

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v ESCAPE CLUB ENTERTAINMENT LTD., Respondent

LRB File No. 058-23; January 16, 2024

Chairperson, Michael J. Morris, K.C.; Board Members: Lori Sali and Allan Parenteau

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

Counsel for the Respondent,
Escape Club Entertainment Ltd.: Graham Quick

Certification application – Managerial and confidentiality exclusions – Exclusions inapplicable to Operations Manager positions – Exclusions applicable to Cafémaster position.

“All employee” unit proposed – Operations Manager positions exercising some supervisory responsibilities – “All employee” unit including Operations Manager positions appropriate.

REASONS FOR DECISION

Background:

[1] Michael J. Morris, K.C., Chairperson: These are the Board’s reasons following a hearing with respect to a certification application involving United Food and Commercial Workers, Local 1400 [Union] and Escape Club Entertainment Ltd. [Employer].

[2] The Employer operates a business [Escape Club], which it describes as follows:

Escape Club is a locally owned and operated escape room provider. It operates escape rooms and a board game café in Regina, Saskatchewan with six different themed escape rooms, hundreds of card and board games, and a licensed café.¹

[3] Escape rooms are rooms which are designed for customers’ amusement. Essentially, they require customers to problem-solve how to exit a room, based on puzzles and clues. The café and escape rooms are operated from the same leased location in Regina.

[4] The Union seeks to certify an “all employee” bargaining unit. The primary issue before the Board is whether certain positions must be excluded from the proposed bargaining unit based on

¹ Employer’s brief, para 3.

the managerial or confidentiality exclusions in s. 6-1(1)(h)(i) of *The Saskatchewan Employment Act*² [Act]. In addition, the appropriateness of an “all employee” unit is otherwise questioned by the Employer.

[5] The Union submits that the Cafémaster position should be excluded from the proposed bargaining unit, based on the managerial exclusion.

[6] The Employer submits that the Cafémaster position should be included in the proposed bargaining unit, and that the Operations Manager positions should be excluded based on the managerial and confidentiality exclusions. Alternatively, the Employer submits that each of the Cafémaster and Operations Manager positions should be excluded from the proposed bargaining unit. Finally, if neither the managerial or confidentiality exclusions apply to the Operations Manager positions, the Employer suggests that the Board may consider whether the positions ought to be in a separate bargaining unit from all other employees, based on the positions having at least supervisory responsibilities.

Evidence:

[7] The Union called Kyle Cuthbert [Mr. Cuthbert] as a witness. Mr. Cuthbert has worked for the Employer for several years, initially as a Gamemaster, meaning an employee who runs (i.e., facilitates the playing of) escape rooms for customers, and more recently as a full-time Operations Manager. As an Operations Manager, Mr. Cuthbert continues to run escape rooms for customers, amongst other duties.

[8] The Employer called its owner/operator, Dale D’Silva [Mr. D’Silva]. Mr. D’Silva indicates that as a small business owner he “does everything”, from running escape rooms to ensuring employees are paid.

[9] The Escape Club has been open at its current location since 2018. It primarily employs casual employees, many of whom are teenagers. Most of the employees are Gamemasters. One of the casual employees, Ms. Blair, works as an administrative assistant. Another, Ms. Gerry, schedules other employees, in addition to working as a Gamemaster.

[10] The Cafémaster position is a casual position, and its occupant is John Kessler [Mr. Kessler].

² *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act].

[11] The Operations Manager positions are the only full-time positions. In the fall of 2021, Mr. Cuthbert began working increased hours at the Escape Club in return for a monthly salary. By late 2022, both Mr. Cuthbert and Duncan Graham [Mr. Graham] were being paid \$2,500 per month on the understanding that they would work 40 hours per week. Though the terms of their employment had changed since their initial hiring as Gamemasters, neither Mr. Cuthbert nor Mr. Graham signed new employment contracts reflecting their new roles as Operations Managers. According to Mr. D'Silva, the reason he provided full-time employment to Mr. Cuthbert and Mr. Graham was to relieve himself of some of the responsibilities of running the business. During his examination-in-chief Mr. D'Silva explained that these responsibilities included checking the calendar for bookings, ensuring staff coverage for bookings, ensuring staff were getting breaks, inputting paper-based time sheets into an electronic spreadsheet, inputting cash in/cash out into a spreadsheet, and doing screening for hiring. In cross-examination, Mr. D'Silva mentioned that having Mr. Cuthbert and Mr. Graham as full-time employees meant that they could cover his responsibilities on weekends. He also stated that, from his perspective, they had the authority to hire staff without his approval.

