UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY ALLIED INDUSTRIAL AND SERVICE WORKERS INTERENATIONAL UNION (UNITED STEELWORKERS), Applicant v. EVRAZ WASCO PIPE PROTECTION CORPORATION, Respondent

LRB File No. 275-16; 277-16 & 278-16; December 23, 2016

Vice-Chairperson, Graeme G. Mitchell Q.C.; Members: John McCormick and Allan Parenteau

For the Applicant, Union: Heather M. Jensen
For the Respondent Employer: Eileen V. Libby, Q.C. and Matthew Klinger, Student-at-Law

Interim Application – Unfair Labour Practice – Arguable Case – Employee terminated allegedly after publicly supporting Union in its organization drive – Employer asserts employee terminated because of serious workplace safety infractions – Board finds that Union demonstrated an arguable case the Employer committed an unfair labour practice.

Interim Application – Unfair Labour Practice – Balance of Convenience – Union alleged irreparable labour relations harm if employee not reinstated during a representative vote – Board concludes that labour relations harm to Union outweighs labour relations harm to the Employer if employee reinstated.

Interim Application – Remedy – Board orders that employee's termination be set aside – Employee suspended with pay pending final determination of unfair labour practice application.

Interim Application – Practice and Procedure – Employer challenges admissibility of an affidavit submitted on behalf of the Union – Board reviews procedural requirements respecting admissibility of affidavits on interim relief applications – Board concludes certain paragraphs should be excised from impugned affidavit but balance of affidavit admitted.

REASONS FOR DECISION

OVERVIEW

[1] **Graeme G. Mitchell, Q.C., Vice-Chairperson:** United Steel, Paper and Forestry, Manufacturing, Energy, Allied Industrial and Service Workers International Union [the "Union"] is engaged in an organization drive at Evraz Wasco Pipe Protection Corporation [the "Employer"].

[2] To that end, the Union filed an application for bargaining rights pursuant to section 6-9 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [the "*SEA*"] on December 9, 2016.[1] The Union seeks to become the certified bargaining unit for the following employees of the Employer:

> *All employees (including lead hands (team leaders) employed by Evraz Wasco Pipe Protection Corporation in Saskatchewan except office, sales and professional staff, superintendents, assistant superintendents, managers and those employees at or above the rank of manager.*

[3] On December 12, 2016, the Board issued an Order directing that a vote be conducted to determine whether a majority of the employees wished to be represented by the Union.[2] The Board sent mail-in ballots to all eligible employees and directing that these ballots must be returned within 21 days from the date of mailing.

[4] At the same time the Union filed its application for certification, it also filed an unfair labour practice application against the Employer.[3] The relevant portions of the Union's application read as follows:

> 1. *The applicant, the United Steelworkers is a union within the definition of Part 6 of The Saskatchewan Employment Act, and is in the process of applying for bargaining rights in relation to a group of employees employed by the [Employer].*
> 2. *The union filed an application for bargaining rights (certification) on December 9, 2016.*
> 3. *The union says that on or about 5 December 2015, Danielle Findlay was terminated from her employment in part because of her activity and participation in the union organizing drive undertaken by the United Steelworkers.*
> 4. *The union says the termination of Ms. Findlay's employment interferes with, intimidates and threatens employees, including but not limited to Ms. Findlay, in the exercise of her rights conferred by Part 6 of The Saskatchewan Employment Act.*

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[1] LRB No. 275-16.
[2] There is a competing application brought by another union for certification: LRB File No. 202-16. However, it is not relevant to these proceedings.
[3] LRB File No. 277-16

> *5. The union says the termination of Ms. Findlay's employment interferes with the formation of a labour organization in violation of Section 6-62(1)(b) of the Act.*
> *6. On or about November 30, Danielle Findlay spoke publicly with a group of employees of the employer about the union's organizing drive and provided union cards to several employee members.*
> *7. Danielle Findlay was known to her co-workers as a supporter of the union's organizing drive and was actively working in support of the union's certification application.*
> *8. On or about December 5, 2016, the employer terminated Danielle Findlay's employment with the employer. The union says the reasons set forth for the termination of the grievor's employment do not justify the termination of her employment.*
> *9. The union relies upon the presumption set out in Section 6-62(4).*
> *10. The union says Ms Findlay was terminated in whole or in part because of her actions for and support of the union and its organizing drive.*

[5] The Employer's unilateral action in firing Ms. Findlay, the Union alleges, violates sections 6-4, 6-5, 6-6 and subsections 6-62(1)(a), 6-62(1)(b) and 6-62(1)(g) of the *SEA*.

[6] Also on December 9, 2016, the Union filed an application for interim relief pursuant to subsection 6-103(2)(d) of the *SEA*. It asserts that the termination of Ms. Findlay particularly at a critical juncture in the Union's certification drive casts a chill over other employees who will be voting in the coming days. As a consequence, the Union insists the Board's immediate intervention is necessary to prevent further labour relations harm occurring during the certification vote.

RELEVANT STATUTORY PROVISIONS

[7] For purposes of the Union's interim application, the following statutory provisions are relevant:

> ***6-4****(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*
> *(2) No employee shall unreasonably be denied membership in a union.*
>
> ***6-5*** *No person shall use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue to be or to cease to be a member of a union.*
>
> ***6-6****(1) No person shall do any of the things mentioned in subsection (2) against another person:*
>
> *. . . . . .*
>
> *(c) because the person has made an application, filed a complaint or otherwise exercised a right conferred pursuant to this Part[.]*

(2) In the circumstances mentioned in subsection (1), no person shall do any of the following:

(a) refuse to employ or refuse to continue to employ a person;

(b) threaten termination of employment or otherwise threaten a person[.]

