in ensuring that employer communications do not interfere with employees' freedom of association as protected by the *Canadian Charter of Rights and Freedoms*.

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[2] 2018 CanLII 127677 (SK LRB), confirmed on reconsideration at 2019 CanLII 120618 (SK LRB).
[3] Written Submission on Behalf of SGEU, para 5.
[4] 2015 SCC 4 (CanLII), [2015] 1 SCR 245, at para 101.

[7] SGEU relies on *Service Employees International Union (West) v Saskatchewan Association of Health Organizations*[5] ["*SAHO*"], which, it says, stands for the following:

> - *That the test for employer interference continues to involve a contextualized analysis of the probable consequences of impugned employer conduct on employees of reasonable intelligence and fortitude: para 96.1.*
>
> - *That if the Board is satisfied that the probable effect of the employer's conduct would have been to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of protected rights, a violation of the Act will be sustained: para 98.*
>
> - *That the relevant analysis includes an assessment as to whether a power imbalance or particular vulnerability exists in a workplace, even if the same will not be presumed: para 100.*
>
> - *That context remains fundamental to any proper application of the employer interference ULP, with the Board properly guarding against even subtle messages or actions when the representational question is before employees (while allowing greater latitude in collective bargaining within an established bargaining relationship): para 101.*[6]

[8] SGEU points out that *United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Association Limited*[7] ["*Saskatoon Co-operative*"] considered the following factors in determining whether a contravention of clause 6-62(1)(a) had occurred:

> 1. *Evidence, if any, of a particular vulnerability of the subject employees to the views and opinions of their employers. […]*
> 2. *The maturity of the bargaining relationship between the parties. […]*
> 3. *The context within which the impugned communication occurred. […]*
> 4. *The evidentiary basis for and value of the impugned communication. […]*
> 5. *The balance or neutrality demonstrated by an employer in communicating impugned information. […]*

[9] In this case, it argues, all of those factors are present:

- This group of employees was particularly vulnerable to the effects of a memo that attacked the individuals involved in the organizing drive, because they are a disparate group of employees, without close connections and who work at different locations. The employees of

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[5] 2014 CanLII 17405 (SK LRB), rev'd in part 2015 SKQB 222 (CanLII), reinstated in part 2016 SKCA 161 (CanLII).
[6] Written Submission on Behalf of SGEU, para 46.
[7] 2020 CanLII 10516 (SK LRB), at para 73.

EGADZ work at a number of different locations across Saskatoon and do not necessarily know or interact with many of their co-workers.

- There is no bargaining relationship between the parties, therefore employees are at their most vulnerable.
- This was an all-employee memo in a workplace where this was the normal way in which the employer communicated with its employees. SGEU suggests that, in this context, the effect of the email should be considered equivalent to an all-employee "captive audience" meeting in other workplaces.
- In addition to the anti-union rhetoric, EGADZ discussed and impugned SGEU's organizing conduct, and purported to identify the union organizer, attacking his or her competence, character, and motivations, insinuating that the organizing drive was motivated by revenge and being conducted by outsiders and without *bona fides*. It questioned SGEU's motivations, and impliedly threatened the continued suitability for employment and the shared goals of union supporters. SGEU argues that the memo implies that employees who are involved with a union are not good employees, and that employees like that will be fired.
- The memo is baldly anti-union, states that EGADZ does not want a union and provides arguments for why there should not be a union.

[10] The evidence indicated that employees felt intimidated and discouraged in the organizing drive because of what they read in the memo, and what they read into the memo. SGEU urged the Board to find a contravention, based on the following statement of the Alberta Labour Relations Board:

> *We accept this employer lacked knowledge in the area of unionized workplaces, but we reject any assertion it was neutral or ambivalent about being unionized. An employer is responsible for the communications it issues and the clear intention of the written communications here was to dissuade employees from supporting the Union. The mechanism used for doing that was an inaccurate statement that would have resonated quite clearly with a workforce that, as we note above, was particularly sensitive to issues relating to job security.*[8]

SGEU argues that this means that EGADZ is responsible for the effect of the memo regardless of its intent.