[12] During late November and early December of 2022, Mr. Cuthbert and Mr. Graham hired two Gamemasters. Prior to doing so they checked with Mr. D'Silva and obtained his approval for the hires.

[13] Mr. D'Silva took a trip to India during January and part of February of 2023. Mr. Cuthbert described this time as being somewhat of a trial period for him and Mr. Graham. In his view, Mr. D'Silva was gauging whether they could run the business while he was away.

[14] By this time, Mr. Kessler had been hired by Mr. D'Silva. Mr. Kessler's employment contract is dated January 3, 2023, and the Board infers that it was entered into shortly before Mr. D'Silva's trip to India. Mr. D'Silva explained that he had previously worked with Mr. Kessler in the restaurant industry, and that Mr. Kessler was also his roommate. Mr. Kessler's employment contract is unlike any of the Employer's other employment contracts, and much briefer. It describes Mr. Kessler being hired as a "café worker" at a wage of \$20 per hour (over \$5 per hour more than any other employee, including Mr. Cuthbert and Mr. Graham). Mr. D'Silva testified that Mr. Kessler was primarily hired to set a menu for the café, and to put it in a position where it could be open for lunch. Mr. Kessler did not (and does not) report to Mr. Cuthbert or Mr. Graham. Further, Mr. D'Silva testified that Mr. Kessler's role is nothing like what is described in his employment contract; rather, Mr. Kessler is more like a business consultant.

[15] Mr. Cuthbert described becoming acquainted with Mr. Kessler at the end of January, at which time Mr. Kessler was added to a WhatsApp³ chat that included several Escape Club staff. In the chat, Mr. Kessler stated that the café would be opening for lunch and that new employees would be hired to staff it.⁴ This disappointed Mr. Cuthbert and Mr. Graham, who considered using existing Gamemasters to fill café shifts to be preferable.⁵

[16] In February, Mr. Cuthbert and Mr. Graham met with Mr. Kessler. Tyler Polishak [Mr. Polishak] also attended this meeting. Before Mr. Kessler's hiring, Mr. Polishak had primary responsibility for the café. During the meeting Mr. Kessler explained that he wanted to manage "the chaos" of the business, and to reduce Mr. D'Silva's involvement in having to run it.

[17] Later in February, once Mr. D'Silva returned from India, it was apparent that none of Mr. Cuthbert, Mr. Graham or Mr. D'Silva were happy with how things had gone in his absence. Mr. Cuthbert explained that he and Mr. Graham didn't have access to basic information they needed, such as who to order paper towel from and end-of-night sales figures, or the ability to purchase necessary items with company funds as opposed to their own funds. For his part, Mr. D'Silva had concerns that payroll was higher than ever for the period he was away, and that there was limited revenue to cover it. As a consequence, he needed to take out a loan. Further, he was concerned that Mr. Cuthbert and Mr. Graham may not have been working the hours they were supposed to.

[18] A meeting occurred between Mr. Kessler, Mr. D'Silva, Mr. Cuthbert and Mr. Graham in March of 2023. Mr. D'Silva described having asked Mr. Kessler to assist him at this meeting, as a mediator. In Mr. D'Silva's words, Mr. Kessler "took point" at the meeting. Mr. D'Silva stated that his concerns regarding payroll exceeding revenue were raised, along with his concerns about Mr. Cuthbert's and Mr. Graham's hours. He recalled Mr. Graham complaining that he and Mr. Cuthbert did not have access to financial information for the business, and that after the meeting, he provided them with payroll and revenue information. Mr. Cuthbert testified that he and Mr. Graham were being asked to justify their positions, i.e., what duties they performed and why they were being paid what they were. As a result of this he created a document, Exhibit U-1, which listed their current responsibilities as well as "new responsibilities that seem natural", "acceptable new responsibilities" and "differences in responsibilities" (as between Mr. Cuthbert and Mr. Graham). This document was shared with Mr. Kessler and Mr. D'Silva in late March or early April.