***6-62**(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer to do the following:*

(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;

(b) subject to subsection (3), to discriminate respecting or interfere with the formation or administration of any labour organization or to contribute financial or other support to it;

. . . . .

(g) to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat or termination or suspension of an employee, with a view to encouraging or discouraging membership in any activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to this Part[.]

. . . . .

(2) Clause (1)(a) does not prohibit an employer from communicating facts and it opinions to its employees.

(3) Clause 1(b) does not prohibit an employer from:

(a) permitting representatives of a union to confer with the employer for the purpose of collective bargaining or attending to the business of a union without deductions from wages or loss of time while so occupied; or

(b) agreeing with any union fro the use of notice boards and of the employer's premises for the purposes of the union.

(4) For the purposes of clause 1(g), there is a presumption in favour of an employee that the employee was terminated or suspended contrary to this Part if:

(a) an employer or person acting on behalf of the employer terminates or suspends an employee from employment; and

(b) it is shown to the satisfaction of the board or the court that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right pursuant to this Part.

(5) For the purposes of subsection (4), the burden of proof that the employee was terminated or suspended for good and sufficient reason is on the employer.

. . . . . .

***6-103**(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*

(2) Without limiting the generality of subsection (1), the board may do all or any of the following:

. . . . .

(d) make an interim order or decision pending the making of a final order or decision.

APPLICATION FOR INTERIM RELIEF

A. Pre-requisites to Applying for Interim Relief

[8] This Board's jurisprudence is clear, there are two (2) pre-requisites which must be satisfied before the Board will adjudicate an application for interim relief brought pursuant to subsection 6-103(2)(d) of the *SEA*. First, the applicant must have filed an underlying application with the Board. In this case, this pre-requisite is clearly met for as already noted, the Union filed an unfair labour practice application on December 9, 2016.

[9] Second, a party seeking interim relief – in this case the Union – must serve and file a formal application for interim relief as well as affidavits supporting the application. In this case, the Union filed two (2) affidavits: the Affidavit of Danielle Findlay dated December 9, 2016 and the Affidavit of Pablo Guerra dated December 14, 2016.

[10] The Employer filed its Reply to this Union's interim relief application on December 14, 2016. In support of its Reply, the Employer filed four (4) affidavits: the Affidavit of Bryan Taylor; the Affidavit of Leonard Shane Prudhomme; Affidavit of Habib Faal, and the Affidavit of Greg Wright. All of these affidavits are dated December 14, 2016.

B. Employer's Objections to the Admissibility of the Guerra Affidavit

[11] The Employer objected to the admissibility of the Affidavit of Pablo Guerra on various grounds. We turn to consider the Employer's preliminary objection now.

1. Governing Legal Principles

[12] Recently, in *UNIFOR, Local 609 v Health Sciences Association of Saskatchewan*, LRB File No. 189-16; 2016 CarswellSask 597, 2016 CanLII 74279 (SK LRB) ["*Health Sciences*"] the Board reviewed and summarized the legal principles governing the admissibility of affidavit evidence submitted on applications for interim relief. After reviewing prior authorities as well as section 15 of *The Saskatchewan Employment (Labour Relations Board) Regulations* [the "*Regulations*"], the Board stated as follows:

[17] From these authorities, the following principles are applicable to the Union's objection. First, affidavits filed in support of an application for interim relief must be based on information within the personal knowledge of the affiant. This requirement has long been recognized by the Board in its' prior decisions and is now explicitly mandated by subsection 15(2) of the Regulations.

[18] Second, subsection 15(3) of the Regulations contemplates that an affidavit which is sworn on information and belief, and not personal knowledge, may yet be admitted if it is demonstrated that "special circumstances" exist for its admission. The Board has not considered what might qualify as "special circumstances" for purposes of this provision. No argument was advanced before us on the point so we decline to say anything more about it. Suffice it to say this provision appears to add a nuance to applications for interim relief which had not existed previously.

[19] Third, the Board will review an affidavit which contains statements that are not, or cannot be, based on personal knowledge of the affiant to assess whether the affidavit can stand with the offending portions excised or whether the affidavit must be struck in its entirety. In Grain Services Union (ILWU-Canada) v Startek Canada Services Ltd. [LRB File No. 032-04, 2004 CanLII 65591 (SK LRB)], for example, the Board critically reviewed the supporting affidavit which contained numerous paragraphs based on hearsay or information and belief without identifying the basis for the statement. Ultimately, the Board concluded that "the impugned portions of the affidavit and application document are too extensive to selectively excise and yet support the interim application" [Startek, supra, at para. 10]. As a consequence, the application failed because there was no other evidence that the Applicant could rely upon to support its request for interim relief.

[20] Contrastingly, in United Food and Commercial Workers, Local No. 1400 v Wal-Mart Canada Corp.[LRB File No. 069-04, 2009 CanLII 2047 (SK LRB)] the Board critically assessed the supporting affidavit of the Employer's Reply. The Board concluded that three paragraphs contained information outside the personal knowledge of the affiant and, accordingly, must be struck. However, the Board went on to admit the balance of the affidavit into evidence.