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[8] *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry in Canada, Local Union No. 496 v Bilton Welding and Manufacturing Ltd*, 2018 CanLII 2665 (AB LRB), at para 65.

[11] SGEU argues that the reference in the memo to the sharing of employee contact information contravened clause 6-62(1)(a) of the Act because it implied that the information had been improperly shared. However, evidence led by SGEU indicated that EGADZ circulates an employee contact list to its employees and that there are no rules about how the contact list is to be used. In a workplace like this one, it argues, organizing is only possible through the use of this personal contact information.

[12] SGEU relies on *Convergys Customer Management Canada Inc. v B. C. Government and Service Employees' Union*[9] in support of its argument that it could properly use that employee contact information for the purpose of organizing:

> *140 Section 4 provides employees with the right to participate in the lawful activities of a union. This includes the right to participate in an organizing campaign by lawfully disclosing to the Union the names of co-workers, for the purpose of canvassing employees' wishes about union representation. This activity gives employees an opportunity to express their choice about whether to sign a membership card and is a necessary aspect of an organizing campaign. The Employer's blanket prohibition on the disclosure of contact information has the effect of interfering with the outcome of the organizing campaign and, therefore, the selection, formation or administration of a union for the purposes of Section 6(1): Delta Optimist at page 232. We note that the Employer did not argue that this activity is unlawful per se.*
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> *141 We recognize the Employer has a legitimate interest to protect its property in employee lists or other information data. Policies that protect this property by regulating the disclosure of this information do not contravene Section 6(1) per se. However, weighing the Employer's interest and the effect of its policy, we find that a blanket prohibition on the disclosure of any contact information by employees is not justified. Therefore, the threat to dismiss employees for contravention of a blanket prohibition on disclosing contact information improperly interfered with the selection, formation or administration of a union contrary to Section 6(1).*

Therefore, it was improper for EGADZ to suggest otherwise. SGEU objects to the suggestion in the memo that somehow employee contact information had been leaked or improperly shared.

[13] SGEU also claims that EGADZ contravened clause 6-62(1)(b) of the Act. That provision, it says, prohibits EGADZ from talking about SGEU's internal organizing procedures. EGADZ contravened clause (b) by questioning the source of employee contact information and defaming the union organizers.

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[9] 2003 CanLII 62911 (BC LRB).

Argument on behalf of EGADZ:

[14] EGADZ relies on *Saskatoon Co-operative*. First, with respect to onus of proof, the Board stated in that decision:

> *[40] On the present Application, the onus of proof rests with the Applicant, the Union. The Union bears the onus to prove, on a balance of probabilities, that the Employer breached clauses 6-62(1)(a) and 6-62(1)(b) of the Act. The evidence before the Board must be sufficiently clear, convincing, and cogent.*

[15] Next, it turned to an analysis of what a union must prove:

> *[43] First, in United Food and Commercial Workers, Local 1400 v Moose Jaw Co-operative Association, 2019 CanLII 43225 (SK LRB) [Moose Jaw Co-operative Association], at paragraph 73, the Board described the test to establish a breach of clause 6-62(1)(a):*
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>> *... This test involves a contextual analysis of the probable consequences of the Employer's conduct on employees of reasonable intelligence and fortitude. It is an objective test. If the Board is satisfied that the probable effect of the conduct would have been to interfere with, restrain, intimidate, threaten or coerce an employee in their exercise of their protected rights, the Board may find a breach. Prohibited conduct is that which would compromise the free will of the employees.*
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> *[44] This is an objective test - the Board is required to consider the probable consequences of the Employer's actions on employees of reasonable intelligence and fortitude. The protected rights are those that are conferred by Part VI.*

[16] EGADZ argues that SGEU has not met this test. In its view, in the memo, it properly provided facts and opinions to its employees to assist them in making a decision about unionizing. It encouraged them to make up their own minds and provided the pros and cons of the decision.

