The Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4195, Applicant v. SASKATCHEWAN RIVERS SCHOOL DIVISION NO. 119, Respondent

LRB File Nos. 236-02, 237-02 & 238-02; May 30, 2003
Chairperson, Gwen Gray, Q.C.; Members: Bruce McDonald and Clare Gitzel

For the Applicant: Neil McLeod, Q.C.
For the Respondent: Ronald Mills, Q.C.

Unfair labour practice – Anti-union animus – In most cases, anti-union animus must be inferred from employer's conduct – In this case, Board heard uncontradicted evidence that reasons for termination directly related to employee's participation in grievance process – Board rejects employer's argument that substitute employee with no claim to work beyond what employer prepared to offer cannot complain about termination - Board finds violations of ss. 11(1)(a) and 11(1)(e) of *The Trade Union Act*.

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

REASONS FOR DECISION

Background:

[1] Canadian Union of Public Employees, Local 4195 (the "Union") filed an unfair labour practice application, along with an application seeking reinstatement and monetary loss for Garry Klughart. The Union claimed that Mr. Klughart was terminated from his employment with the Saskatchewan Rivers School Division No. 119 (the "Employer" or "school division") for union activity. The Employer denied the allegations in its reply. A hearing was conducted in Saskatoon on April 28, 2003.

Facts:

[2] Mr. Klughart was hired by the Employer on December 7, 2000 to work as a substitute school caretaker. Substitute caretakers are employed on an "as needed" basis to fill in for regular caretakers who are off on sick leave or other leaves of absence. Under the terms of the collective agreement, substitute caretakers do not accumulate seniority.

[3] Mr. Klughart asked an acquaintance, Mike Hurd, maintenance superintendent at the school division, if there was work available for caretakers in the school division. Shortly after this contact, Bob McBeth, caretaking services manager for the school division, contacted Mr. Klughart to offer him work as a substitute caretaker. Substitute work is the main method of obtaining regular, full-time work as a caretaker in the school division.

[4] In September, 2001, Mr. Klughart was asked to fill in for a regular caretaker who was assigned to other work due to the illness of a third caretaker. Mr. Klughart worked split shifts at four school locations. His assignment amounted to full-time work lasting from September, 2001 until April, 2002. Mr. Klughart was subject to supervision and worked regularly with other caretakers. No adverse comments were made with respect to his work during this period.

[5] On April 22, 2002, Mr. Klughart was assigned to work on a fulltime basis at the high school, filing in for an employee who was away on disability leave. Mr. Klughart worked the evening shift from 4 p.m. to midnight, Monday to Friday, with some weekend work. Mr. Klughart was expected to work some weekends as he had a steam ticket and was licensed to look after the boilers and air conditioning systems.

[6] In September, 2002, the Employer proposed to introduce a shift schedule for caretakers at the high school that required all caretakers to work weekend shifts. Prior to this time, only junior employees were required to work weekends and the change of shifts was not welcomed by the senior caretaking staff. The caretaking managers conducted two meetings with the staff, one of which Mr. Klughart was not permitted to attend because of his status as a substitute caretaker.

[7] At some point in the process, the Union filed a grievance with the Employer with respect to the proposed change of schedule for caretakers at the high school. Mr. Klughart signed the grievance, along with other caretakers, and he attended the grievance meetings, along with the other caretakers.

[8] The first grievance meeting took place on October 3, 2002. During this meeting, Mr. Hurd, maintenance superintendent, explained to the Union and its

members that he proposed the change in shift schedules to make the work more attractive to new employees and to make the schedule fairer to new employees. During the conversation, Mr. Hurd looked to Mr. Klughart and remarked that Mr. Klughart had a young family and he would benefit from having more weekends off with them. In response, Mr. Klughart told Mr. Hurd that, although it would be a better deal for him personally, it was not fair to the senior employees. Mr. Klughart concluded that Mr. Hurd did not like his answer and that he had expected that Mr. Klughart would side with him on the issue. Mr. Klughart reported that his relationship with Mr. Hurd cooled considerably after this meeting.