[21] Fourth, it is apparent that striking an affidavit in its entirety because it contains information not founded on personal knowledge should be the remedy of last resort. The Board must be satisfied the offending paragraphs have so polluted the affidavit that it is not possible to rely upon what remains of the document. See especially: [Startek, supra]

[22] Fifth, even if an affidavit is struck in its entirety for failing to comply with the requirement of personal knowledge, it does not follow that it will result in the application being dismissed or, in the case of a respondent, the failure of its defense. A good illustration of this reality is Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Loraas Disposal Services Ltd.[[1997] Sask. L.R.B.R. 517. LRB Files No. 208-97 to 239-97]. In that Decision which related specifically to the Union's application for interim relief, the Employer challenged the sufficiency of the Union's various supporting affidavits for the reason that they were not based on the affiants' personal knowledge. The Board disposed of this objection summarily. It noted that even though the affidavits in question failed to comply with the procedural requirement, the Union could rely on admissions contained in the Employer's supporting affidavit to prove its case. The Board stated [at page 523:

> *In this instance, the Board finds that the essential evidentiary claims made by the Union were confirmed by the affidavit filed on behalf of the Employer. As such, it is not necessary for the Board to review the sufficiency of the Union's affidavit or make any rulings with respect to the credibility of the deponents.*

[13] These are the governing principles against which the Board will assess the Employer's objections to the admissibility of the Guerra Affidavit.

2. Analysis and Disposition of Employer's Objection to Admissibility of the Guerra Affidavit

[14] The Employer's principal argument is that the Guerra Affidavit should be struck in its entirely for violating section 15 of the *Regulations* as it is not based on personal knowledge and contains statements of opinion lacking any basis in fact. Alternatively, the Employer submits that paragraphs 6, 7, 8, 9, 10, 11, 12, 13 and 14 should be excised for similar reasons.

(a) Paragraph 6 of the Guerra Affidavit

[15] Paragraph 6 reads as follows:

> *6. It is my expectation that a vote by secret ballot will be conducted among all eligible employees within the coming weeks, likely starting December 15 or December 16, 2016. The vote process will likely conclude before the unions Unfair Labour Practice Application assigned LRB File No. 2677-16 can be heard and decided by the Board.*

[16] The Board accepts that the information contained in this paragraph is not within the personal knowledge of the affiant. However, the fact that the ballots were mailed to all eligible employees on December 15, 2016, was discussed at the hearing which Mr. Guerra attended. In addition, it is accurate that the unfair labour practice application in this matter will not conclude before the mail-in vote is completed. On balance, the Board concludes that as the information contained in this paragraph is largely uncontroversial, paragraph 6 will be permitted to remain in the affidavit, even though this information was not directly within in the personal knowledge of the affiant at the time the affidavit was sworn.

(b) Paragraph 7

[17] Paragraph 7 reads as follows:

> *7. It is my belief that, on or shortly before December 5, 2016, members of management at Evraz Wasco Pipe Protection Corporation were aware of union activity among employees. The termination of Ms. Findlay's employment with Evraz Wasco Pipe Protection Corporation, shortly after she discussed with a group of her co-workers whether they supported the union's organizing drive, has had a chilling effect on the organizing drive. After Ms. Findlay's employment was terminated, I noticed some employees who had previously expressed interest in the union's organizing drive were less receptive and had new questions about the risks they could incur by supporting the union in its attempts to organize.*

[18] The Employer submits that the affiant lacked any personal knowledge of the assertion contained in the opening sentence. The Board agrees that this sentence is based on conjecture with no factual basis to support it. As a result, this sentence must be struck from the affidavit.

[19] Respecting the balance of this paragraph, Union counsel argues that this information should be permitted to remain as a "special circumstances" exception contemplated in subsection 15(3) of the *Regulations*.

[20] As noted in *Health Sciences*, *supra,* the "special circumstances" exception to the personal knowledge requirement for affidavits submitted on interim relief applications is new and its meaning has not been the subject of any prior decision of this Board. Its interpretation was not argued in depth by the parties at the hearing. As a consequence, the Board must be cautious not to establish new principles in the absence of full argument and legal briefing. At the very least, however, to qualify as "special circumstances" under subsection 15(3) of the *Regulations* the party seeking to tender the affidavit in dispute has to demonstrate that there are legitimate and persuasive reasons why the individual possessing personal knowledge of the matters attested to is unavailable to file an affidavit on his or her behalf.

[21] While leaving the question of what constitutes "special circumstances" to another day, the Board acknowledges the reality that in the course of a certification drive there may often exist a certain level of trepidation among employees about how management might perceive the future prospect of unionization in its workplace and their attitude towards employees who are actively working towards that end. These fears can be exacerbated by unusual events taking place at the workplace during such a time.

[22] In this application, there is evidence that among employees at the Employer's worksite the perception exists that she was fired in large measure because she advocated for unionization and encouraged her co-workers to support the Union. Indeed, this is Ms. Findlay's

perception as well, as she herself attests in her affidavit. Furthermore, Mr. Guerra attests to interactions he personally had with unidentified employees who had decidedly cooled towards the Union following her termination.

[23] For purposes of this application and in the factual context of this particular matter, the Board is prepared to permit the balance of paragraph 7 to remain in the Guerra Affidavit.

(c) <u>Paragraphs 8, 9, 10 and 11</u>

[24] The Board finds it convenient to deal with these paragraphs together.