[17] EGADZ referred the Board to *Button v United Food and Commercial Workers, Local 1400*[10]. In that case, some of the communications were made before the restrictions on employer communications were modified by legislative amendments in 2008.[11] Even under the more restrictive rules, the Board described the employer's right to communicate with its employees as follows:

> *Having reviewed the 2004 communications, other than one (1) potentially inappropriate reference in the April 19, 2004 document (i.e.: wherein the Employer described the Union*

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[10] 2011 CanLII 100501 (SK LRB), at para 42.

[11] Prior to the passage of *The Trade Union Amendment Act, 2008*, clause 11(1)(a) read "(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act". The 2008 amendment repealed clause (a) and substituted the following "(a) to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating facts and its opinions to its employees".

> *as a "wedge" between management and its employees), we were not satisfied that these communications, when viewed objectively, would have interfered with an employee (of average intelligence and fortitude) in the exercise of his or her rights under the Act. The communications were directed to all of the employees as a group and were responsive to new events occurring in the workplaces involving the employees; namely the solicitation of support by the Union for a certification application. We are satisfied that the communications did not suggest that employees undertake any anti-union activities and, more importantly, we were not satisfied that these documents amounted to a campaign by the Employer against the Union as was the case in Canadian Union of Public Employees v. Prairie Bus Services (1983) Ltd., [1999] Sask. L.R.B.R. 413, LRB File No. 083-98.*

[18] Finally, EGADZ relies on *Reliance Gregg's*, where the Board did not find a contravention of clause 6-62(1)(a):

> *[36] There were no threats in the speech. Nor could it be said that the tone or words used could be considered to be intimidating. There was no attempt to restrain employee choice or to interfere with the voting process. Plain and simple, it was a plea to the employees not to vote in favour of a union in the workplace.*
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> *. . .*
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> *[39] There is certainly no evidence to show that any employee was so intimidated, coerced, restrained, threatened or interfered with by Mr. O'Brien's speech that they did not exercise their rights under the SEA. We do not know if any employees changed their view of the Union as a result of Mr. O'Brien's speech, but even so, that would not, in and of itself, be offside of the provision. Employers are entitled to communicate with their employees in an attempt to change their minds as to how they may ultimately vote on the representation question.*

[19] With respect to the application of *Reliance Gregg's* to this matter, EGADZ argues:

> *The employer in Reliance Gregg's goes even further in communicating sentiments beyond anything made evident by the Employer in the present case. That employer also:*
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> - *conveys the employer's opinion that unions cannot ensure security of employment (paragraph 29); and*
> - *raises the issue of potential strikes during negotiation and under a collective bargaining agreement (paragraphs 50 and 57).*
>
> *It is clear that the employer in Reliance Gregg's openly bore anti-union sentiment, and communicated it directly and repeatedly to employees by way of facts and opinions. The Employer's opinions on the value of the Union to employees as stated in the communication of February 6th, 2020 lack these additional arguments, and overall bear a significantly milder tenor. The Board in Reliance Gregg's found none of the above violates s. 6-62(1)(a).*[12]

[20] EGADZ also denies that the memo contravened clause 6-62(1)(b), relying on *SAHO*[13]:

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[12] Brief of Law on Behalf of the Respondent, Saskatoon Downtown Youth Centre Inc., at para 17.

[13] *SAHO* considered an alleged contravention of clause 11(1)(b) of *The Trade Union Act*, the predecessor to clause 6-62(1)(b) of the Act.

