

SHORTT, MOORE & ARSENAULT
BARRISTERS & SOLICITORS

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TO: Frank Pozzobon
U.F.C.W., Local 1518

FAX NO: 434-4145

DATE: December 12, 2000

FROM: Shona A. Moore, Q.C.

RE: UFCW, Local 1518/Save-On Foods
Sigurdur - Legal Opinion
File No. 2-097

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MESSAGE:

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December 12, 2000

U.F.C.W., Local 1518,
4021 Kingsway,
Burnaby, B.C.,
V5H 1Y9

Attention: Mr. Frank Pozzobon

Dear Sirs and Mesdames:

Re: **U.F.C.W., Local 1518 -and- Save-On Foods #946**
(Sharyn Sigurdur - Legal Opinion)

You have asked us to prepare a legal opinion concerning the merits of a grievance or a potential grievance filed by your member Sharon Sigurdur arising out of the facts as set out below. In preparing this legal opinion we have reviewed the provisions of the collective agreement, the *Labour Code* of British Columbia and certain arbitral and Labour Board jurisprudence.

The facts upon which this legal opinion is based are as follows:

1. Sharyn Sigurdur is an employee of Save-On Foods and is a member of the U.F.C.W., Local 1518. Ms. Sigurdur is a member of the Union who is active in the "Members for Democracy" ("MFD") group within Local 1518.
2. Individual members of the MFD have commenced a lawsuit against Local 1518 and certain members of the Executive Board. One of the members of the Executive Board, Ms. Donna Tremblay, is an individual defendant in this litigation and is also an employee of Save-On Foods. Ms. Tremblay works in the same store as Ms. Sigurdur.

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3. Ms. Sigurdur has posted information concerning the MFD and the lawsuit in the workplace. Ms. Sigurdur has approached employees in order to gain support for the MFD and to raise financial support to fund the MFD and its lawsuit.
4. During her breaks, Ms. Sigurdur has sought to engage co-workers in conversation regarding the activities of the MFD and the MFD lawsuit against Local 1518. In some of these discussions with co-workers, Ms. Sigurdur has identified Ms. Tremblay as a defendant in the MFD lawsuit.
5. Ms. Tremblay complained to the Employer that she was being harassed in the workplace by her co-worker, Ms. Sigurdur.
6. In September, 2000, the Assistant Manager met with Ms. Sigurdur and told her that she was to stop speaking to fellow workers about "internal union turmoil" and about the lawsuit filed by the MFD against Local 1518 and certain members of its Executive Board. The Employer further directed Ms. Sigurdur that she was no longer permitted to post any materials regarding the MFD in the workplace and she was prohibited from talking about these issues even on her own time during breaks. Ms. Sigurdur was advised that if she contravened any of these directions she would be subject to discipline.
7. Ms. Sigurdur summarized her complaints in a letter to Mr. Sundin dated October 5, 2000 in this way:

"On September 16th, I was in Kerry Brewster's store to serve him a writ. After being served Mr. Brewster became very angry and shortly thereafter I was asked to leave the store by the Senior Clerk in charge. Thursday, September 28, 2000, I was called into the store meeting room by my assistant store manager and subsequently informed that if I continued to tell my co-workers that the MFD was "suing" Donna Tremblay and UFCW Local 1518, or post materials stating such, Donna Tremblay would file harassment charges against me. I was also informed that they (the employer) were also considering discipline, and that it was in my best interest to no longer talk of any legal action brought forth by the MFD, distribute MFD literature, and I was asked to offer sister Tremblay an apology. On October 5th I was again warned by the assistant manager in #946 Save-on-Foods that I was to stop all talk concerning MFD and/or union business. I was told that I could not talk on my breaks as well. I was told that I would be disciplined if I was found to be informing my fellow brothers and sisters."