[25] These paragraphs read as follows:

> *8. As a union Organizer, termination of an employee who publicly supports the union's organizing drive during the attempts to form a union intimidates employees in the exercise of their rights to choose union representation, and I believe the termination of Ms. Findlay will influence the representation vote.*
>
> *9. The period of time before a representation vote is concluded and a certification order issues is a particularly vulnerable time, when employees are especially susceptible to interference and intimidation.*
>
> *10. I believe the effect of the termination of Ms. Findlay will cause the union and its members irreparable harm, unless Ms. Findlay is reinstated on an interim basis until the union's Unfair Labour Practice can be heard.*
>
> *11. I believe there is a real danger that the employer's actions in terminating Ms. Findlay's employment will, if not remedied on an interim basis through the union's application, discourage employees from exercising their rights under The Saskatchewan Employment Act, and discourage or improperly influence employees in casting ballots in the representation vote.*

[26] The Employer submits that these paragraphs ought to be struck because they are simply statements of opinion without identifying a source for these opinions or providing any factual basis for them.

[27] The Board agrees that much of what is contained in these paragraphs represent Mr. Guerra's unvarnished opinions. It is true that no particular source for these opinions is enumerated in these paragraphs. However, as Mr. Guerra attests at the outset of his affidavit, he is the designated organizer for the Union in this workplace. Although the affidavit regrettably does not set out the length of Mr. Guerra's experience as a Union organizer, the Board is of the

view that these paragraphs should be read as drawing upon his experience as an union organizer involved in other organizational drives.

[28] Respecting paragraphs 10 and 11, these paragraphs are reminiscent of the affidavit filed by a national union representative in *C.U.P.E., Local 4836 v Luthercare Communities*, LRB File No. 043-09, 2009 CanLII 22876. There the Board struck the entire affidavit for various reasons, most notably because it was argumentative and based almost entirely on the affiant's information and belief and not his personal knowledge.

[29] In light of these principles, the Board concludes the following in respect of those paragraphs:

- **Paragraph 8:** The final clause of this paragraph – "and I believe the termination of Ms. Findlay will influence the representation vote" – shall be removed as it is Mr. Guerra's opinion with no basis in fact. The remainder of the paragraph is permitted to remain in the Affidavit as it based his experience as a union organizer, generally.

- **Paragraph 9:** This paragraph is permitted to remain in the Affidavit as it, too, is based on Mr. Guerra's experience as a union organizer, generally.

- **Paragraphs 10 and 11:** These paragraphs are struck as they are argumentative and represent Mr. Guerra's personal opinions on the very issues the Board is asked to determine on this application. There is no factual basis identified to substantiate the unqualified opinions set out in these paragraphs.

(d) <u>Paragraphs 12, 13 and 14</u>

[30] These paragraphs, too, will be dealt with together. They read as follows:

> *12. During the organizing drive, I have spoken with many employees employed by the employer. These employees cannot be identified without potentially disclosing whether employees support the union and without having a negative impact on these employees' exercise of rights under the Act. My understanding is the employer relies on a comment Ms. Findlay made to Habib as the reason her employment was terminated. I have heard from other employees that the type of comment the employer relies on to terminate Ms. Findlay's employment is not the type of conduct that has led to the termination of other employees. In this workplace, it is my understanding that other employees who have engaged in a physical altercation with a co-worker and [made] inappropriate comments remain in the employment of the employer. The reasons given for the termination of Ms. Findlay's employment are not consistent with the normal working relationships, expectations and climate of this workplace.*
>
> *13. If the interim relief sought is not ordered, I believe employees will continue to be discouraged or intimidated or otherwise improperly influenced or dissuaded from freely exercising their rights under the Act without fear that support for the union may negatively affect their security of employment. Absent interim relief, the employer's actions are likely to have a substantial impact on the outcome of the representation*

> *question, when the vote is conducted, and cause the union and employees irreparable harm.*
>
> *14. Interim reinstatement of Ms. Findlay's employment is necessary to avoid further irreparable harm to the union and employees in their exercise of rights in the voting process and otherwise under the Act.*

[31] The Employer submits that paragraphs 13 and 14 should be struck from the affidavit for the reason that the information set out is argumentative, lacking any basis in fact, and represent Mr. Guerra's own opinions respecting the central issues to be decided on this application for interim relief. The Board agrees with the Employer's objections to the inclusion of these paragraphs. They, like paragraphs 10 and 11 discussed above, are argumentative and based entirely on Ms. Guerra's information and belief. As a consequence, these paragraphs must be excised from the affidavit.

[32] The Board is of the view that the admissibility of paragraph 12 is a harder issue. The Employer principally relies on this Board's Decision in *Grain Services Union (ILWU-Canada) v Startek Canada Services Ltd.*, LRB File No. 032-04, 2004 CanLII 65591 (SK LRB) ["*Startek*"]. There the Board struck the entire affidavit submitted on behalf of the application. Chairperson Seibel found it to be rife with paragraphs based solely on information and belief without providing any source for this information. As a consequence, once the offending paragraphs were excised what remained could not support the interim application and the application failed.