³ WhatsApp is an application that allows users to send electronic messages to each other. The evidence before the Board is that it is commonly used for work-related communications at the Escape Club.

⁴ Exhibit U-2, p 3.

⁵ Exhibit U-2, p 4.

[19] Mr. Cuthbert testified that the responsibilities listed as “current responsibilities” in Exhibit U-1 were accurate for him and Mr. Graham at the time the certification application was filed, being April 12, 2023. Those listed as “new responsibilities that seem natural” were those that he and Mr. Graham thought they should have. “Acceptable new responsibilities” were those that they were prepared to take on. “Differences in responsibilities” highlighted, for example, that Mr. Graham handled most small electronics and coding tasks while Mr. Cuthbert handled most power tool-related tasks. For reference, all of the text contained in Exhibit U-1 is reproduced in Appendix “A” of these reasons.

[20] During cross-examination, Mr. D’Silva stated:

- It is possible that Mr. Cuthbert and Mr. Graham may have had a different conception of their job duties than Mr. D’Silva due to a lack of communication between them regarding same.
- Mr. Kessler was not subordinate to Mr. Cuthbert and Mr. Graham, and they could not fire him.
- Mr. Cuthbert and Mr. Graham had never hired anyone without consulting with Mr. D’Silva first.
- Mr. Cuthbert and Mr. Graham had never given anyone a raise, never promoted anyone from part-time/casual to full-time, and never fired anyone. He thought they may have given verbal warnings, but did not know for sure, and couldn’t give any examples of this having occurred.

[21] Mr. D’Silva stated that Mr. Cuthbert and Mr. Graham had access to a company credit card. Mr. D’Silva indicated that this was used by Mr. Graham to book promotional space for the Escape Club at the Regina Farmers’ Market. For his part, Mr. Cuthbert stated that the one time he tried to use the company credit card it was declined, and that he had to use his personal card to make purchases for things like screws to repair props.

[22] Mr. Cuthbert described being away from the workplace for a period after the certification application was filed, returning full-time in late August or early September.⁶ He mentioned that when he returned to work the scheduling system for Gamemasters was changed, apparently at Mr. Kessler’s initiative.

Argument on behalf of the Union:

⁶ Mr. Graham has been away from the workplace since shortly after the certification application was filed.

[23] The Union submits that the Operations Manager positions are important, but that their primary responsibility is not to perform functions that are of a managerial character. Their primary responsibility is to run escape rooms, with some additional supervisory responsibilities. They do not exercise any managerial authority that would put them in an insoluble conflict with employees in the proposed bargaining unit.

[24] Further, the Operations Managers do not have access to confidential information of the type that would put them in an insoluble conflict of interest with employees in the proposed bargaining unit. They do not have access to information that is not available to one or more other employees, such as Ms. Blair.

[25] With respect to the Cafémaster, the Union emphasizes Mr. Kessler's higher pay and distinct employment contract in comparison to other staff. It notes that the Operations Managers earn approximately \$14.42 per hour,⁷ compared to \$20 per hour for the Cafémaster. The Union points to Mr. Kessler's statements that he was brought in to manage "the chaos" of the business and reduce the associated burden on Mr. D'Silva. It submits that Mr. D'Silva's testimony that he considers Mr. Kessler a business consultant and Mr. Kessler's close relationship with Mr. D'Silva indicate that Mr. Kessler, as Cafémaster, would be in an insoluble conflict of interest with employees in the proposed bargaining unit.

Argument on behalf of the Employer:

[26] The Employer submits that the Operations Managers should be excluded on the basis of the managerial and confidentiality exclusions.

[27] The Employer points to the positions' title, as well as Mr. Cuthbert's and Mr. Graham's references to themselves as part of the "management team" in WhatsApp chats with employees. The Employer submits that the Operations Managers have authority to independently hire and fire employees, exclusive of Mr. D'Silva's approval. It notes that they are responsible for training employees, ensuring staff coverage for bookings, and the day-to-day running of the escape room side of the business. The Employer points to the Operations Managers being the Escape Room's only full-time employees, being salaried, and having access to certain benefits (e.g., dental and prescription drug benefits under a group policy) which are not provided to other staff. It notes the

⁷ This is based on \$2,500 per month (\$30,000 per annum) being converted into an hourly wage, assuming a 40 hour work week ($\$30,000 \div 52 \text{ weeks} \div 40 \text{ hours} = \14.42 per hour). The Union notes that this will be less than minimum wage as of October 1, 2024, when the provincial minimum wage rises to \$15 per hour.

