Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v. DEL ENTERPRISES LTD. operating as ST. ANNE'S CHRISTIAN CENTRE, Respondent

LRB File Nos. 087-04, 088-04, 089-04, 090-04, 091-04 & 092-04; June 14, 2004
Chairperson, James Seibel; Members: Marshall Hamilton and Maurice Werezak

For the Applicant: Jim Holmes
For the Respondent: Diane Olech, Sharon Karol and Ed Golemba

Remedy – Interim order – Criteria – Board reviews criteria for granting interim relief – Where key union organizers summarily laid off with no expectation of recall, compelling likelihood that employer's actions will have chilling effect on employees' perception of ability to exercise statutory rights free from fear of prejudice or retribution – Board orders interim reinstatement and monetary loss.

***The Trade Union Act*, ss. 5(f), 5(g), 5.3 and 11(1)(e).**

REASONS FOR DECISION

Background:

[1] Del Enterprises Ltd. operating as St. Anne's Christian Centre (the "Employer"), operates a personal care home located in Ituna, Saskatchewan. On April 6, 2004 Canadian Union of Public Employees (the "Union") commenced organizing the employees of the Employer, through the efforts of two of the employees, part-time caregivers, Moira Markle and Joanne Ord. Both were laid off without a date of recall on April 19, 2003, ostensibly because of a decline in the number of residents in care. On April 30, 2004, the Union filed applications pursuant to ss. 5 (d), (e), (f) and (g) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") alleging that, in terminating Ms. Markle and Ms. Ord, the Employer committed unfair labour practices in violation of ss. 11(1)(a) and (e) of the *Act*, and requesting that Ms. Markle and Ms. Ord be reinstated and paid monetary loss.

[2] On June 3, 2004, the Union filed an application pursuant to s. 5.3 of the *Act* for interim relief, seeking, *inter alia*, the reinstatement of Ms. Markle and Ms. Ord pending the hearing and disposition of the applications proper.

[3] The Employer's replies to the applications proper allege, *inter alia*, that the Employer had no knowledge of union activity by the employees and that Ms. Markle and Ms. Ord were laid off because the number of residents in care had declined.

[4] The application for interim relief was heard by the Board on June 9, 2004. The applications proper are scheduled to be heard on September 15, 2004.

Evidence:

[5] In support of the application for interim relief the Union filed affidavits of Moira Markle and Joanne Ord, each sworn June 2, 2004, and an affidavit of Aina Kagis, sworn June 1, 2004. The Employer filed no affidavit material in response to the application for interim relief. Following is a brief review of the affidavit material filed.

Affidavit of Aina Kagis

[6] Aina Kagis is employed by the Union as a national representative. Ms. Kagis deposed that she met with Ms. Markle on April 2, 2004 at Ms. Markle's request to discuss organizing the employees at St. Anne's Christian Centre in Ituna. Ms. Markle indicated that she would be working with Ms. Ord to sign up support for the Union. Ms. Kagis forwarded union application for membership cards to Ms. Markle and Ms. Ord for their use and followed up with them as to their progress on at least two occasions during the subsequent days. Between April 14 and April 17, 2004, employees signed eight union membership cards. Ms. Markle advised Ms. Kagis on April 19, 2004 that both she and Ms. Ord had received notices of layoff that day. The Union filed the applications alleging unfair labour practice and for reinstatement and monetary loss with the Board on April 30, 2004.

Affidavit of Moira Markle

[7] Moira Markle was hired by the Employer as a part-time caregiver on June 2, 2003. She was given a notice of layoff by the Employer on April 19, 2004 that stated as follows:

> *With regrets, we wish to inform you that due to a large decline in our resident numbers, we are forced to reduce our staff.*

Enclosed please your Record of Employment (sic).

[8] The enclosed Record of Employment indicated that the reason for layoff was "number of residents in decline." It further indicated that the last day for which Ms. Markle was to be paid was April 26, 2004 (in purported compliance with *The Labour Standards Act*.)

[9] Ms. Markle was familiar with the Union through her membership in another local at a different workplace where the Union represents the employees. She initiated contact with Ms. Kagis on April 2, 2004 after a union meeting at the other workplace. After receiving the blank union membership cards between April 7 and 17, 2004, Ms. Markle and Ms. Ord distributed the cards to employees at St. Anne's Christian Centre and obtained signatures to eight cards.