[9] Mr. Klughart also attended the second grievance meeting on November 6, 2002 and spoke to the substance of the grievance, along with other union members. During the grievance meeting, William Cooke, director of education, asked if Mr. Klughart was a permanent employee. Dr. Cooke, along with John Kuzbik, superintendent of education, and Mr. McBeth, caretaking services manager, attended the meeting on behalf of the Employer.

[10] Karen Carle, local union president, testified that at the second grievance meeting, the Employer's representatives, Mr. McBeth and Mr. Kuzbik, called her out of the meeting to question why Mr. Klughart was present with the other caretakers. Mr. McBeth indicated to her that Mr. Klughart had no right to be present as he was not covered by the collective agreement. Ms. Carle informed Mr. McBeth that, in her opinion, Mr. Klughart did have rights and he was affected by the grievance and had a right to be present.

[11] On November 7, 2002, Mr. McBeth wrote Mr. Klughart requesting that he attend a meeting on November 8, 2002 with a union representative, if Mr. Klughart desired. At the meeting, which was attended by Mr. Kuzbik and Mr. McBeth for the Employer, Mr. McBeth informed Mr. Klughart that he was being removed from the caretaking substitute list. Mr. Kuzbik told Mr. Klughart and his union representative that the Employer did not want a person there for the next ten to fifteen years who would be in grievance after grievance after grievance. The Employer did not want an employee who would stir the pot.

[12] At that time, the Employer also posted two full-time and one part-time permanent caretaker positions at the high school. Mr. Klughart applied for a full-time permanent position by letter dated November 5, 2002. The job was awarded to another employee. Mr. Klughart also applied for a full-time temporary caretaker II position at the Education Centre on the same date but he was not successful.

[13] Prior to his termination, Mr. Klughart had not been the subject of any disciplinary or corrective action by the Employer. Since the termination, Mr. Klughart has been unable to secure other work. He is 54 years old and suffers from a physical disability.

[14] Mr. Klughart acknowledged that he was never promised permanent employment when he was hired as a substitute caretaker. He indicated that he accumulated no seniority for hiring purposes when he was a substitute caretaker, but if he was hired into a permanent position, his seniority would be calculated to take into account the time he spent as a substitute caretaker.

[15] Mr. Klughart was asked questions about attempts he had made to obtain paid leave for bereavement and his work performance. The Union president, Ms. Carle, indicated that there was some room to question the Employer's interpretation of the bereavement leave and sick leave provisions in the collective agreement relating to the availability of such paid leaves for substitute employees. In her mind, the matter was not clear cut.

[16] Ms. Carle acknowledged on cross-examination that substitute caretakers do not have seniority rights under the collective agreement, that they may be awarded permanent positions at the discretion of the Employer, and that they are awarded substitute positions at the discretion of the Employer.

[17] The Employer did not call any evidence.

Relevant Statutory Provision:

[18] The Union's unfair labour practice application alleges violations of ss. 11(1)(a) and (e) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*") which provide:

> *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:*
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> *(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;*
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> *. . .*
>
> *(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;*

Arguments:

[19] The Union argued that Mr. Klughart was terminated from his employment for signing the shift change grievance and for attending and speaking at the grievance meetings. According to the Union, such activity is protected under s. 11(1)(e) as constituting an attempt to exercise a right under the *Act.* The Union argued that Mr. Klughart was an employee of the Employer; he had rights under the collective agreement; he paid union dues; he was terminated and provided with a record of employment; and he is protected as are all employees against Employer actions that are

motivated by anti-union animus. Such actions have a chilling effect on vulnerable employees and prevent them from actively engaging in union activity. The Union noted that the evidence of anti-union animus was not refuted by the Employer. The Union referred the Board to *Canadian Union of Public Employees v. City of Saskatoon,* [1991] 1st Quarter Sask. Labour Rep. 77, LRB File Nos. 254-89 & 255-89; and *Canadian Union of Public Employees v. City of Saskatoon,* [1994] 1st Quarter Sask. Labour Rep. 91, LRB File Nos. 208-93 & 209-93.