Operations Managers have some discretion with respect to their working hours and can delegate tasks to employees.

[28] Regarding the confidentiality exclusion, the Employer submits that the Operations Managers have access to human resources files, are privy to confidential human resources information (such as reasons for absences or leaves), and participate in discussions about escape room design, which Mr. D'Silva considers the "secret sauce" of the business. The Employer submits that Operations Managers are expected to advise if any of the escape rooms are not performing well, which could impact staffing requirements (i.e., the scheduling of casual employees).

[29] The Employer submits that there is nothing in the nature of the Cafémaster position that supports its exclusion from the proposed bargaining unit. Mr. Kessler would not be an insoluble conflict of interest if he were in the unit. Alternatively, if the Cafémaster has similar authority and access to confidential information as the Operations Managers, the Cafémaster should be excluded along with the Operations Managers.

[30] Finally, the Employer submits that it is open to the Board to conclude that the Operations Managers have at least supervisory responsibilities, and that on this basis it is appropriate for them to be in a separate bargaining unit from employees they supervise, since they do not share a sufficient community of interest with them.

Statutory Provisions:

[31] The following provisions of the Act are relevant:

Interpretation of Part

6-1(1) In this Part:

(a) "bargaining unit" means:

(i) a unit that is determined by the board as a unit appropriate for collective bargaining; ...

...

(h) "employee" means:

(i) a person employed by an employer other than:

(A) a person whose primary responsibility is to exercise authority and perform functions that are of a managerial character; or

(B) a person whose primary duties include activities that are of a confidential nature in relation to any of the following and that have a direct impact on the bargaining unit the person would be included in as an employee but for this paragraph:

- (I) labour relations;
- (II) business strategic planning;
- (III) policy advice;
- (IV) budget implementation or planning;

...

Right to form and join a union and to be a member of a union

6-4(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.

...

Acquisition of bargaining rights

6-9(1) A union may, at any time, apply to the board to be certified as bargaining agent for a unit of employees appropriate for collective bargaining if a certification order has not been issued for all or a portion of that unit.

...

Determination of bargaining unit

6-11(1) If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of one bargaining unit to another bargaining unit, the board shall determine:

- (a) if the unit of employees is appropriate for collective bargaining; ...

...

(2) In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.

...

Analysis and Decision:

[32] The Board is being asked to consider the managerial and confidentiality exclusions with respect to the Operations Manager and Cafémaster positions. In addition, it must consider the appropriateness of the proposed bargaining unit, overall.

[33] With respect to the purposes of the managerial exclusion and the considerations in determining whether it applies, the Board refers to its decision in *Saskatchewan Polytechnic*,⁸ which provides a useful summary:

⁸ *Saskatchewan Polytechnic v Saskatchewan Government and General Employees' Union*, 2022 CanLII 45399 (SK LRB) [*Saskatchewan Polytechnic*].

[77] Pursuant to subparagraph 6-1(1)(h)(i)(A), a position falls outside the definition of employee if its primary responsibility is to exercise authority and perform functions that are of a managerial character. There is no definition in the Act of “managerial character”. Instead, the Legislature has left it to the Board to determine the meaning of that phrase. In doing so, the Board draws on its extensive case law considering this issue.

[78] As explained by the Board in *Saskatoon Public Library*, it is necessary to consider the purposes of the exclusion in assessing whether it applies to the position in question:

[65] The determination of whether the ACI Analyst and SEP Analyst positions meet the criteria to be excluded under the managerial exclusion requires a careful review of the stated purposes of the exclusion: to promote labour relations in the workplace by preserving clear identities for the parties to collective bargaining; to avoid muddying or blurring the lines between management and the bargaining unit; and to ensure that persons who can affect the economic lives of other employees are not placed in an insoluble conflict of interest by including them in a bargaining unit[31].

