The Labour Relations Board
Saskatchewan

SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 336, Applicant v. BRIDGES PERSONAL CARE INC., Respondent

LRB File Nos. 013-08, 014-08 & 015-08; February 12, 2008
Vice-Chairperson, Catherine Zuck, Q.C.; Members: John McCormick and Kendra Cruson

For the Applicant: Keir Vallance
For the Respondent: Mark Morris

Remedy – Interim order – Long time employee with minor disciplinary record who had testified on behalf of union on application for rescission terminated shortly thereafter ostensibly for taking resident's blood pressure when relative of resident in room – Board concludes that arguable case that employer violated s. 11(1)(e) of *The Trade Union Act* and reinstates employee on interim basis.

Remedy – Interim order – Status of union can be just as fragile and employees can be just as vulnerable to pressure exerted by employer during application for rescission as during application for certification – Employer did not lead evidence or argue that it or residents would suffer any particular harm if employee reinstated – Board concludes that balance of labour relations harm favours union and reinstates employee on interim basis.

Remedy – Interim order – Union's already precarious situation made more so by firing of union supporter – Board permits union to have personal contact with members in workplace and orders posting of interim decision.

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

REASONS FOR DECISION

Background:

[1] Service Employees' International Union, Local 336 (the "Union"), filed an application on January 22, 2008 alleging that Bridges Personal Care Inc. (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 Valerie Laverdiere. The Union also, on the same date, filed applications for reinstatement of and monetary loss for Ms. Laverdiere.

[2] Also on January 22, 2008, the Union filed an interim application returnable January 28, 2008 seeking interim relief including, *inter alia,* the reinstatement of Ms. Laverdiere.

[3] As of the date of the hearing of the interim application (January 28, 2008) the Employer had not filed a reply to the unfair labour practice, reinstatement and monetary loss applications. The Employer filed no material in response to the interim application.

[4] An Order reinstating Ms. Laverdiere and providing other interim relief was issued on January 28, 2008. These Reasons for Decision relate to the Board's Order of January 28, 2008.

Decision:

[5] The Union established that it had an arguable case and that the balance of labour relations harm favoured it and, therefore, its interim application succeeded. The Board ordered reinstatement of Ms. Laverdiere, access by the Union to the employees at the workplace and the posting of the Board's Order and these Reasons for Decision.

Evidence:

[6] The Union filed affidavits sworn by Ms. Laverdiere and Barbara Wotherspoon on January 17, 2008. The Employer filed no evidence. The following recitation of facts is based on the evidence filed by the Union.

[7] Ms. Laverdiere has been employed as a personal care aide by the Employer and its predecessor since 1999. She generally works 80 hours in two weeks usually consisting of 8-hour shifts Monday to Friday.

[8] The Union is the certified bargaining agent for the employees of the Employer. Ms. Laverdiere has been the shop steward for the Union since the spring of 2006. One of the employees of the Employer filed an application for rescission with the Board on or about November 8, 2007. The Board has heard the application for rescission but no decision has been rendered to date. Ms. Laverdiere was called as a witness by the

Union to testify with respect to the application for rescission. She attended the hearing on November 28, 2007 and testified on behalf of the Union by telephone on December 10, 2007. Representatives of the Employer attended on both hearing dates. Mark Morris, who represented the Employer at the hearing of the interim application, testified on the Employer's behalf in relation to the application for rescission on December 10, 2007. It is unknown at this time whether the application for rescission will be dismissed or whether the Board will order a vote of the employees on the issue.

[9] On December 31, 2007, Ms. Laverdiere and a co-worker were asked to attend a meeting with Win Smith, the Employer's out-of-scope administrator. Ms. Laverdiere asked if the meeting was disciplinary because, if it was, she wanted Ms. Wotherspoon, the Union's representative responsible for servicing the bargaining unit, to attend. Ms. Smith assured Ms. Laverdiere it was not a disciplinary meeting and Ms. Laverdiere and her co-worker attended the meeting.

[10] At the meeting, the main issue was that Ms. Laverdiere had taken the blood pressure of a resident in the presence of the resident's son-in-law on December 25, 2007. The son-in-law observed the reading. Ms. Laverdiere agreed that she had done this.

[11] On January 7, 2008 Ms. Laverdiere received a letter from Ms. Smith advising her that she should not take a resident's blood pressure when there were others in the room as this was a breach of the resident's privacy. Ms. Laverdiere was told to keep resident information confidential in the future. Ms. Smith's letter indicated that a copy of the letter would be placed in Ms. Laverdiere's file. Ms. Laverdiere intended to put this direction into practice and thought that this was the end of the matter.