[119] . . . . The Board further commented on the legislative purpose of s. 11(1)(b) as follows:

> *In our view, this passage suggests the appropriate focus for this section. We see it as intended to protect the integrity of the trade union as an organization, not to speak to all of the types of conflict which may arise between a trade union and an employer in the course of their dealings. Insofar as meetings between an employer and employees are permissible – and we have outlined the perils which they face on other grounds – it is to be expected that they will be planned by the employer so that the persuasive impact of the information conveyed will be maximized. This in itself, however annoying, does not constitute "interference with the administration" of a trade union within the meaning of Section 11(1)(b).*

[120] In Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Canada Safeway Limited, et. al., [1995] 3rd Quarter Sask. Labour Rep. 170, LRB File No. 093-95, this Board adopted the above descriptions of the legislative purpose of s. 11(1)(b) and came to the following conclusions with respect to the application of this provision:

> *We have stated above our view that not every instance of employer conduct which has an effect which is not expected, welcomed or approved of by a trade union constitutes "interference" of a kind which is prohibited under Section 11(1)(b). This comment seems equally applicable to an allegation of an infraction of Section 11(1)(b). In the relationship between a trade union and an employer, there will be many occasions when the strategy pursued by the union does not have the anticipated result, or the union must make concessions in the face of the superior bargaining power of the employer. This is the nature of collective bargaining. It cannot be the case that every action of an employer which does not serve the best interests of the trade union can be viewed as an infraction of Section 11(1)(b). As we indicated in the cases cited above, this provision must, in our view, be taken to govern conduct which threatens the integrity of the trade union as an organization, or creates obstacles which make it difficult or impossible for the trade union to carry on as an organizational entity devoted to representing employees.*

[21] Nothing in the memo threatens SGEU's integrity as an organization or creates obstacles that make it difficult or impossible for SGEU to carry on as an entity devoted to representing employees.

Relevant Statutory Provisions:

[22] SGEU relies on the following provisions of the Act:

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:

(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;

> *(b) subject to subsection (3), to discriminate respecting or interfere with the formation or administration of any labour organization or to contribute financial or other support to it;*

> *(2) Clause (1)(a) does not prohibit an employer from communicating facts and its opinions to its employees.*

Analysis and Decision:

Clause 6-62(1)(a)

[23] The starting point in the analysis of this application is that the onus is on SGEU to satisfy the Board that EGADZ has contravened clause 6-62(1)(a). The evidence must be sufficiently clear, convincing and cogent. The test to establish the contravention is an objective test: that the probable effect of the memo, on employees of reasonable intelligence and fortitude, would have been to interfere with, restrain, intimidate, threaten and/or coerce them in the exercise of their rights under Part VI of the Act. This requires a contextual analysis.

[24] *United Food and Commercial Workers, Local 1400 v Securitas Canada Limited*[14] ["*Securitas*"] contains a useful description of the analysis to be undertaken by the Board:

> *[31] By way of background, the substantive test for determining whether or not impugned communications by an employer represents a violation of s. 6-62(1)(a) of The Saskatchewan Employment Act involves a contextualized analysis of the probable consequences of the employer's conduct on employees of reasonable intelligence and fortitude. In other words, if the Board is satisfied that the probable effect of the impugned communications of an employer would have been to interfere with, restrain, intimidate, threaten or coerce that employer's employees, the communications are unlawful and a violation can be sustained. This test is an objective one. The Board's approach is to determine the likely or probable effects of impugned employer communications upon a so-called "reasonable" employee; being someone of reasonable intelligence and possessed of reasonable fortitude and resilience.*

> *[32] While employers continue to be prohibited from interfering with, intimidating, threatening and coercing their employees, the Board is much less paternalistic in our presumptions as to vulnerability and/or susceptibility of employees to the views and opinions of their employers. In our opinion, the inclusion of the words "Clause (1)(a) does not prohibit an employer from communicating facts and its opinions to its employees" in The Saskatchewan Employment Act signals a greater tolerance by the Legislature for the capacity of employees to receive information and views from their employer without being threatened, intimidated or coerced. As noted by this Board in Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, supra¸ to fall outside the sphere of permissible communications, an employer must do more than merely influence its employees. Improper communications requires conduct that is capable of infringing upon, compromising or expropriating an employee's free will. For example, the mere fact that an employer has communicated facts and its opinions to its employees and*

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[14] 2015 CanLII 43778 (SK LRB).

those employees may have been influenced by those views and opinions, should not now automatically lead to a finding of interference, let alone employer coercion or intimidation. Simply put, the prohibited effect targets a higher threshold than merely "influencing" employees in the exercise of their rights.