[20] The Employer argued that the Union president's remark that Mr. Klughart had no rights under the collective agreement ended the matter. Mr. Klughart's employment could come to an end at any time without recourse to any grievance or arbitration provisions. As a substitute employee, he had no guarantee of hours or shifts. His employment was "at will" and termination for any reason is permitted. Mr. Klughart had no reasonable expectation of work unlike the situation is the cases cited by the Union.

Analysis:

[21] We find that Mr. Klughart's employment was terminated by the Employer with a view to discouraging Mr. Klughart and other employees from participating in the normal activities of the trade union, contrary to ss. 11(1)(a) and (e). Employees have a right under s. 3 of the *Act* to engage in collective bargaining through a bargaining agent of their own choosing. "Collective bargaining" includes the negotiation of grievances and disputes. Like any other employee, Mr. Klughart enjoys these statutory rights to participate fully in his Union.

[22] In most cases, evidence of anti-union animus must be inferred from the Employer's conduct, such as the coincidence of timing between the activity of the employee in support of the Union and the termination of employment. However, in this case, there is uncontradicted evidence from Mr. Klughart and Ms. Carle that the reasons for termination were directly related to Mr. Klughart's participation in the grievance process. Mr. Kuzbik expressly tied Mr. Klughart's termination to his activity in the Union. The coincidence of timing between the attendance at the grievance meeting and the termination of employment is also a significant factor.

[23] The Employer's argument suggests that, since a substitute caretaker has no claim to work beyond what the Employer is prepared to offer, he cannot complain when his employment is terminated, even if it is terminated for reasons that violate the *Act.*

[24] This argument has been rejected by labour relations boards in the past in various contexts. For instance, an employer who contracts out work may be entitled to do so under the terms of a collective agreement but, if the contracting out is done for the purpose of union avoidance or other forms of anti-union animus, it constitutes a breach of the anti-discrimination or non-interference provisions contained in the relevant labour statute: see, for instance, *North Canada Air Ltd.,* [1979] 3 Can LRBR 239 (CLRB).

[25] Similarly, labour relations boards have held that employers who do not renew employees' term contracts as a result of anti-union motivation are guilty of an unfair labour practice and are required to renew the contracts: see, for instance, *Re Dionne,* (1998), 42 C.L.R.B.R. (2d) 239 (CLRB).

[26] In this province, the Board has required the reinstatement of an employee hired for an indefinite seasonal term where the reasons for not recalling the employee were motivated by anti-union animus: see, *Canadian Union of Public Employees v. City of Saskatoon,* [1994] 1st Quarter Sask. Labour Rep. 91, LRB File Nos. 208-93 & 209-83.

[27] In the present case, had the Employer not terminated Mr. Klughart as a result of his participation in the shift change grievance, Mr. Klughart would have continued to work for the Employer filling in for various permanent employees who were unable to attend work. Although the work would not be permanent, Mr. Klughart's own work history with the Employer demonstrated that he worked close to full-time hours. He also had opportunities to bid on permanent caretaking positions and the evidence demonstrated that, although the Employer was not contractually obligated to promote the most senior substitute caretaker to the permanent positions, its practice was to do so. Substitute caretaking is the recognized path to permanent employment. It cannot be said that Mr. Klughart had no loss as a result of the Employer's actions – his loss is substantial and real.

[28] As indicated, we find that the Employer discharged Mr. Klughart because of Mr. Klughart's activity in the Union, contrary to ss. 11(1)(a) and 11(1)(e). The parties asked that the Board leave the remedial issues aside to be addressed at a further hearing if the parties are unable to come to a satisfactory resolution of the matter. As a result, at this time, the Board will reserve its jurisdiction to address issues of reinstatement and monetary loss in a further order. Either party may request that the Board be reconvened on giving ten (10) days notice to the opposite party and the Board.

DATED at Regina, Saskatchewan this **30th** day of **May, 2003.**

LABOUR RELATIONS BOARD

Gwen Gray, Q.C.
Chairperson