[79] The Board in *Prince Albert Parkland* described the principles and factors to be considered in making the determination:

[66] The Board considered and dealt with all of the cited cases in University of Saskatchewan, supra. That case set forth the following principles to be considered:

- 1. The determination of whether a position falls to be excluded is primarily a factual one (para 36)*
- 2. Exclusions on the basis of managerial responsibility should be made on as narrow a basis as possible (para 37)*
- 3. A person to be excluded must have a significant degree of decision-making authority in relation to matters which affect the terms, conditions or tenure of employment of other employees. A high degree of independence to make decisions of a purely professional nature is not sufficient. (para 38)*
- 4. The job functions which the Board considers central to the finding of managerial status includes the power to discipline and discharge, the ability to influence labour relations, and to a lesser extent, the power to hire, promote and demote. Other job functions, such as directing the workforce, training staff, assigning work, approving leaves, scheduling of work, and the like are more indicative of supervisory functions, which do not, in themselves, give rise to conflicts which would undermine the relationship between management and union by placing a person too closely identified with management in a bargaining unit. (para 38)*
- 5. In assessing managerial authority, the Board considers the actual authority assigned to a position and the use of that authority in the workplace. (para 38)*
- 6. The authority bestowed on a managerial employee must also be an effective authority; it is not sufficient if the person can make recommendations, but has no further input into the decision-making process. (para 38)⁹*

⁹ *Saskatchewan Polytechnic*, at paras 77-79.

[34] As indicated above, the job functions which the Board considers central to the finding of managerial status include the power to discipline and discharge, the ability to influence labour relations, and to a lesser extent, the power to hire, promote and demote. Other job functions, such as directing the workforce, training staff, assigning work, approving leaves and scheduling of work are more indicative of supervisory functions, which do not, in themselves, give rise to conflicts which would undermine the relationship between management and union by placing a person too closely identified with management in a bargaining unit.

[35] The fact that a position may have a title of “manager” is not determinative. For example, in *Saskatchewan Liquor & Gaming Authority*,¹⁰ the Board refused to apply the managerial exclusion to liquor store managers, whose primary functions included the following:

16 *The primary functions of [liquor store managers] include:*

- (a) budget preparation and control;*
- (b) supervision of staff;*
- (c) scheduling of staff;*
- (d) selection of staff;*
- (e) first step grievance handling;*
- (f) imposition of discipline, with direction from regional manager and human resources;*
- (g) in-store staff training; and*
- (h) assignment of work.¹¹*

[36] Precedents regarding arguably analogous positions may be reviewed by the Board, but each case must be decided on its own facts to determine whether a position exercises a sufficient degree of decision-making authority in relation to matters which affect the terms, conditions or tenure of employment of employees to place its occupant in an insoluble conflict of interest with employees in the bargaining unit.

[37] Like the managerial exclusion, the Board applies the confidentiality exclusion on as narrow a basis as possible.¹² Its purpose is to ensure that an employer has access to necessary

¹⁰ *SGEU v Saskatchewan Liquor & Gaming Authority*, 1997 CarswellSask 823 (SK LRB), [1997] Sask LRBR 836 [Saskatchewan Liquor & Gaming Authority].

¹¹ *Saskatchewan Liquor & Gaming Authority*, at para 11.

¹² *University of Saskatchewan v Administrative and Supervisory Personnel Association*, 2007 CanLII 68769 (SK LRB) [University of Saskatchewan], at para 42.

resources within a protected sphere of privacy.¹³ In *Saskatoon Public Library*,¹⁴ the Board explained the competing rights it must balance when considering the confidentiality exclusion:

[70] In considering the confidentiality exclusion, the Board has an obligation to balance a number of important competing rights: the rights of individual employees to not be unnecessarily denied access to collective bargaining; the right of the Union to not have its collective strength weakened by an unnecessary reduction of the bargaining unit; and the right of the Employer to make rational and informed decisions regarding labour relations, business strategic planning, policy and budget implementation and planning, in an atmosphere of candour and confidence.¹⁵

[38] In order for the exclusion to apply, the position's primary duties must include activities that: (i) are of a confidential nature; (ii) in relation to labour relations, business strategic planning, policy advice, or budget implementation or planning that has a direct impact on the bargaining unit that the position would otherwise be included in.¹⁶

[39] Like the managerial exclusion, the Board must consider whether the position's occupant, on account of their duties to the employer, will be placed in an insoluble conflict of interest with employees in the bargaining unit.¹⁷

[40] The Board will address the Operations Manager positions first, then it will address the Caf master position.