[33] While employers now enjoy a greater capacity to communication facts and their opinions to employees, there continues to be a number of important limitations on an employer's so-called "free speech". As noted by the Saskatchewan Court of Appeal in Saskatchewan Federation of Labour v. Saskatchewan, et. al., 2012 SKQB 62 (CanLII), the inclusion of the right to communicate "facts" and "opinions", does not give employers an unrestricted right to do so. The Saskatchewan Employment Act (as did its predecessor The Trade Union Act) seeks to balance a number of laudable, yet clearly competing, interests in dealing with communications by an employer, including; the interests of employers (the right to freely communicate with its employees regarding matters directly affecting its business interests, its current activities, and its plans for the future); the interests of employees (the right to exercise their associational rights free from coercion, intimidation or interference); and the interests of trade unions (the right to be the exclusive bargaining agent for organized employees). See: Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, supra. While employers may communicate with their employees, they may not do so in a manner that infringes upon the ability of those employees to engage and exercise their collective bargaining rights.

[34] To fall outside the sphere of permissible employer communications, the Board must be satisfied that the probable effect of an impugned communication would be to compromise or expropriate the free will of a reasonable employee. Obviously, the challenge for the Board is differentiating between those communications by an employer that are permissible (because they contain useful and helpful information for employees; information that is merely "influential") and prohibited communications that stray into the prohibited grounds of threats, intimidation and coercion. To guide in this evaluation, the Board will generally examine:

1. *Evidence, if any, of a particular vulnerability of the subject employees to the views and opinions of their employers. As indicated, absent evidence of a particular susceptibility of employees, we start from the presumption that employees are capable of receiving and weighing a broad range of information about matters affecting their workplace and of making rational decisions in response to that information. See: Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, supra.*

2. *The maturity of the bargaining relationship between the parties. Generally speaking, in a mature bargaining relationship, employees are less vulnerable to the views and options of their employer.*

3. *The context within which the impugned communication occurred. Almost as much as the words themselves, context is important in understanding the meaning and significance of an impugned employer communication. The events occurring in the workplace; the timing of the communication(s) relative to those events; the audience; and status of the bargaining relationship; are all factors to be considered by the Board. For example, context can help the Board determine if otherwise ambiguous statements may convey a subtle message or have a different meaning for the affected employees. Similar, context can also help the Board determine if a seemingly threatening communication may, in fact, contain useful and helpful information for employees. Finally, the context in which impugned communication(s) occur guides the Board in the restraint applied to its*

intervention. Historically, the Board has been the most interventionist when the representational question is before employees. On the other hand, the Board has adopted a more laissez faire approach to communications by the parties when they are engaged in collective bargaining; particularly so with respect to communications that occur at the table. See: Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, supra.

4. *The evidentiary basis for and value of the impugned communication. To fall within the protection of s. 6-62(2) of the Act, there must be an evidentiary basis for the facts and opinions expressed by an employer and, generally speaking, the genesis of the information must be within the business knowledge of the employer and/or the personal experience of the communicator. Furthermore, the facts and opinions communicated by or on behalf of the employer must be relevant and useful to the subject employees. The greater the utility of the information being conveyed to employees, the more likely such information will fall within the sphere of permissible communications. See: International Brotherhood of Electrical Workers Local 2038 v. Clean Harbours Industrial Services Canada & BCT Structures Inc., 2014 CanLII 76047 (SK LRB), LRB File Nos. 063-14, 071-14, 096-14, 105-14 & 106-14.*

5. *The balance or neutrality demonstrated by an employer in communicating impugned information. While a certain degree of "spin" and/or self-promotion may be anticipated in employer communications (particularly with respect to collective bargaining proposals), if an impugned communication contains misinformation or unnecessary amplification or spin, the more likely it will be to stray outside the sphere of permissible communication. See: Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, supra. Furthermore, there are certain subjects, such as the representational questions, with respect to which the Board expects the most balance and patent neutrality from employers.*

. . .