[12] On January 11, 2008 Ms. Laverdiere received a letter of dismissal from Ms. Smith. Ms. Smith had apparently met with the Employer's board of directors on January 9, 2008. The letter said that the decision was made to terminate Ms. Laverdiere based on her "past actions" and the events of December 25, 2007. Ms. Laverdiere was paid 4 weeks of severance in lieu of notice and her unused vacation pay.

[13] Between January 7 and 11, 2008 Ms. Laverdiere worked two full shifts. The termination letter was given to Ms. Laverdiere at the end of her shift on January 11, 2008.

[14] Ms. Laverdiere received a verbal warning on or about July 10, 2007 and attended a non-disciplinary meeting on or about November 18, 2007. Both were unrelated to resident privacy or confidentiality.

[15] Ms. Laverdiere contacted Ms. Wotherspoon on January 14, 2008. Ms. Wotherspoon believed that Ms. Laverdiere had been terminated because of her union activity, in particular, her role as a witness during the rescission hearing because there was no other justification for the harsh penalty. Ms. Wotherspoon therefore contacted counsel for the Union and these applications were commenced.

[16] Ms. Wotherspoon deposed that she believed that "this dismissal has and will continue to send a chill throughout the workplace intimidating workers from supporting the union during a difficult time, with the rescission application still outstanding." Further, Ms. Wotherspoon deposed that Ms. Laverdiere's termination "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."

[17] The co-worker who also attended the December 31, 2007 meeting was suspended for 3 days because she had answered questions posed by the same resident's son-in-law about the resident's blood pressure. She also testified on behalf of the Union at the hearing of the application for rescission.

Relevant statutory provisions:

[18] Relevant statutory provisions of the *Act* are as follows:

> *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.*
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> *. . .*

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) to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating with his employees;*
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> *. . .*
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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;*
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> *. . .*
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> *(g) to interfere in the selection of a trade union as a representative employees for the purpose of bargaining collectively;*

Arguments:

The Union

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

[20] The Union took the position that the application for rescission made by an employee in November 2007 (rather than the more usual certification application) constituted the exercise of rights under the *Act* referred to in ss. 11(1)(a) and (e). Due to the reverse onus in s. 11(1)(e), the Employer will have the burden of proving that Ms. Laverdiere's termination was for good and sufficient reason. The Union argued that the Employer is aware that the application for rescission is pending and that Ms. Laverdiere was involved in activity surrounding the application for rescission, including testifying for the Union at the hearing of the application.

[21] The Union took the position that the timing of the termination was extremely suspicious in light of the pending application for rescission and Ms. Laverdiere's testimony on December 10, 2007. Further, the extent of the discipline was too harsh; the written reprimand letter of January 7, 2007 should have been the end of the matter. The Union pointed out that Ms. Laverdiere was a long time employee with no relevant disciplinary record and that there was no explanation for the change in the Employer's response, from a written reprimand to termination, after Ms. Smith's meeting with the board of directors.

[22] The Union argued that there is therefore an arguable case that Ms. Laverdiere was terminated contrary to s. 11(1)(e) of the *Act.*

[23] The Union suggested that the second part of the test to be applied on the interim application is whether the balance of labour relations factors favours the Union.

[24] The Union argued that there is much uncertainty for this bargaining unit because no one knows what is going to happen with respect to the application for rescission. There is a possibility that a rescission vote will be ordered. Every vote will count if a vote is ordered. The firing of a known supporter of the Union and shop steward will make other members afraid to vote for the Union, run for union positions or even support the Union. This will cause a big negative impact on the Union's support in any upcoming rescission vote. In addition, Ms. Laverdiere may have been able to influence co-workers to support the Union in any vote.

[25] The Union pointed out that this occurred in a small bargaining unit in a small town, remote from any union resources. It was very visible and known that this supporter of the Union was terminated and the Union is not able to counteract the chilling effect that this will have on other members of the Union if they "stand up and be counted." The Union argued that it needs to have access to and contact with its members to offset this harm and that it would not be sufficient for the Board to simply return Ms. Laverdiere to work, even with the Union subsequently sending its members a letter confirming Ms. Laverdiere's return to work.

[26] The Union argued that the Employer would suffer no harm as a result of the reinstatement of Ms. Laverdiere, noting that the evidence does not support a contention that Ms. Laverdiere is a danger to residents -- she was allowed to work for three weeks after the incident and to work her shift before being terminated.