[41] The Board is not satisfied that the Operations Manager positions should be excluded from the proposed bargaining unit under the managerial or confidentiality exclusions.

[42] Based on the evidence, the Board accepts that the Operations Managers' responsibilities are mostly, though not exclusively, captured in Exhibit U-1. Exhibit U-1 does not reveal the Operations Managers having as a primary responsibility exercising authority and performing functions that are of a managerial character. The listed responsibilities range from assorted cleaning tasks, data entry and maintaining and repairing escape rooms to training and monitoring staff with respect to escape rooms and basic operations, addressing customer and staff concerns, and designing new escape rooms. Some of the responsibilities, such as training and monitoring staff, are in the nature of supervisory responsibilities, but not managerial responsibilities that

¹³ *University of Saskatchewan*, at para 45.

¹⁴ *Saskatoon Public Library Board (Saskatoon Public Library) v Canadian Union of Public Employees*, 2019 CanLII 128791 (SK LRB) [*Saskatoon Public Library*].

¹⁵ *Saskatoon Public Library*, at para 70.

¹⁶ Act, s 6-1(1)(h)(i)(B).

¹⁷ *Saskatoon Public Library*, at para 78.

would place Operations Managers in an insoluble conflict of interest with employees in the proposed bargaining unit.

[43] Exhibit U-1 makes no reference to Operations Managers having the authority to hire, promote, discipline or discharge employees. The evidence before the Board is that the Operations Managers did not understand themselves to possess such authority, beyond hiring with Mr. D'Silva's approval, and providing corrective advice, as opposed to corrective discipline.¹⁸ Further, while Mr. D'Silva suggested that the Operations Managers may have had more authority in this regard than they thought, it does not appear that he expected them to exercise authority beyond what they did. On the whole, the Board does not have clear, convincing and cogent evidence before it that establishes that the Operations Managers should be excluded from the proposed bargaining unit based on the managerial exclusion.

[44] Similarly, the evidence does not establish that the Operations Manager positions should be excluded from the proposed bargaining unit on the basis of the confidentiality exclusion. They do not have greater access to human resources information than at least some other employees, including the Employer's administrative assistant, a position that the Employer does not object to including within the proposed bargaining unit. Their knowledge of escape room designs and concepts is acquired through their employment, just as other employees' knowledge is, and is subject to the same confidentiality and non-competition provisions in their employment contracts. According to Mr. Cuthbert's evidence, which the Board accepts, the Operations Managers do not have access to any detailed financial information about the Escape Club, including information with respect to its financial viability. Their primary duties do not involve the activities listed in s. 6-1(1)(h)(i)(B). Any significant income and expense-related decisions regarding operation of the escape rooms, including those which could directly impact the bargaining unit, are made by Mr. D'Silva, because it is his capital that is invested in the Escape Club.

[45] The Board will now turn to the Cafémaster position.

[46] The Cafémaster position appears to have been created specifically for Mr. Kessler. Notably, Mr. Kessler has a unique employment contract, unlike those for other Escape Club employees. It appears that it may have been hastily drafted, shortly before Mr. D'Silva left for India. For example, under the heading compensation, there is single dangling sentence: "The

¹⁸ In cross-examination, Mr. Cuthbert said he had "heard of people getting reprimands". This was not explored further with him, in terms of who he understood had reprimanded employees.

Employee will be paid at a rate of \$20.00 per hour through”.¹⁹ Also notable is the fact that, according to Mr. D’Silva, Mr. Kessler’s responsibilities are nothing like those described in his contract, and that he views Mr. Kessler as a business consultant. Mr. D’Silva explained that he hired Mr. Kessler at his brother’s suggestion. Mr. D’Silva’s brother noted that Mr. D’Silva was living with a person who had extensive management experience in the restaurant industry (i.e., Mr. Kessler), and that in terms of getting the café up and running, Mr. Kessler could do this “in his sleep”.