[10] Ms. Markle deposed as to her belief from examining the work schedules that the shifts that she had been working were reassigned to another employee. There are also at least three employees hired after she was hired who continue to work for the Employer. There were also fewer residents during August to September, 2003 than there were in April, 2004 but no layoffs were initiated at that time.

Affidavit of Joanne Ord

[11] Joanne Ord was hired by the Employer as a part-time caregiver on October 23, 2002. She also received a notice of layoff from the Employer on April 19, 2004 identical to that received by Ms. Markle. The reason for layoff stated in her Record of Employment was also the same and, again, there was no indication of an expected date of recall. She received pay up to May 3, 2004.

[12] Ms. Ord received some blank union membership cards from Ms. Markle and worked with her to sign up the employees.

[13] From her examination of the work schedules she does not believe that the number of shifts has decreased but have been reassigned to other employees. At least three employees continue to work who were hired after Ms. Ord.

Arguments:

[14] Mr. Holmes, on behalf of the Union, asserted that, on the uncontroverted facts as set forth in the affidavits filed, the present case met the test with respect to applications for interim relief as enunciated by the Board in, for example, *Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn)*, [1999] Sask. L.R.B.R. 190, LRB File No. 131-99. That is, that (1) the application proper expresses an arguable case under the *Act*; and, (2) the labour relations harm of not granting interim relief exceeds the labour relations harm of granting such relief.

[15] In further support of this position, Mr. Holmes referred to the decisions of the Board in *Meroniuk v. Rural Municipality of Preeceville No. 334*, [2002] Sask. L.R.B.R. 353, LRB File Nos. 063-02, 064-02 & 065-02; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Northern Steel Industries Ltd*., [2002] Sask. L.R.B.R. 304, LRB File No. 114-02; and *United Food and Commercial Workers, Local 1400 v. Tropical Inn, operated by Pfeifer Holdings Ltd. and United Enterprises Ltd*., [1998] Sask. L.R.B.R. 218, LRB File Nos. 374-97. 375-97 & 376-97.

[16] In addition to submitting that there was an arguable case to be heard, Mr. Holmes referred to the harm to the Union and the employees in the chilling effect that the layoffs would likely have upon the exercise by the employees of their rights to engage in union activity under the *Act*, as well as the personal financial hardship to Ms. Markle and Ms. Ord pending the hearing and determination of the applications proper.

[17] Ms. Olech and Ms. Karol, on behalf of the Employer, did not address the merits of the application for interim relief during the opportunity afforded to them for argument. Instead, they submitted that the reinstatement of Ms. Markle and Ms. Ord would likely result in financial disaster for the Employer and might result in the closure of the workplace. They also attempted to argue that Ms. Markle and Ms. Ord were laid off for poor work performance. The evidence overwhelmingly belies the latter position, which is not even alluded to in the replies filed by the Employer. There is absolutely no evidence before us to support either of these contentions.

Statutory Provisions:

[18] Relevant provisions of the *Act* include the following:

> *5. The board may make orders:*
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> *(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) 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 any 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:*
>
> *(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;*

Analysis and Decision:

[19] We are of the opinion that the application for interim relief should be granted, that Ms. Markle and Ms. Ord should be reinstated to their employment as it existed prior to their open-ended layoffs pending the hearing and final determination of the unfair labour practice application proper and that they should as well receive compensation for monetary loss.

[20] The test for the granting of interim relief was enunciated by the Board in *Regina Inn*, *supra*, as follows, at 194:

> *The Board is empowered under ss. 5.3 and 42 of the Act to issue interim orders. The general rules relating to the granting of interim relief have been set down in the cases cited above. Generally, we are concerned with determining (1) whether the main application reflects an arguable case under the Act, and (2) what labour relations harm will result if the interim order is not granted compared to the harm that will result if it is granted. (see Tropical Inn, supra, at 229). This test restates the test set out by the Courts in decisions such as Potash Corporation of Saskatchewan v. Todd et al., [1987] 2 W.W.R. 481 (Sask. C.A.) and by the Board in its subsequent decisions. In our view, the modified test, which we are*

> *adopting from the Ontario Labour Relations Board's decision in Loeb Highland, supra, focuses the Board's attention on the labour relations impact of granting or not granting an interim order. The Board's power to grant interim relief is discretionary and interim relief can be refused for other practical considerations.*

[21] 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, at 444, 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.*

[22] Accordingly, and as iterated in *Chelton Suites Hotel*, *supra*, at 446, each application for interim relief is determined according to its specific facts. Certain types of applications have particular factors that the Board takes into account in assessing the application according to the test. The factors considered are driven by the specific objectives of the particular statutory provisions alleged to have been violated. In applications such as the present one, where it is alleged that employees were terminated for activity in support of the union, or in attempted intimidation of union supporters, the Board has considered the potential for a negative effect on the status of the union and the potential for loss of support and confidence, as well as the impact on the individual employees terminated. The fragility of the union's status and strength of support, and the vulnerability of its supporters to pressure exerted by the employer prior to certification, is generally accepted and not seriously disputed.