[39] … In our opinion, a communication does not fall outside of sphere of s. 6-62-(2) because the factual basis for an employer's views or opinions ultimately turns out to be erroneous; provided the employer's original belief in the state of facts at the time of its communication was reasonable under the circumstances.

[25] That description of the analysis to be undertaken by the Board is consistent with the task outlined for the Board in *SAHO*:

[100] Furthermore, the historic presumption that all employer communications are inherently and inevitably intimidating or coercing for employees can not stand in face of the 2008 amendment to s. 11(1)(a). It may well be that a power imbalance exists in a particular workplace or that a particular group of employees are vulnerable for one reason or another to the wishes or influences of their employer. However, it is no longer appropriate for this Board to begin its analysis of the impugned employer conduct by presuming that employees are inherently or inevitably susceptible to the expropriation of their free will by an employer. In our opinion, absent evidence of an unusual power imbalance in the workplace, we start from the presumption that employees are capable of receiving a variety of information from their employer; of evaluating that information, even being aided or

influenced by that information; without necessarily being improperly influenced, threatened, intimidated or coerced by that information. Absent evidence of a particular vulnerability of employees, we start from the presumption that employees are capable of weighing any information they receive, including information from their employer, and will make rational decisions in response to that information. In blunt words, in evaluating the probable affect of impugned communication by an employer, we do not assume that affected employees are timorous minions cowering in fear of their masters.

[101] The context in which an impugned communication occurs continues to be fundamental to evaluating the probable effect of that communication in two (2) ways. Firstly, contextualizing an impugned communication helps evaluate the probably effect of that communication on employees of reasonable fortitude. Considering the context within which an impugned communication occurs help the Board determine if an otherwise ambiguous statement may convey a subtle message or have a different meaning in that particular context. Secondly, the circumstances in which an impugned communication occurs also guides the Board in determining the approach it will take to intervention. An analysis of the Board's jurisdiction reveals that communications occurring during an organizing campaign or during a rescission application have generally been subject to a more rigorous review by the Board. During an organizing campaign or at any time when the representational question is before employees, the Board has generally been highly alert to subtle signs of employer interference, intimidation, coercion or threats. For example, communications from an employer about the relative benefits of unionization have been found to convey a subtle message of intimidating or coercive effect when made during an organizing campaign. See: Super Valu, a Division of Westfair Foods v. United Food and Commercial Workers, Local 401, [1981] 3 Can. LR.B.R. 412, LRB File No. 121-81.

[26] The analysis for the Board to undertake is to review the memo, in the context of this workplace, to determine whether its probable effect, on employees of reasonable intelligence and fortitude, would have been to influence them in a permissible manner, or whether it went a step further and interfered with, restrained, intimidated, threatened or coerced them in their consideration of whether to support the organizing drive. The Board is to apply these principles in the context of this workplace. The Board has examined the memo in light of the five criteria described in *Securitas* and *Saskatoon Co-operative*.

[27] First, in this matter there was no evidence of a particular vulnerability of the employees to the views and opinions of their employer. No evidence of a power imbalance in this workplace was provided to the Board. The Board does not agree with SGEU's suggestion that the Board should assume vulnerability based on the fact that they are a disparate workplace. The lack of evidence on this key issue is a significant gap in SGEU's construction of the context in which the Board is to analyze the memo. Therefore, the Board starts from a presumption that the employees were capable of receiving and weighing a broad range of information in making a decision about whether to support SGEU.

[28] The second criterion is the maturity of the bargaining relationship between the parties. There is no bargaining relationship between these parties. Therefore, the Board must be vigilant, and was vigilant, in reviewing the evidence to determine the vulnerability of these employees to their employer's views and opinions.

[29] With respect to the context within which the communications occurred, the Board notes that EGADZ sent one memo, by email, to its employees. SGEU invites the Board to find that in this workplace that memo is equivalent to an all-employee captive audience meeting in other workplaces. No evidence was led to support this submission. Again, this lack of evidence is a crucial gap in SGEU's evidence. SGEU did not provide the Board with evidence of context that could support such a finding.