[33] It should be noted that *Startek* was decided prior to the promulgation of section 15 of the *Regulations*. Until that time, the practice of the Board was summarized in *Saskatchewan Joint Board, Retail Wholesale v Loraas Disposal Service*, LRB File No. 208-97, [1997] Sask. L.R.B.R. 517 ["*Loraas*"], at 523 as follows:

> *A procedural issue was raised by counsel for the Employer with respect to the sufficiency of the affidavits filed by the Union. <u>It has been the practice of this Board to require that affidavits filed in an application for interim relief be based on personal knowledge</u>. [Emphasis added.]*

[34] With the advent of subsections 15(3) and (4) of the *Regulations*, however, the precedential value of cases such as *Startek* and *Loraas* has been muted somewhat. Paragraphs based on information and belief are permissible in special circumstances provided the source of this information is clearly identified. That said, the guiding principle governing

affidavits submitted by parties on applications for interim relief remains that those affidavits are to be founded upon the affiant's personal knowledge.

[35] The Board has concluded that on balance paragraph 12 must also be struck. To begin, It is entirely based on information and belief. While we accept that in the context of an organizing drive employees are understandably reluctant to identify themselves to their employer by filing an affidavit in a proceeding such as this, there is insufficient specificity respecting how many "employees" he spoke with, when he spoke to them and where. Information such as this would at the very least allow the Employer and the Board to determine its significance to this application.

(e) Conclusions on the Employer's Objections to the Guerra Affidvait

[36] As the Board held in *Health Sciences*, *supra*, at paragraph 21 "striking an affidavit in its entirety because it contains information not founded on personal knowledge should be a remedy of last resort". Only if the Board is satisfied that "the offending paragraphs have so polluted the affidavit that it is not possible to rely upon what remains of the document" would it then be appropriate to strike the entire affidavit from the record.

[37] For the foregoing reasons, the Board has determined that paragraphs 10, 11, 12, 13 and 14 should be struck from the Guerra Affidavit as well as the first sentence in paragraph 7, and the final clause in paragraph 8. With these portions excised, the Board is satisfied that it would not be appropriate to strike the Guerra Affidvait and will admit the balance of this affidavit.

C. Application for Interim Relief

1. Relevant Legal Principles

[38] An excellent summary of the general principles respecting applications for interim relief brought pursuant to subsection 6-103(5) of the *SEA* is found in *Saskatchewan Government and General Employees' Union v The Government of Saskatchewan*, LRB File No. 150-10, 2010 CanLII 81339 (SK LRB) ["*SGEU*"] at paragraphs 30 – 32 as follows:

> *[30] Interim applications are utilized in exigent circumstances where intervention by the Board is thought to be necessary to prevent harm from occurring before an application pending before the Board can be heard. Because of time constraints, interim applications are typically determined on the basis of evidence filed by way*

> *of certified declarations and sworn affidavits without the benefit of oral evidence or cross-examination. As such, the Board is not in a position to make determinations based on disputed facts; nor is the Board able to assess the credibility of witnesses or weigh conflicting evidence. Because of these and other limitations inherent in the kind of expedited procedures used to consider interim applications, the Boards utilizes a two-part test to guide in its analysis: (1) whether the main application raises an arguable case of a potential violation under the Act; and (2) whether the balance of convenience favours the granting of interim injunctive relief pending a hearing on the merits of the main application.*
>
> *. . . . . .*
>
> *[31] In the first part of the test, the Board is called upon to give consideration to the merits of the main application but, because of the nature of an interim application, we do not place too fine a distinction on the relative strengths or weakness of the applicant's case. Rather, the Board seeks only to assure itself that the main application raises, at least, an "arguable case".*
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> *. . . . . .*
>
> *[32] The second part of the test – balance of convenience – is an adaption of the civil irreparable harm criteria to the labour relations arena….In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy. [Citations omitted.]*

2. Onus

[39] In applications such as this one, the onus rests upon the applicant. See: *Health Services*, *supra*, at para. 34. As well, it is settled the reverse onus created in subsection 6-62(4) that operates in unfair labour practice applications such as this one is not relevant on an interim relief application. See especially: *International Union of Bricklayers and Allied Craftsmen, Local #1 Sask, v Regal Flooring Ltd.*, LRB File No. 175-96, [1996] S.L.R.B.D. No. 61, at para. 21.

3. Factual Background

[40] As noted above, the Union filed two (2) affidavits supporting its application for interim relief: the Affidavit of Diane Findlay dated December 9, 2016, and the Affidavit of Pablo Guerra dated December 14, 2016.

[41] In her affidavit, Ms. Findlay deposed to the following factual matters relevant to this application:

- She was employed as a lead hand at the Employer's workplace until her termination on December 5, 2016 (para. 1).
- On November 25, 2016, she suffered an electrical shock at the worksite (para. 2).

- On November 27, 2016, she visited a physician because she experienced abdominal pain as a result of this shock (para. 3).

- On November 28, 2016, she returned to work for the night shift commencing at 5:30 p.m. Shortly after the tool box meeting, an assistant manager named Habib asked her if she was okay. He then pretended to punch her in the area of her abdomen where she had been in pain. In response she told him not to hit her or she "would shove a wooden doorstop up his ass". In response, Habib laughed, hit her in the arm and walked away. Nothing further was said by anybody about this encounter (paras. 4 and 5).

- On November 30, 2016, she spoke publicly to a group of approximately 15 persons about the organizing drive. She presented union cards to a number of them (para. 6).

- On December 5, 2016, she was asked to attend a meeting with representatives of the Employer's human resources department. She was asked about her previous encounter with Habib. Initially, she could not recollect it. After the meeting, the Employer sent her home before the end of her shift (para. 7).

