

**The Labour Relations Board  
Saskatchewan**

**SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 336, Applicant v.  
CHINOOK SCHOOL DIVISION No. 211, Respondent**

LRB File Nos. 025-08, 026-08 & 027-08; April 8, 2008

Chairperson, Kenneth Love, Q.C.; Members: John McCormick and Ken Ahl

For the Applicant: Keir J.M. Vallance

For the Respondent: James R. McLellan

**Remedy – Interim order – Employee organizer dismissed during organizing campaign - Affidavit evidence discloses potential for harm to union, employer and students of school if organizer reinstated – Board places organizer on paid leave pending final determination of unfair labour practice application.**

**Remedy – Interim order – Employee organizer dismissed during organizing campaign - Board orders posting of Reasons for Decision and Order – Board orders employer to allow union representatives, including employee organizer, free and unobstructed access to employees during work time for purposes of communicating with employees about unions, union representation and processes of certification.**

***The Trade Union Act*, ss. 5.3 and 11(1)(e).**

**REASONS FOR DECISION**

**Background:**

[1] The Applicant, Service Employees' International Union, Local 336 (the "Union"), filed an application on March 10, 2008 for an order determining whether the Respondent, Chinook School Division No. 211 (the "Employer") engaged in an unfair labour practice as defined by ss. 11(1)(a), (e) and (g) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") by terminating Johanne Lee ("Ms. Lee").

[2] The Union also filed an application on March 10, 2008 for interim relief, including, *inter alia*, the reinstatement of Ms. Lee and payment of any monetary loss she may have suffered.

[3] The Employer had not filed a reply as of the date of the hearing of the interim application and filed affidavits in response to the interim application.

[4] The hearing of the interim application took place on March 14, 2008. These are the Reasons for Decision with respect to the interim application.

[5] The Union established that it has an arguable case. The Board is also of the view that the Union should not be impaired in its organizational efforts, nor should Ms. Lee be prevented from taking part in that organizational effort. Therefore, the Union's interim application succeeds, in part. Ms. Lee shall be placed on paid leave, following the expiration of the three (3) month payment in lieu which she has already received, until the final determination of this matter.

**Facts:**

[6] The Union filed affidavits sworn by Ms. Lee, Gayle Jamieson and Barbara Wotherspoon on March 10, 2008.

[7] Ms. Lee has been employed as an educational assistant by the Employer and its predecessor since 1998. At the time of her termination she was employed at Oman School in Swift Current, Saskatchewan. She has generally worked 30 hours per week.

[8] The Union is not the certified bargaining agent for the employees of the Employer who are employed at Oman School. It has been involved in an organization drive of the Employer since early 2006. A representation vote was held with respect to two schools in the school division on January 7, 2008 but the Union was unsuccessful in this vote.

[9] Ms. Lee says in her affidavit that, prior to the representation votes on January 7, 2008, she contacted the Union and obtained membership application cards. She says that she then placed those cards and a "question and answer" letter from the

Union “in the mail slots in the main office of Oman School for each employee who was working as an educational assistant, library technician, noon hour supervisor or secretary.” The affidavit of Ms. Wotherspoon, the business agent for the Union, identifies Ms. Lee as “our main organizer within the workplace,” being Oman School which Ms. Wotherspoon says the Union had been trying to organize prior to January 7, 2008.

**[10]** The Employer filed affidavits by Peggy Drinkle, Carrie Frase, Arlene Adair, Kyle McIntyre and Rod Siemens.

**[11]** The Employer, in the affidavit of Ms. Drinkle, principal of Oman School, says that as early as March 2007 Ms. Lee was insubordinate to her supervisor, Carrie Frase. Ms. Drinkle attests that Ms. Lee was also insubordinate in June of 2007. Also in June 2007, Ms. Drinkle attests that Ms. Lee made comments concerning a particular teacher’s lack of skills in the classroom, which Ms. Drinkle says “overstepped her role as an educational assistant.”