[23] In *Amalgamated Transit Union, Local 1624 v. Trentway-Wagar Inc.*, [2000] C.I.R.B.D. No. 10 (February 21, 2000), a case similar to the present one in that

the union's key organizers were dismissed at the height of the organizing campaign, the Canada Board approved of an approach to considering applications for interim relief that specifically entailed consideration of the objectives of the statutory provisions in issue. With respect to the discharge of a union organizer, it approved of the following statement by the Ontario Board in *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019:

> *52. In the instant case, there is not much doubt that the applicant meets the threshold. Where the union's two key organizers are unexpectedly discharged at the height of the organizing campaign, there is a prima facie case of a breach of the Act, and there is reasonable cause for employees to believe that an unfair labour practice has occurred; moreover, in cases of this kind, where the employer bears the legal onus of establishing that it has not contravened the Act, it is hardly surprising that the union requests that the pre-discharge status quo be maintained until the employer meets the statutory onus cast upon it. If the employer is obliged to establish that its removal of employees from the workplace was not unlawful, there is nothing counter-intuitive about keeping them there until it does so. …*
>
> *53. In other words, whether or not the employer is ultimately successful on the main application, the sequence of events under review is likely to inhibit the free exercise of employee rights, unless there is some positive and tangible assurance that those statutory rights will be protected. If an outsider regards these discharges as at least suspicious, an employee in the workplace would reasonably fear the consequences of his/her involvement with the union. … whatever the motive for these discharges may actually have been, there is likely to be an adverse impact in the workplace until the aggrieved employees' rights are resolved through adjudication.*

[24] In the present case, the Union has established that the layoff of each of Ms. Markle and Ms. Ord raises an arguable case that is not frivolous or vexatious. They are experienced employees who were summarily laid off with no expectation of recall – for the purposes of the *Act* we find that their employment was terminated. Ostensibly the actions were taken because of a decline in resident numbers – that is for a reduction in work. However, by the Employer's own admission in the replies it filed, employees hired just two or three months earlier in February and March, 2004 continue to work. Also, the replies declare that another employee has commenced working the shifts that had previously been assigned to Ms. Markle and Ms. Ord.

[25] The terminations of Ms. Markle and Ms. Ord are highly suspicious coinciding with the height of activity in their organizing on behalf of the Union. While the Employer may ultimately be able to discharge the reverse onus imposed upon it under s. 11(1)(e) of the *Act* to establish that the terminations were not motivated in whole or in part because of their activities as key Union organizers, in the period pending the hearing and determination of the application proper, the compelling likelihood is that the actions of the Employer in terminating Ms. Markle and Ms. Ord will have a chilling effect upon the perception of the employees of the ability to exercise their statutory rights pursuant to s. 3 of the *Act* free of the fear of prejudice or retribution.

[26] The likelihood that employees will be led to fear for negative consequences of involvement with the Union far outweighs any alleged potential harm to the Employer if an order is granted for interim reinstatement.

[27] For these reasons, we have determined that an order will issue for the immediate reinstatement of each of Ms. Markle and Ms. Ord to their employment as it was before their terminations and for compensation for monetary loss for the shifts each has missed from work, pending the hearing and determination of the main application. The Board shall remain seized of the matter in the event that the parties are unable to determine the amount of the monetary loss.

[28] Furthermore, it is imperative that the employees at St. Anne's Christian Centre understand that they are entitled to exercise their rights under s. 3 of the *Act* to organize and participate in the activities of the Union without fear of prejudice or retribution. The Employer shall post these Reasons and the Order that will issue herein for a period of fourteen (14) days in a place in the workplace where the Employer normally posts notices to employees.

DATED at Regina, Saskatchewan this **14th** day of **June, 2004.**

LABOUR RELATIONS BOARD

James Seibel, Chairperson