- On December 6, 2016, at approximately 6:00 p.m. she was told by her employer that she was terminated from her employment (para. 8)

- Prior to her termination, she had not been disciplined or warned by the Employer for improper conduct (para. 9).

- After she was promoted to assistant superintendent, Habib made inappropriate sexual remarks to her and she told him not to make such remarks to her because he was her supervisor (para. 10).

[42] Once the offending portions are excised from his affidavit, Mr. Guerra deposed to the following matters relevant to this application:

- He is a union organizer employed by the Union and is responsible for District 3 which includes Saskatchewan. He was assigned to assist employees at the Employer's workplace to obtain certification (paras. 1-2).

- The termination of Ms. Findlay by the Employer in the course of a certification has appeared to affect employees who prior to that event expressed interest in unionization (para. 7).

- As a union organizer, it is his experience that the termination of an employee publicly supportive of the union intimidates employees (para. 8).

- The time before the representation vote concludes and a certification order issues is for employees a particularly vulnerable time (para. 9).

[43] As already noted, the Employer filed four (4) affidavits in support of its Reply: the Affidavit of Habib Faal; the Affidavit of Greg Wright; the Affidavit of Bryan Taylor, and the Affidavit of Leonard Shane Prudhomme. All of these affidavits are dated December 14, 2016.

[44] In his affidavit, Mr. Faal deposed to the following matters relevant to this application:

- He is employed as the Plant Superintendent at the Employer's workplace which is a specialized pipe coating facility. He was Ms. Findlay's direct supervisor at all material times (paras. 1-2).

- On November 28, 2016, for approximately 20 minutes after the evening shift had started, he noticed Ms. Findlay and some employees she supervises standing around. He told them to go to their workstations and start work (para. 4).

- He returned a short time later to discover these individuals had not yet started work. He told them to perform certain tasks including cutting duct tape with a knife. He reminded them to wear cut resistant gloves when doing so. Ms. Findlay then stated "the opposite shift was manned with 'pussies' and they needed to go to the gym as they were all weak and stupid" (para. 5).

- He disapproved of Ms. Findlay's behavior and told her it was not acceptable, given she had just experienced a safety incident. He reminded her that as a leader she was expected to set a good example to the employees she supervised. Ms. Findlay then grabbed a wooden door stop from the construction table and told him "bend over and I'll shove this up your ass". This threat of violence upset him (para.6).

- On November 30, 2016, he reported this incident and Ms. Findlay's insubordinate behavior to his supervisor, Mr. Prudhomme (para. 7).

- He expressly denied ever hitting, punching or pretending to hit or punch Ms. Findlay either in her or stomach or her arm (para. (1).

- He expressly denied every making any sexual comments towards Ms. Findlay (para. 1)

[45] In his affidavit, Mr. Wright deposed to the following matters relevant to this application:

- He is the Manager of Health, Safety and Environment at the Employer's workplace. His core responsibilities are to promote and provide a health and safety culture at the workplace (paras. 1-2).

- On November 26, 2016, he received a telephone call from Ms. Findlay. She told him that on the previous day she had made contact with the holiday detection station and received an electrical shock. She now felt unwell. He told her to seek immediate medical attention at the nearest hospital emergency department. She told him she would (para. 3).

- On November 27, 2016, he followed up with Ms. Findlay. She told him she had not gone to the hospital yet. Later that day, she texted him and asked for the contact information for the company's doctor. He gave her the information but told her that his office was not opened on a Sunday (para. 5).

- On November 28, 2016, Ms. Findlay contacted him and asked what time she should come to the Health, Safety and Environment office to complete the safety incident statement. He advised her to complete the statement with Mr. Bryan Taylor. She replied "absolutely not" (para. 6).

- Later that same day, he asked Ms. Findlay if she had obtained a doctor's note. She rolled her eyes and said no. He then asked her why she did not go to the emergency department when he had asked her. She replied that she "had things to do". He found her flippant attitude towards health and safety at the workplace troubling (para. 7)

[46] In his affidavit, Mr. Taylor deposed to the following matters relevant to this application:

- He is employed as a Health, Safety and Environment Shift Supervisor at the Employer's workplace. One of his responsibilities is to report safety incidents that occur during the night shift (paras. 1-2).

- In the early morning hours of November 26, 2016, Ms. Findlay came to him and reported that she had received an electrical shock when she made contact with the holiday detection station. She explained that she had touched the station with a wire brush which caused her to receive an electrical shock. At the time she did not express any discomfort as a result of this shock. He logged the event in accordance with the Employer's Health, Safety and Environment policy (paras. 3, 4 and 5).

- The holiday detection station "is a highly sensitive electrical device designed to locate pinholes, voids, and thin spots in the coating (referred to as "holidays"), not easily seen by the naked eye. These are used on the coatings of relatively high-electrical resistance when such coatings are applied to the surface of materials of steel pipe" (para. 3).

- On November 28, 2016, he witnessed Ms. Findlay in the presence of employees whom she supervises, deliberately touch the holiday detection station. She again received an electrical shock. He spoke to her and said he couldn't believe she shocked herself again (para. 6).

[47] In his affidavit, Mr. Prudhomme deposed to the following matters relevant to this application:

- He is the Vice-President of Wasco North America and General Manager of Evras Wasco Pipe Protection Corporation. He is responsible for the operations and the management of the Employer's workplace in Regina (paras. 1-2).