**[12]** In June 2007, Ms. Lee was assigned to assist a special needs student in Grade 5. In this assignment she was to be placed with “a knowledgeable and skilled Grade 5 teacher as her supervising teacher.” According to Ms. Drinkle, Ms. Lee was unhappy with this decision and voiced her disapproval to both Ms. Frase and Arlene Adair. Notwithstanding her displeasure, the assignment was not changed.

**[13]** Ms. Drinkle attests that, on January 10, 2008, Ms. Lee was again insubordinate to her supervisor, Ms. Adair, in the presence of her assigned special needs student. A letter was written to Ms. Lee outlining the inappropriateness of her behaviour. She was encouraged in the letter to review the role of the educational assistant within the Chinook School Division. The role of the educational assistant had been reviewed at staff meetings in both September of 2007 and again in January of 2008. Ms. Lee declined to attend either of these meetings.

**[14]** On February 8, 2008 Ms. Frase assembled the educational assistants to ensure there was no miscommunication regarding time made up for early dismissal days. Ms. Frase reported to Ms. Drinkle that, at that meeting, Ms. Lee had again made insubordinate comments directed to Ms. Frase. Ms. Drinkle, Ms. Frase and Ms. Lee later

met to determine the reason for the comments. At that meeting Ms. Lee was advised that the next time she met with Ms. Drinkle, Mr. McIntyre from human resources would also be present. That meeting occurred on February 13, 2008, at which time Ms. Lee was given a letter advising she was being suspended with pay pending investigation.

**[15]** On February 15, 2008 Mr. McIntyre wrote to Ms. Lee advising of the matters discussed at the February 13, 2008 meeting and advising that an investigation had been conducted into the allegations brought forward to the human resources department. The letter directed Ms. Lee to attend a meeting on Monday, February 25, 2008 “to discuss the results of the investigation and to respond to the concerns.”

**[16]** The meeting was held on January 25, 2008. At that meeting, the results of the investigation were discussed along with other matters. By letter dated January 26, 2008 Ms. Lee was advised that she was being terminated. The letter provides that:

*[A]lthough we have reason to believe there may be sufficient cause to terminate without notice, on a without prejudice basis we are prepared to pay you a severance of three months in lieu of notice....*

**[17]** Both the affidavits of Mr. Siemens and Mr. McIntyre filed by the Employer give the following as the reasons for the termination of Ms. Lee:

- (a) *Ms. Lee was insubordinate to her supervisor, and*
- (b) *Ms. Lee refused to follow acceptable processes when, and if, she had concerns about or in respect of her fellow employees.*

**[18]** Both Mr. Seimens and Mr. McIntyre also depose that they were “completely unaware of any union activity of Ms. Lee until she herself stated her involvement” during the investigation of her insubordinate behaviour.

**[19]** In all of the affidavits of Ms. Drinkle, Ms. Frase and Ms. Adair, warnings are given about the undesirability of returning Ms. Lee to the workplace. In her affidavit, Ms. Drinkle says:

*That Johanne Lee cannot be reintegrated into the staff at Oman School because of her hostility to supervision and exceptional*

*criticism of other staff. If Ms. Lee returns to Oman School, the emotional well-being of staff, both teachers and Educational Assistants will be impacted.*

[20] In her affidavit, Ms. Frase says:

*I know, unequivocally, that I cannot function as her supervisor. Her hostility and aggression towards authority make it impossible to lead or direct her in any way. I would also be concerned for the safety of our students because of her temper. One educational assistant said she was concerned about her personal safety and the defecation [sic] of her personal property should Mrs. Lee find out that she spoke To Mr. McIntyre during an investigative process. If she returns to work at Ecole Oman School I will require a leave of absence due to stress in the work place.*

[21] In her affidavit, Ms. Adair says:

*Ms. Lee should not be reintegrated into the staff at Oman School because of the impact it would have on other staff members. I believe that if Ms. Lee comes back to Oman School, the educational outcomes for our students will be negatively impacted, due to feelings of mistrust and anxiety of other staff members. In my opinion, we could not provide an effective and healthy learning environment with Ms. Lee back in our school. Also, should Ms. Lee be reintegrated at Oman School, I could not continue to work in my position as her supervising Student Services Teacher.*