8. Ms. Sigurdur advised the Union of this threatened discipline.

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9. On October 16, 2000, a grievance was filed by the Union on behalf of Ms. Sigurdur.
10. On October 17, 2000, Ms. Sigurdur had a meeting with Mr. John MacKenzie. This meeting was also attended by a shop steward.
11. Mr. MacKenzie acknowledged speaking to Ms. Sigurdur on an earlier date and said that his instructions from head office have been revised. Mr. MacKenzie advised Ms. Sigurdur that she could discuss matters concerning the MFD on her own time in the store but could not "name names". Ms. Sigurdur was also advised by Mr. MacKenzie that she was to stop trying to talk to any co-worker if they indicated they were not interested in pursuing a conversation with her.
12. By letter dated October 27, 2000, Ms. Sigurdur wrote to Ms. Dawn Green of the Union to advise in part as follows:

"I am also going to update you, as the company [assistant manager John MacKenzie] has since notified me that they have changed their position. I am however still sure that the conditions set out by the company's change of position is still a violation of my rights. I am also now asking you to file on my behalf under the following Sections of the *Labour Code*..."

QUESTIONS:

1. Is the Employer's conduct contrary to the collective agreement?
2. Is the Employer guilty of unfair labour practice conduct when it directs Ms. Sigurdur to restrict her discussion of MFD matters at the workplace to her personal time and directs her to refrain from speaking about these matters to anyone who indicates they are not interested in pursuing a conversation?

ANSWERS:

1. The Employer did not contravene the collective agreement when it gave the revised directions complained of in the October 16, 2000 grievance.
2. The Employer is not guilty of an unfair labour practice in the circumstances of this case.

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REASONS:**1. Is the Employer's conduct contrary to the collective agreement?**

Two issues potentially arise under the collective agreement: whether the Employer is entitled to give the directions set out in paragraph 11 above; and, whether the Employer would be entitled to impose some discipline on Ms. Sigurdur should she fail to comply with the Employer's directions.

An employee has a broad freedom to communicate with co-workers during non-working hours concerning matters associated with the conduct of union business and matters of general interest to the employee and his or her co-workers. An employer's rule seeking to limit off-duty conduct at the workplace must satisfy three tests:

1. Was the employee's conduct sufficiently injurious to the interests of the employer?
2. Did the employee act in a manner incompatible with the rule and faithful discharge of his or her duties?
3. Did the employee do anything prejudicial or likely to be prejudicial to the interests or reputation of the employer?

[*Re Canadian General Electric Co. Ltd. -and- U.E.W., Local 524* (1959), 9 L.A.C. 83].

Arbitrators have held that the distribution of Union literature on the employer's premises during non-working hours constitutes "union activity". Where the collective agreement specifies that a union not engage in union activity on company time, an employer may not prohibit the distribution of union literature on the employer's premises during non-working hours: *Re Textpack Ltd. -and- Canadian Textile and Chemical Union* (1973), 3 L.A.C.(2d) 38.

An Employer may prohibit such activity if, and only if, it is reasonably necessary for the maintenance of order or the protection of productivity: *Re Lake Ontario Steel Co. Ltd. -and- United Steelworkers, Local 6571* (1978), 20 L.A.C.(2d) 432.

In *Lake Ontario Steel Co. Ltd. -and- United Steelworkers, Local 6571* (1978), 20 L.A.C.(2d) 432, a worker arranged for copies of a letter addressed to his fellow workers to be distributed at the workplace. The subject matter of the letters concerned an internal union dispute. The Employer issued a written warning prohibiting the distribution of these letters claiming that the distribution would interfere with the workplace. The grievor disobeyed the warning and indirectly arranged for the union steward to distribute the letters. The Board held that such distribution was permissible union activity and held

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that the employer would only be justified in prohibiting such activity "if it was reasonably necessary for the maintenance of order or the protection of productivity". The grievance was allowed by the Arbitrator because there was no evidence that the rule was reasonably necessary in the circumstances at the case.

The Employer is entitled to ensure that workplace communications about internal union matters or private lawsuits does not interfere with all employees' ability to work productively in the workplace without harassment.