- Ms. Findlay was hired on August 3, 2016 in an operator position in the production department. She reported to her Superintendent, Habib Faal (para. 5).

- Approximately two (2) weeks after being hired, Ms. Findlay was advanced to a Team Leader position. In that position she was responsible for supervision of approximately 15 production staff members as well as various health, safety and environmental duties (para. 6).

- Ms. Findlay received extensive health and safety training upon being hired (para. 7).

- When he returned to his office on November 30, 2016 after being away on vacation leave, Mr. Faal advised him that Ms. Findlay had been involved and contributed to two (2) health and safety infractions as well as exhibited insubordinate behavior that was unacceptable to the Employer. Upon learning of these events, he directed that Ms. Findlay's actions should be reviewed in full (paras. 8-9).

- On December 5, 2016, Ms. Findlay attended a meeting with Ms. Diane Herbert, Senior Manager for Human Resources, Mr. Steve Demchuk, the Assistant General Manager and Mr. Prudhomme (para. 10).

- At that meeting, Ms. Findlay initially denied making a threat towards Mr. Faal but then later referred to it as a joke. She never said anything about Mr. Faal making sexually inappropriate remarks to her (para. 11).

- He also asked Ms. Findlay why she repeated the unsafe behavior in front of employees she supervised. She offered no explanation and "just shrugged her shoulders" (para. 12).

- Based on his review of the safety infractions, Ms. Findlay's insubordination and her response to his questions, he determined her continued employment "was untenable". He then terminated Ms. Findlay on December 5, 2016. He believes the Employer's workplace "is safer and better for it" (paras. 13-14).

- Ms. Findlay's termination was not motivated by the Union's organizing activities and Ms. Findlay's role in them. Until he read Ms. Findlay's affidavit filed in these proceedings, he "was not aware that Ms. Findlay was involved in any organizing efforts" for the Union (paras. 16-17).

4. Has the Union Demonstrated an Arguable Case?

[48] The first part of the test for interim relief requires the Board to assess whether the main application, namely the Union's unfair labour practice application demonstrates an arguable case. *SGEU*, *supra*, makes it clear that this is not a rigorous standard. Rather, it only requires an application to demonstrate that it is more likely than not the main application raises and arguable case.

(i) The Union's Position

[49] The Union asserts that Ms. Findlay's termination was motivated in large measure because of her active participation in the Union's organizing drive. Counsel for the Union relies principally upon the Board's decisions in *Saskatchewan Government Employees Union v Regina Native Youth and Community Services Inc.*, [1995] 1st Quarter Sask. Labour Rep. 118, LRB File Nos. 144-94, 159-94 & 160-94 ["*Regina Native Youth*"]; *United Steelworkers v Comfort Cabs Ltd.,* 2013 CanLII 62414 (SK LRB) ["*Comfort Cabs*"]; *Re Chinook School Division No. 211*, LRB File Nos. 025-08, 026-08 & 027-08, [2008] S.L.R.B.D. No. 6 ["*Chinook School Division*"], and *SEIU West v Revera Retirement Genpar Inc.*, LRB File Nos. 080-11, 093-11, 095-11 & 100-11, 2011 CanLII 75835 (SK LRB) ["*Revera Retirement*"]. She states that these authorities demonstrate when, as here, a reasonable argument can be advanced that an employee's termination may be linked to his or her exercise of a worker's rights protected not only under the *SEA* but also section 2(d) of the *Canadian Charter of Rights and Freedoms* [the "*Charter*"], an arguable case has been demonstrated.

(ii) The Employer's Position

[50] The Employer disputes the Union's assertions that it terminated Ms. Findlay because of her active and public support for the Union's organizing drive. Counsel for the

Employer submits that the affidavit evidence submitted on this application, including Ms. Findlay's own affidavit, shows that she committed at least one (1) serious safety infraction as well as made insolent and insubordinate comments to her supervisor, Mr. Faal. In the face of this evidence, counsel submits that Ms. Findlay was terminated for clear and legitimate reasons, and not because of her purported union activity, of which the Employer was not aware at the time of her termination. The Employer relies principally on *United Food and Commercial Workers, Local 1400 v The Watrous Cooperative Association Ltd.*, LRB File Nos. 037-11, 038-11, 039-11 & 040-11, 2011 CarswellSask 389 ["*Watrous Cooperative*"].

(iii) Analysis and Decision on the Arguable Case Issue

[51] There are a number of grounds upon which the Union bases its unfair labour practice; however, on this application it relied principally on subsection 6-62(1)(g) of the *SEA.* This provision prohibits employers from using coercion or intimidation and from discriminating in the treatment of its employees because of their support for a union, because of their desire to be unionized, or because they have exercised a right granted under the *SEA*. See *e.g.*: *Comfort Cab*, *supra*, at para. 40.