[22] In her affidavit, Ms. Jamieson, who is the chair of the organizing committee for the Union, deposes that she was contacted by Ms. Lee in January of 2008, prior to the representation vote on January 7, 2008. She says that she was assisting Ms. Lee in contacting employees of the school and attempting to have them sign union cards. She says that, since the termination of Ms. Lee, “employees who had previously been willing to speak to me regarding organizing and union membership have become unwilling to do so.” She also says:

*I believe the termination of Ms. Lee’s employment has caused great harm to and will continue to interfere with the union’s standing in the workplace and the union’s ongoing organization efforts.*

[23] In Ms. Wotherspoon's affidavit, she says that:

*[I] believe this dismissal has and will continue to send a chill throughout the workplace intimidating workers from supporting the union during a key time, with an organizing drive underway.*

She also alleges that:

*[I] believe that the termination of Ms. Lee's employment has caused great harm to and will continue to interfere with the union's standing in the workplace, but if she were reinstated to her employment and returned to the workplace, I believe a good deal of this harm may be undone.*

**Relevant statutory provisions:**

[24] Relevant provisions of the Act are as follows:

5. *The board may make orders:*

*(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*

*(e) requiring any person to do any of the following:*

*(i) to refrain from violations of this Act or from engaging in any unfair labour practice;*

*(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*

*(f) requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice, or otherwise in violation of this Act;*

*(g) fixing and determining the monetary loss suffered by an employee, an employer or a trade union as a result of a violation of this Act, the regulations or a decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or trade union the amount*

*of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;*

...

5.3 *With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.*

...

11(1) *It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*

(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;*

...

(e) *to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such*

*unit as their representative for the purpose of bargaining collectively;*

...

*(g) to interfere with the selection of a trade union as a representative of employees for the purpose of bargaining collectively;*

**Decision:**

[25] The first part of the test for the granting of this interim application is not whether the Employer had just cause for dismissal, but whether there is an arguable case that Ms. Lee was terminated in circumstances where she was exercising her rights under the *Act*.

[26] The union activity and exercise of rights under the *Act* as specified in ss. 11(1)(a), (e) and (g) in this case is the organizing drive of the Union commenced in 2006. Upon the hearing of the unfair labour practice application, the reverse onus in s. 11(1)(e) will be applicable, whereby the onus will be on the Employer to prove that Ms. Lee's termination was for good and sufficient reason and not because of the exercise of her rights under the *Act*.

[27] It is the Union's position that the timing of this termination creates a chill in the workplace and interferes with its rights to organize employees of the school district.

[28] The Board agrees that the Union has met the test of whether there is an arguable case that Ms. Lee was terminated because she was exercising her rights under the *Act*.

[29] The second part of the test to be applied on interim applications is whether the balance of labour relations factors favours the Applicant Union.

[30] There is much uncertainty for this bargaining unit because of the embryonic nature of the organizational drive and the fact that the recent representation vote for two schools was lost by the Union. No one knows if the Union will continue with its organizational efforts in the face of its failure on January 7, 2008. No information was

provided to the Board concerning the nature of the organizational drive, nor the Union's intentions concerning the balance of the schools in the district.

**[31]** The Chinook School Division comprises a large geographic area surrounding the city of Swift Current. We were not advised if the organizational effort extended outside the city of Swift Current. Presumably, the Union's organizational efforts will extend throughout the Division.

**[32]** From the affidavit evidence, there appears to be potential for harm to the Union, the Employer and the students of Oman School if Ms. Lee is reinstated to her position there. Therefore, in an effort to calm the working environment, the Board finds that it is desirable for Ms. Lee to be retained on paid leave, pending our further determination in respect of this matter, rather than being reinstated to her position there. Furthermore, Ms. Lee and the Union should not be prevented from engaging in their organizing efforts and the exercise of their s. 3 rights.