[47] The Board notes Mr. D’Silva’s evidence that he asked Mr. Kessler to mediate the March 2023 meeting with Mr. Cuthbert and Mr. Graham, and that Mr. Kessler “took point” at this meeting. The Board also notes that in advance of this meeting, in February, Mr. Kessler had met with Mr. Cuthbert, Mr. Graham and Mr. Polishak and advised them that his aim was to manage “the chaos” of the business, and to reduce Mr. D’Silva’s involvement in having to run it.

[48] The Union characterizes Mr. Kessler’s position, that of Cafémaster, as having as its primary responsibility “reorganizing the entire business operation”.²⁰ While this may be overstated, the Board is satisfied that Mr. Kessler was hired to assist with organizing or reorganizing the Escape Club, particularly on the café side of the business, and that he has at least served as a sort of deputy to Mr. D’Silva with respect to the escape room side of the business.

[49] It is telling that Mr. D’Silva has a close personal relationship with Mr. Kessler (which led to his hiring), that he asked Mr. Kessler to mediate between him and the Operations Managers at the March 2023 meeting, and that Mr. Kessler “took point” at this meeting. All of this suggests that Mr. Kessler’s loyalty will lie with Mr. D’Silva and the Employer rather than employees in the proposed bargaining unit, in cases of conflict.

[50] Mr. Kessler’s primary role as a business consultant to Mr. D’Silva suggests that the Cafémaster position should be excluded from the proposed bargaining unit on the basis of the confidentiality exclusion. The Cafémaster can be expected to provide confidential advice and be privy to confidential information in relation to strategic planning and labour relations that could have a direct impact on the proposed bargaining unit (e.g., staffing, compensation and conditions of work). Accordingly, the Board concludes that the Cafémaster position should be excluded from

¹⁹ Exhibit E-8.

²⁰ Union’s brief, para 13.

the proposed bargaining unit. Including the position within the unit would place its occupant in an insoluble conflict of interest with the employees therein.

[51] Given the Board’s conclusion with respect to the confidentiality exclusion, it is not strictly necessary for it to make a determination regarding whether the managerial exclusion applies to the Cafémaster position. Nevertheless, it is appropriate for it to do so. The Board notes that Mr. Kessler appeared to be taking a lead role in determining the required staffing complement for the café, as of February 2023. Further, his hourly pay greatly exceeded that of any other staff, and Mr. D’Silva considered him to be a business consultant. The Board is satisfied that, as of the date the certification application was filed, Mr. Kessler as Cafémaster had the ability to make effective recommendations regarding hiring, discipline and firing to Mr. D’Silva, at least for the café side of the business.²¹ Indeed, Mr. Kessler was hired for his restaurant expertise, which Mr. D’Silva lacked. Accordingly, the Board is satisfied that the Cafémaster position is properly excluded from the proposed bargaining unit on the basis of the managerial exclusion, in addition to the confidentiality exclusion.

[52] The Board will now address the Employer’s argument that the Operations Manager positions should be in a separate bargaining unit from other employees whom they supervise. In its brief, the Employer acknowledges that there is no longer a definition of “supervisory employee” in the Act nor an associated statutory impediment to such employees being within the same bargaining unit as employees they supervise.²² However, the Employer submits that the Operations Managers’ supervisory responsibilities place them in in an “inherent conflict” with employees they supervise, and suggests that the Operations Managers do not share a sufficient community of interest with them.²³

[53] The Employer did not press this position in oral argument, and in its brief, it acknowledges the Board’s preference for larger broadly-based units.²⁴ In *O.K. Economy*, the Board explained that larger and fewer bargaining units (such as “all employee” units) tend to promote administrative efficiency and convenience in bargaining, enhance lateral mobility among employees, facilitate common terms and conditions of employment, eliminate jurisdictional

²¹ The concept of “effective recommendations” is discussed in many of the Board’s decisions. See, for example, *Prince Albert Firefighters Association, IAFF Local 510 v Prince Albert (City)*, 2011 CanLII 78523 (SK LRB), at para 56. See also *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) v Riide Holdings Inc.*, 2019 CanLII 86848 (SK LRB), at paras 33-34.