[30] A controversial issue in this matter was whether there was an evidentiary basis for the facts and opinions expressed in the memo. Did EGADZ reasonably believe the facts in the memo to be true when the memo was sent?

[31] Don Meikle, Executive Director of EGADZ gave evidence at the hearing. On January 15, 2020, he received an email from Rob Clarke[15] that read as follows:

> *Your organization is nothing more than joke! How many more good hardworking people are going to let slip away because of the bullshit you let go on???*
>
> *I have had several people work here with nothing good to say. Even some of your present staff believe this place is ill. You will soon be exposed for the disgusting things being done.*
>
> *You will get this thing called Karma! It is a reality check for the way you treat others, and devalue high performing employees. There is a group of us meeting with Don from Regina today, you will not be allowed to treat people like garbage for much longer. You will be a union before you know it!*
>
> *I am so disgusted at how you treat amazing, valuable, people!! I heard through numerous co workers that another person was let go yesterday, because she came forward with some valued facts about another employee? You do realize that this was a HUGE mistake, that one person contributed so much, by keeping evil people and letting generous ones slip away you take away from the youth! Are they not your priority? By the sounds of the way things are going, it sure sounds like your EGOS have become your biggest priority.*
>
> *Past employees all have their crazy tales about this place! Your supervisors are nothing more than puppets on a string that have to "fall in line" or they too will be let go!*
>
> *Stop hiding behind trying to help kids! There is a lot of ugly people in your upper management that have an ugly heart and it will be exposed for what it is!*

[15] Exhibit E-2. No one who gave evidence at the hearing knew who this person was.

For someone who has been homeless and knows the effects of bullying I would be so very ashamed to let my organization be labelled in such a way.

[32] He received another email of similar tone from Rob Clarke on January 30, 2020[16]. His evidence was that the information in the third paragraph of the memo, that SGEU takes particular issue with, is based on his interpretation of the January 15, 2020 email. Don Regel, a Member Organizer for SGEU who gave evidence at the hearing, denies that a fired employee or a person named Rob Clarke played any role in SGEU's organizing efforts.

[33] The Board accepts Don Meikle's evidence that he reasonably believed the statements in the memo when the memo was sent. What Meikle read in, and read into, the Rob Clarke emails, reasonably formed the basis of the comments in the memo about a person he thought was involved in the organizing drive. Whoever Rob Clarke is did no favors for the employees or SGEU in sending the two emails to EGADZ in January, in the middle of the organizing campaign.

[34] The second part of the analysis of this criterion, as described in *Securitas*, is that the facts and opinions must be relevant and useful to the employees. The Board is of the view that the personal information of the terminated employee, being the reasons for her termination, was not relevant or useful to the other employees and should not have been included in the memo. However, as in *Saskatoon Co-operative*, the Board has found that the inclusion of this information is not fatal. The memo can be viewed as largely accurate even though potentially misleading on this one issue.

[35] The last question is whether EGADZ demonstrated balance or neutrality in the memo. The memo includes facts or opinions not in favour of a union. For example, EGADZ said it did not think a union would improve employment; it does not have money for raises, extra vacation or benefits; employees will have to pay union dues; employees will lose flexibility in the application of workplace rules. However, it also says employees have a legal right to join and support a union; it will accept whatever the staff chooses; it will not know what each employee's personal decision is. The Board is of the view that this demonstrates that the information provided by EGADZ was reasonably balanced. The last statement, that EGADZ will not know what any employee's personal decision is, is particularly compelling in this analysis.

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[16] Exhibit E-3.