**[33]** On an application for interim relief we are not charged with determining whether the allegations have been proven, but rather with whether the status quo should be maintained pending the final determination of the main application: an interim order is intended to be preservative rather than remedial. As the Board observed in *Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suites Hotel (1998) Ltd.*, [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00, 125-00, 139-00, 144-00 & 145-00, an interim order must be consonant with the preservation and fulfillment of the objectives of the *Act* as a whole and of the specific provisions alleged to have been violated. The Board stated at 443:

*Any interim order must first and foremost be directed to ensuring the fulfillment of the objectives of the Act pending the final hearing and determination of the issues in dispute. This includes not only the broad objectives of the Act but also the objectives of those specific provisions alleged to have been violated.*

**[34]** Therefore, in applying the first part of the test, that is, whether the main unfair labour practice application reflects an arguable case under s. 11(1) (a) (e) and/or (g) of the *Act*, the Board finds at a minimum that there is an arguable case under s. 11(1)

(e). The terminated employee is a longtime employee with no prior disciplinary record that we have been advised of. Ms. Lee was exercising her rights under the *Act* and was engaged in activity to support the Union during the organizing drive, notwithstanding the Employer's alleged lack of knowledge of it. It was certainly within the knowledge of the employees of Oman School whom Ms. Lee had left information for in their mail slots. It is therefore an arguable case, and not a frivolous application, that the Employer committed an unfair practice as defined by s. 11(1)(e) of the *Act*.

**[35]** The alleged labour relations harm to the Union is that the remaining employees could fear that their support of the Union with respect to the certification application would result in the same or similar adverse impact on their employment. Employees should always be free to support or not support a union as their bargaining agent, without the implicit threat from the employer that support will jeopardize their employment. The Union's support in any potential application for certification and in general is being negatively affected. There is a possibility that the remaining members will lose confidence that the Union can protect them and their jobs.

**[36]** The labour relations harm to the Employer is that there will be significant impact on staff employed at Oman School if she is reinstated. This may mean that the Employer has a less than satisfactory employee on staff until this application can be finally determined. This potential harm, along with the alleged harm to the students at Oman school must be weighed against the potential harm to the Union in its organizational drive. That balance must, wherever possible, favour the rights of employees under s. 3 of the *Act* "to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing...". In this case the Board finds that the balance of labour relations harm tips in favour of the Union and the employee.

**[37]** Therefore, the Board hereby orders:

- (1) That within twenty-four (24) hours of its receipt of the Board's Order and these Reasons for Decision, the Employer shall post a copy of the Board's Order and these Reasons for Decision in the workplace in a location where the documents are visible to and may be read by

as many employees as possible, such posting to remain until the final determination of the Union's applications;

- (2) That until the final determination of this matter, Ms. Lee be placed on paid leave with her employer, such leave to commence upon the expiry of the payment in lieu of notice which Ms. Lee has already received;
- (3) That the Employer shall allow representatives of the Union, accompanied by Ms. Lee, if the Union wishes her to be in attendance, and provided that Ms. Lee conducts herself in a reasonable fashion, free and unobstructed access to workers at Oman School, on company time for the purposes of communication with workers concerning unions, union representation, and the processes of certification, such access and meetings to be without loss of pay and without surveillance by the Employer or anyone on its behalf;
- (4) That the Board's Order shall remain in effect until such time as the Board disposes of the applications filed under ss. 5(d), 5(e), 5(f) and 5(g) of *The Trade Union Act*; and, depending upon whether the final application for reinstatement of Ms. Lee is determined in favour of the Union or the Employer, there may be no further obligation to employ Ms. Lee from that time; and

- (5) That the Board shall remain seized of this matter for the purposes of determining any issues associated with the implementation of its Order.

**[38]** Except as provided for above, it is not necessary at this interim application to make an order for monetary loss, as there was severance paid.

**DATED** at Regina, Saskatchewan, this **8th** day of **April, 2008**.

**LABOUR RELATIONS BOARD**

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Kenneth G. Love, Q.C.,  
Chairperson