The collective agreement provides in Section 19.09:

"Intimidation: No employee shall be discharged or discriminated against for any lawful Union activity, or for serving on a Union committee outside of business hours, or for reporting to the Union the violation of any provision of this Agreement.

....

This is not to be construed to restrict Management personnel from reprimanding an employee as required by his or her position to maintain the proper operation of the store."

Section 19.13 addresses "harassment and discrimination";

"Harassment and Discrimination: The Employer and the Union recognize the rights of employees to work in an environment free from harassment, including sexual harassment, and discrimination. Where an employee alleges that harassment or discrimination has occurred on the job the employee shall have the right to grieve under the Collective Agreement. Where an allegation of harassment or discrimination has been received by the Employer or the Union, it will be investigated on a priority basis in accordance with the joint policy.

No Discrimination: Both the Employer and the Union endorse the principles outlined under the B.C. Human Rights Act wherein it is illegal for either the Employer and/or the Union to discriminate in respect to employment or membership in the Union because of race, creed, colour, sex, nationality, ancestry, or place of origin."

The collective agreement, therefore, protects an employee's right to engage in lawful union activity on their own time.

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The collective agreement also recognizes that the employee's right to engage in lawful union activities does not restrict the Employer's right from reprimanding an employee in order to maintain the proper operation of the store. In other words, an employee's right to engage in union activity in the workplace on his or her own time, is limited by the employer's right to maintain the proper operation of the workplace.

In the instant case, the Employer has withdrawn the broad prohibitions originally communicated to Ms. Sigurdur in September. The Employer now acknowledges that Ms. Sigurdur may discuss MFD business on her own time in the store subject to two limitations only - (1) that she not "name names" [presumably in reference to her co-worker Ms. Tremblay]; and (2) she may not insist on pursuing a conversation with a co-worker who does not wish to engage in a conversation with her concerning MFD matters. The Employer has placed no continuing restriction on Ms. Sigurdur's ability to distribute written material in the workplace concerning the MFD nor to have conversations with her co-workers concerning MFD business or other internal union related matters.

In our opinion, the Employer has imposed limitations on Ms. Sigurdur which are permitted by the collective agreement and in particular by the language of 19.09. By placing the restrictions on Ms. Sigurdur against "naming names", the Employer is properly responding to its obligations under Section 19.13 to ensure that all employees, including Ms. Tremblay, have the right to work in an environment free from harassment. Faced with a harassment complaint or the threat of a harassment complaint from Ms. Tremblay, the Employer is entitled to give directions to workers with a view to minimizing friction between co-workers.

In other words, the Employer's imposition of minimal restrictions on the activities of Ms. Sigurdur, are, in our opinion, consistent with the Employer's legitimate interest in maintaining a productive workplace.

Accordingly, we believe that the Employer's directions to Ms. Sigurdur on October 17, 2000 do not contravene the collective agreement.

2. **Is the Employer guilty of unfair labour practice conduct when it directs Ms. Sigurdur to restrict her discussion of MFD matters at the workplace to her personal time and directs her to refrain from speaking about these matters to anyone who indicates they are not interested in pursuing a conversation?**

The *Labour Relations Code* contains broad prohibition against unfair labour practice conduct. Section 5 of the Code prohibits an employer from threatening a person or otherwise discriminating against a person because a person has "exercised a right conferred by or under this Code". Section 6(3) of the Code prohibits an employer from disciplining an employee or discriminating against a person because the person "participates in the promotion, formation or administration of a trade union".

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A successful unfair labour practice complaint under Section 5 or 6(3) will only succeed if the Board is satisfied that the employer was motivated by anti-union animus. On the facts of this case, it is our opinion that there is no evidence which would support a finding that the Employer's promulgation of the rule restricting Ms. Sigurdur's conduct at the workplace is motivated by an anti-union animus.