[27] The Union therefore took the position that reinstatement of Ms. Laverdiere would assist it in dealing with its own labour relations harm and would not harm the Employer.

[28] The Union did not ask the Board to make an interim order for monetary loss as the Employer did provide severance pay to Ms. Laverdiere.

[29] Counsel for the Union referred to *Grain Services Union (ILWU-Canada) v. Startek Canada Services Ltd.* [2004] Sask. L.R.B.R. 128, LRB File Nos. 115-04, 116-04 & 117-04; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Partner Technologies Inc.*, [2000] Sask. L.R.B.R. 737, LRB File Nos. 290-00, 291-00 &

292-00; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Universal Reel & Recycling Inc.*, [2001] Sask. L.R.B.R. 809, LRB File Nos. 226-01, 227-01 & 228-01; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Watergroup Companies Inc.,* [1992] 3rd Quarter Sask. Labour Rep. 121, LRB File No. 197-92 and *United Food and Commercial Workers Union, Local 1400 v. D & B Taxi Ltd. operating as Capital Cab 2000*, [2004] Sask. L.R.B.R. 347, LRB File Nos. 244-04, 245-04 & 246-04.

The Employer

[30] The Employer denied that Ms. Laverdiere was terminated for anything other than her bad work and said that matters came to a head after the December 25, 2007 incident. The Employer argued that the termination was definitely not retaliation for any of Ms. Laverdiere's union activities. The Employer indicated that it does not know if Ms. Laverdiere supports the Union as the support material filed on the rescission application was secret.

[31] The Employer argued that the timing of Ms. Laverdiere's termination should not be regarded with suspicion as it was determined by the date of the incident involving Ms. Laverdiere. Ms. Laverdiere admitted that she took the blood pressure of the resident in the presence of the son-in-law who observed the reading. The subsequent events happened as quickly as they could having regard for the Christmas season.

[32] The Employer took the position that the meeting between Ms. Laverdiere (and her co-worker) and Ms. Smith was in the nature of an investigation meeting. Despite the wording of Ms. Smith's January 7, 2008 letter to this Ms. Laverdiere, the Employer said that it was not a written warning for the incident. Therefore, there was no suspicious change in the discipline after the board of directors meeting; the only discipline imposed on Ms. Laverdiere was the termination.

[33] The Employer argued that, contrary to the Union's accusation that the Employer is taking a position on the application for rescission, it is not and there is no evidence that the Employer is doing anything with respect to influencing the application for rescission. The Employer took the position that the termination could have the effect of increasing support for the Union, so it was not done to decrease support for the Union.

[34] Finally, the Employer argued that it is suspicious that the Union has made these applications but has not taken any steps with respect to the other employee disciplined and has not grieved the discipline imposed on either employee.

Analysis:

[35] It is the Board's decision that the application for interim relief should be granted and that Ms. Laverdiere shall be reinstated to her employment as a personal care aide on the same terms and conditions and with all of the rights and benefits enjoyed by her prior to her termination until the hearing and final determination of the applications proper.

[36] The test to be met on applications for interim relief has been well established by the Board. A recent statement of the test is found in *Startek, supra,* as follows at 135 through 139:

> *[31] The test for the granting of interim relief was enunciated by the Board in Regina Inn, supra,* [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] *as follows, at 194:*
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> > *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.*

[32] As explained above, the test is adapted from that set out by the Ontario Labour Relations Board in Loeb Highland, [1993] OLRB Rep. March 197. With respect to the [first of the] *two parts of the test – that is, whether the main application raises an arguable case – the Ontario Board stated as follows, at 202:*

> *Turning first to the idea of a threshold test with respect to the merits of the main application, we have some concern about applying a high level of scrutiny to that application at the time of a request for an interim order. To the extent that such scrutiny may imply a form of prejudgment of the final disposition of the main matter, it is not particularly compatible with the scheme for interim relief set out in the Act and the Board's Rules of Procedure. More specifically, the procedure for interim relief contemplated by the Board's Rules reflects the inherent necessity for expedition in these matters. To that end, evidence is filed by way of certified declarations which are not subject to cross-examination. Indeed, s. 104(14) of the Act and Rules 92 and 93 indicate the Board may not hold an oral hearing at all, but may receive the parties' arguments in writing as well.*
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> *This means that the Board is not in a position to make determinations based on disputed facts. In these circumstances, it would normally be unfair for an interim order to be predicated to any significant extent on a decision with respect to the strength or weakness of the main case. That should await the hearing of the main application when the Board hears oral evidence and can make decisions with respect to credibility based on the usual indicia, in a context where the parties have a full right of cross-examination. This is particularly important in cases such as the section 91 complaint to which this application relates, where decisions are often based on inferences and the various nuances of credibility play a key role. In other words, the granting of interim relief in this context should usually be based on criteria which minimize prejudging the merits of the main application.*