[36] One former employee of EGADZ gave evidence. She indicated her opinion that the memo led to employees losing interest in supporting SGEU because they were afraid they would lose their jobs. While the Board took her evidence into consideration, it is also mindful of the following caution in *SAHO*:

> *[106] Before closing on this point, I should perhaps make one further observation. The Chambers judge underlined that the Board heard evidence from ten employees who had said, in various ways, that they had effectively felt intimidated or coerced by SAHO's communications campaign. This evidence, of course, was presented but it was the responsibility of the Board to assess its significance. The question before the Board involved a contextualized assessment of the impact of SAHO's communications on employees of "reasonable intelligence and fortitude." It follows, necessarily, that the testimony of ten employees called by the Unions to give evidence cannot be determinative of the s. 11(1)(a) inquiry.*

The Board was not satisfied that her evidence established a context of a power imbalance or a particular vulnerability or susceptibility of the employees in this workplace to the views of their employer. In the application of an objective test, the focus is not on how any one or more employees actually reacted in response to the memo. The focus is on how an employee of reasonable intelligence and fortitude in this workplace could have been expected, by the employer and the Board, to react. Given the paucity of evidence about the workplace, SGEU has not proven its case.

[37] In summary, the Board found that the memo does not, on its face, contain language that is intimidating, threatening or coercive. That means that SGEU needed to provide the Board with evidence that proved that, in the context of this workplace, it would have had that effect on employees of reasonable intelligence and fortitude. That it did not do. The Board does not have sufficient evidence on which it could make a determination that the memo went beyond influence and into the realm of interference. The onus is on SGEU to prove a contravention of clause 6-62(1)(a). SGEU did not provide the Board with clear, convincing and cogent evidence to meet its onus of proof.

[38] The application to find a contravention of clause 6-62(1)(a) of the Act is dismissed.

Clause 6-62(1)(b)

[39] The second ground on which SGEU made this application was that EGADZ contravened clause 6-62(1)(b) of the Act. With respect to this ground SGEU takes issue with what it characterizes as EGADZ falsely implying that it acted improperly in contacting employees using contact information obtained from an employee contact list. Further, it says, EGADZ provided information about the internal workings of the organizing drive, its motivations, its objects, the identity of its principal, and the character of its associates. This, SGEU argues, was interference with the organizing and its internal workings.

[40] In *Saskatoon Co-operative*, in finding a contravention of clause 6-62(1)(b), the Board made the following findings:

> *[106] On review, in SEIU-West v Saskatchewan Association of Health Organizations, 2015 SKQB 222 (CanLII) [SAHO QB], the Court found, at paragraph 57:*
>
> > *The board decided that s. 11(1)(b) related only to the protection of unions as an independent legal entity, and went on to say at para. 123 that "the fact that the views and opinions being expressed by SAHO and the respondent employers made the jobs of the applicant trade unions more difficult" could not amount to a violation of s. 11(1)(b). That it concluded the independence of the union was not adversely affected by the respondents' conduct is not unreasonable, but it does leave open the question of whether an employer making the union's life difficult can ever be the subject of an unfair labour practice as the board has stated such submission does not belong in either s. 11(1)(a) or s. 11(1)(b).*
>
> . . .
>
> *[126] Further, in relation to clause 6-62(1)(b), the focus is on whether the Employer interfered with the administration of the Union. This provision governs conduct that threatens the integrity of the Union as an organization - with an emphasis on the impugned conduct and its significance for the Union's organizational integrity.*

[41] Can the comments in the memo that SGEU objects to be characterized as adversely affecting SGEU's independence, threatening its integrity as an organization, interfering with its administration or creating obstacles that make it difficult or impossible for SGEU to carry on as an entity devoted to representing employees? SGEU has not provided the Board with evidence that the memo had that effect. The Board does not agree that the comments objected to by SGEU contravene clause 6-62(1)(b). While they could lead, and the evidence indicated they did lead, to employees asking SGEU questions, that result does not prove a contravention of clause (b).

[42] The application to find a contravention of clause 6-62(1)(b) is dismissed.

[43] The Board thanks the parties for the comprehensive oral and written arguments they provided, which the Board has reviewed and found helpful.

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

DATED at Regina, Saskatchewan, this **16th** day of **March, 2021.**

LABOUR RELATIONS BOARD

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Susan C. Amrud, Q.C.
Chairperson