Section 4(1) of the *Labour Code* protects every person's freedom to be a member of a trade union and to participate in its lawful activities. Certainly, the distribution of material relevant to the internal affairs of the Union are likely to fall within the protection of Section 4(1). Accordingly, some aspects of Ms. Sigurdur's distribution of material concerning the MFD may be protected by Section 5 which prohibits an employer from discriminating against an employee for exercising "a right conferred by or under the Code".

In our opinion, the Labour Relations Board will inquire into the legitimacy of the Employer's motivation for making the rule communicated to Ms. Sigurdur on or about October 17, 2000. It is our opinion that the Board will conclude that the Employer has balanced Ms. Sigurdur's rights to engage in lawful union activities with its legitimate business concerns to avoid conflict between workers and potential harassment of one co-worker by another.

The facts of this case are very similar to those in *Consolidated Fastfrate Ltd.* [1980] OLRB Rep. April 418. In *Consolidated Fastfrate Ltd.*, the complainant was a truck driver employed by the company, and was also a member of a dissatisfied group known as "Teamsters for Teamsters", an organization loosely affiliated to Teamsters for a Democratic Union ("TDU").

For a few years, the Teamsters for Teamsters were distributing leaflets on the company property which were highly critical of the union and certain elected officers.

On one occasion, TDU stickers were applied to walls of the washroom, lunchroom, hallways and other areas. This prompted the company to issue a notice prohibiting the circulation of any type of publication, literature, signs or stickers on the employer's property. The complainant disregarded this warning and was subsequently disciplined.

The Board determined that the propriety of the employer's conduct will turn on whether the conduct was undertaken, *bona fide*, in furtherance of legitimate employer interests; or, alternatively, was designed in whole or in part to undermine the employee's statutory rights.

The Board stated at paragraph 15:

"In assessing an allegedly illegal restriction on trade union activity, the Board begins with the premise that 'working time

is for work' and that time outside of working hours is an employee's time to use as he wishes without unreasonable restraint even though he may be on company property."

The Board continued at the same paragraph:

"Does the activity in non-working areas, nonetheless, 'spill over' into the workplace, thereby justifying a broader restriction? Is promulgation of the rule closely associated with the ebb and flow of a trade union organizational activity? Is the impugned employer action part of a pattern of conduct hostile to the trade union? Has solicitation for other purposes, or the distribution of other material, been permitted on working time, and has the non-solicitation rule been applied in a discriminatory fashion?..."

In *Consolidated Fastrate Ltd.*, the Board held that the employer was not engaging in a pattern of unfair labour practices or anti-union conduct. The Board concluded that there was nothing inherently unreasonable or improper in promulgating a rule forbidding the distribution of material without prior permission.

In our opinion, the Board will find the analysis in *Consolidated Fastrate Ltd.* to be persuasive.

In the instant case the Employer has not sought to prohibit the distribution of MFD material on Ms. Sigurdur's own time. The Employer's rule against continued discussion with a co-worker where the co-worker does not wish to pursue the conversation, is wholly consistent with the Employer's interest in maintaining a congenial and co-operative workplace. Similarly, in our opinion, the Employer's restriction to Ms. Sigurdur referring personally to a co-worker as a defendant in the MFD litigation is proper in the circumstances of this case where the co-worker, Ms. Tremblay has filed or threatened to file a harassment complaint.

In summary, it is our opinion that, in this case, the Employer is exercising its lawful responsibility to minimize friction between co-workers in order to maintain a productive and co-operative workforce. The Employer's modified rules, in our opinion, strikes a proper balance between the rights of Ms. Sigurdur to communicate with her co-workers about matters of potentially common interest, and the right of co-workers not to be harassed about non-work related issues at the workplace.

We trust you find this opinion of assistance to you.

We look forward to having an opportunity to review this matter with you in greater detail.

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Yours truly,

SHORTT, MOORE & ARSENAULT

A handwritten signature in dark ink, appearing to read 'Shiona A. Moore', followed by a horizontal line.

SHIONA A. MOORE, Q.C.

SAM:bjm