[33] With respect to the second part of the test – consideration of the respective labour relations harm – as the Board explained 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 &3 145-00, at 444, it is an adaptation of the civil irreparable harm criterion to the industrial relations arena.*
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> *. . .*
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> *[37] 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 Chelton Suites Hotel, supra, 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:*
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> > *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.*
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> *[38] 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 an employee was 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 employee who was 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.*

[37] 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). Ms. Laverdiere was a long time, virtually full-time employee with a very minor disciplinary

record for unrelated incidents who was exercising her rights under the *Act* and was engaged in activity to support the Union during the ongoing application for rescission and the Employer was well aware of this. In particular, Ms. Laverdiere testified on behalf of the Union, with the knowledge of the Employer, and therefore the inference can be made that she supports the Union with respect to the application for rescission. After giving her testimony, Ms. Laverdiere was terminated by the Employer. This timing raises the suspicion that the firing was in retaliation for Ms. Laverdiere's support of the Union and not for any other reason. There is therefore an arguable case that the Employer committed an unfair labour practice as defined by s. 11(1)(e) of the *Act.*

[38] The labour relations harm to the Union is that the remaining members of the bargaining unit could fear that their support of the Union with respect to the application for rescission would result in the same or a similar adverse impact on their employment. Employees should always be free to support or not support a union as their bargaining agent without an implicit threat from their employer that support will jeopardize their employment. The Union's support in any potential vote relating to the application for rescission 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. The status of a union can be as fragile during an application for rescission as it is during a certification application. Employees can be just as vulnerable to any pressure being exerted by an employer during an application for rescission as they would be during a certification application. There is also the obvious harm resulting from the loss of a supporting vote and voice from Ms. Laverdiere in any vote on the application for rescission.

[39] The labour relations harm to the Employer resulting from the issuance of the interim Order if no unfair labour practice has been committed is that the termination of Ms. Laverdiere will be delayed for three weeks until the scheduled hearing of the Union's applications proper and for a short period thereafter until the Board renders its decision on the applications proper. This may mean that the Employer has an employee who is less than satisfactory to it on staff for several weeks. This harm is minor in light of the fact that the Employer already delayed the decision to terminate Ms. Laverdiere almost three weeks and it paid her four weeks of severance pay. It allowed her to work between the date of the incident and the date it terminated her and it will have the benefit of her

services in exchange for the wages it has paid or will pay her during this interim period. The Employer did not lead any evidence or argue that there would be any particular harm to it or to the residents arising from the reinstatement of Ms. Laverdiere.

[40] The Board therefore concludes that the labour relations harm if Ms. Laverdiere is not reinstated is greater than the labour relations harm if she is reinstated. The Board has therefore ordered her reinstatement.

[41] The Board also agrees with the Union that, in such a situation as this, where the Union's precarious situation has been made more so by the firing of its supporter, it should be allowed personal contact with its members to counteract the damage resulting from Ms. Laverdiere's termination. The members should also receive first hand information of the Board's Order and Reasons for Decision to prevent any misinformation.

[42] Therefore, on January 28, 2008, the Board issued an interim Order containing the following terms:

> **(1)** That within forty-eight (48) hours of its receipt of the Board's Order the Employer shall reinstate Valerie Laverdiere to the position of personal care aide on the same terms and conditions and with all of the rights and benefits enjoyed by Valerie Laverdiere prior to her termination, pending final hearing and decision of the applications or until further order of the Board;
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> **(2)** 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 applications;
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> **(3)** That the Employer shall allow representatives of the Union free and unobstructed access to workers on company time for the purposes of communication with workers concerning unions, union representation, and the processes of certification and decertification, such access and meetings to be without loss of pay and without surveillance by the Employer or anyone on its behalf;
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> **(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), (e), (f) and (g) of *The Trade Union Act;* depending upon whether the final application for reinstatement Valerie Laverdiere is determined in favour of the Union or the Employer,

there may be no further obligation to employ Valerie Laverdiere 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.

DATED at Regina, Saskatchewan, this **12th** day of **February, 2008.**

LABOUR RELATIONS BOARD

Catherine Zuck, Q.C.,
Vice-Chairperson