²² The relevant provisions, former provisions s. 6-1(1)(o) and ss. 6-11(3)-(6), were repealed in 2021 via ss. 4 and 5 of *The Saskatchewan Employment Amendment Act, 2021*, SS 2021, c 38.

²³ Employer’s brief, para 67.

²⁴ Employer’s brief, at para 58, citing *North Battleford Community Safety Officers Police Association v City of North Battleford*, 2017 CanLII 68783 (SK LRB), at para 56.

disputes among bargaining units and promote industrial stability by reducing incidences of work stoppages at places of work.²⁵ These considerations apply here.

[54] The Board is satisfied that the Operations Managers share a sufficient community of interest with those they supervise to be within the same bargaining unit. Their supervisory responsibilities do not vitiate their community of interest with those they supervise, and further, placing them in a separate bargaining unit, rather than an “all employee” unit, could frustrate achievement of the ends identified in *O.K. Economy*.

[55] In sum, the Board considers an “all employee” bargaining unit to be appropriate. As identified during the hearing of this matter, the numbered company originally named in the Union’s application²⁶ is not the Employer, and any certification order that may be issued in due course should reference the Employer rather than the numbered company.²⁷ Further, the positions of “Owner/Operator” and “Cafémaster” should be excluded from the bargaining unit.

[56] The Board’s agent is directed to unseal the ballots and to tabulate the vote that was directed in this matter pursuant to s. 27 of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021*, excluding any ballot received from Mr. Kessler. If Mr. Kessler submitted a ballot, it shall be destroyed, unopened. The agent’s report in Form 24 shall be advanced to a panel of the Board for its review and consideration in due course.

[57] An appropriate order will accompany these reasons.

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

DATED at Regina, Saskatchewan, this **16th** day of **January, 2024**.

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson

²⁵ *O.K. Economy Stores Ltd. v Saskatchewan Joint Board, R.W.D.S.U.*, 1990 CarswellSask 688, [1990] Sask Lab Rep 64 (SK LRB) [*O.K. Economy*], at para 12.

²⁶ 101305939 SK Ltd.

²⁷ The Union’s application was amended by consent at the outset of the hearing.

Appendix “A”
(Text contained in Exhibit U-1)

Current Responsibilities

- Maintain and repair escape rooms and other facilities
- Identify and rectify unexpected issues during regular operations (nearly 24/7)
 - Room breakages
 - Address customer concerns
 - Sudden changes to bookings
 - Absent or backed-up staff
 - Unexpected customer interactions (with gameplay, GMs or rooms)
- Identify upcoming problems at end-of-night (e.g. uncovered bookings) and create solutions for them in time for the coming day
- Train staff on running rooms and basic operations
- Monitor rooms for problems (flow, breakages, design flaws, labour sinks, etc)
 - Formulate and implement fixes for such issues
- Monitor rooms for possible gameplay and quality-of-life improvements
 - Incorporate gamemaster experience and ideas
 - Implement these improvements
- Run rooms when no scheduled GMs are available
- Design new rooms
 - Design, construct and implement puzzles, props, set-pieces, etc
 - Consider gameflow
- Identify systems problems, and recommend solutions
 - Keep tabs on the status and progress of these
- Monitor staff, delegate tasks, and address at-the-time staff concerns
- Manage till, float and cash
- Opening and/or closing (usually)
- Relay staff concerns to management
- Answer phones/voicemail (including on personal devices), make bookings
- Monitor the email inbox
- Monitor all staff WhatsApp chats
- Data entry (such as copying time-sheets)
- Process payments
- Assorted cleaning tasks
- Move and sort equipment etc
- Update website, booking software, etc
- Serve customers in the café (which ideally should not be a thing)

New Responsibilities that seem Natural

- Make small purchases to facilitate maintenance, cleaning, administrative and construction tasks
- Review end-of-night sales figures

Acceptable New Responsibilities

- Update POS catalogue
- Make small purchases to cover café stock shortfalls

Differences in Responsibilities

- Dunc handles the majority of small-electronics and coding tasks
- Dunc has the final say on matters of gameplay and room design
- Kyle handles the majority of power-tool related tasks, woodworking etc.
- Kyle should have minimal-to-no food-service responsibilities