[52] In *Regina Native Youth*, *supra*, the Board described the purpose behind section 11(1)(e) of *The Trade Union Act*, RSS 1978, cT-17 – the precursor to subsection 6-62(1)(g) – as follows at page 123:

> *It is clear from the terms of s. 11(1)(e) The Trade Union Act that any decision to dismiss or suspend an employee which is influenced by the presence of trade union activity must be regarded as a very serious nature. If an employer is inclined to discourage activity in support of a trade union, there are few signals which can be sent to employees more powerful than those which suggest that their employment may be in jeopardy. The seriousness with which the legislature regards conduct of this kind is indicated by the fact that the onus rests on the employer to show that trade union activity played no part in the decision to discharge or suspend an employee.*

[53] Issues of this kind have confronted this Board since its inception in 1945. As counsel for the Union observed, the very first decision of the Board involved an application for reinstatement of an employee who had been terminated for union activity. See: *Hotel and Restaurant Employees' and Beverage Dispensers' Union, Local 829 v Stanley Kraft (Empire Hotel, Regina)* dated April 9, 1945, Decisions of the Saskatchewan Labour Relations Board and

Court Cases Arising Therefrom, Volume I 1945-1954 (1975, Saskatchewan Queen's Printer), at pp. 1-3.

[54] The statutory protection from employer retaliation for union activity conducted by its employees now has a constitutional dimension. In *Mounted Police Association of Ontario v Canada (Attorney General)*, [2015] 1 SCR 3, 2015 SCC 1, the Supreme Court of Canada held that union organizing was a constitutionally protected activity under section 2(*d*) of the *Charter* which guarantees to everyone the fundamental freedom of association. Speaking for the majority, McLachlin C.J. and LeBel J. stated at paragraph 66:

> *[66] In summary, s.2(d) viewed purposively, protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.[Emphasis added.]*

[55] The Board has determined that the Union has met is burden on the first aspect of test for interim relief for the following reasons.

[56] First, a hearing must be held to resolve discrepancies in the evidence presented on this application. For example, there is disagreement between the Union's witness and the Employer's witnesses about what transpired at the workplace on November 26, 2016. In particular, the version of events deposed to by Ms. Findlay differs substantially from the account offered by Mr. Faal in his affidavit. As this incident appears to be the triggering event leading ultimately to Ms. Findlay's termination it is necessary to determine what actually happened at that time.

[57] Furthermore, there is no mention of a second safety infraction by Ms. Findlay in her affidavit. In his affidavit Mr. Taylor describes this incident in some detail. It is also not possible for the Board to assess the credibility of these two (2) witnesses and resolve this obvious discrepancy on an interim relief application.

[58] Second, in our view this case is more analogous to *Revera Retirement*, *supra*, than *Watrous Cooperative*, *supra*. Here the evidence is clear that the Union was conducting an organizing drive in the Employer's workplace. For example, in his affidavit Mr. Prudhomme states that he was unaware that Ms. Findlay was actively participating in this activity, however, he does not depose that he was unaware that such a drive was underway. These factors set

this case apart from *Watrous Cooperative, supra*. There the Board concluded at paragraph 44 that there was insufficient evidence to show a membership drive was taking place at the workplace or that the employee's termination was connected to it. As a result, the Board accepted the Employer's assertion that the employee had been terminated for legitimate reasons.

[59] In *Revera Retirement*, the issue was whether in the course of a union organizing drive, the dismissal of three (3) housekeeping staff members was in retaliation for their union activities or for reasons of legitimate financial restraint. On an application for interim relief, the Board determined there was a sufficient correlation between the union drive and terminations to satisfy the arguable case criterion. In his Reasons for Decision, Chairperson Love made the following comments at paragraph 30 which are apposite to this application:

> *While the evidence does not clearly establish that the employees were terminated by reason of an anti-union animus for exercising their rights under [The Trade Union Act], there is sufficient evidence to support an arguable case that the terminations were more than mere coincidence. The Board does not assess the strength of the case at this stage of the proceedings, and the evidence that comes before the Board on the final application will undoubtedly be much clearer with respect to these issues. The evidence of the parties has not been tested by cross-examination and as a result, no absolute conclusions can be drawn. Similarly, we have not had the opportunity to see and observe the witnesses or make any assessment of their credibility in respect of the issues before us. The timing of the terminations may be co-incidental, as argued by the Employer, but that timing, nevertheless, raises the suspicion that the termination may have another motivation.*

[60] While the Board does not discount the Employer's legitimate concerns respecting Ms. Findlay's apparent breaches of workplace safety protocols and practices, there is sufficient evidence presented here to raise suspicions about whether this was the actual reason for her termination. We are mindful of the direction in *SGEU, supra*, that the Board should not weigh too finely "the relative strength or weakness of the applicant's case". Rather, "an application seeking interim relief need not demonstrate a probably [sic] violation or contravention of the Act as long as the main application reasonably demonstrates more than a remote or tenuous possibility". See: *SGEU*, *supra*, at paragraph 30.

[61] It is our considered view that the Union has satisfied its burden on this aspect of the test for interim relief.

5. Does the Balance of Convenience Favour the Issuance of an Order for Interim Relief?

[62] The second part of the test for interim relief under the *SEA* asks the Board to determine whether or not the balance of convenience favours the issuance of an interim order. This aspect of the inquiry is analogous to the test for injunctive relief utilized by superior courts in the civil context. Very recently, in *Health Sciences*, *supra*, at paragraph 65, the Board adopted the following statement from *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Aaron's Furniture*, LRB Files No. 265-15 & 268-15, 2016 CanLII 1307 (SK LRB):

> *[26] This factor [i.e. balance of convenience] is similar to the requirement that an applicant for interim relief must show that the labour relations harm in not issuing the interim order outweigh the labour relations harm in issuance of the requested order. At common law, this is generally regarded as the requirement to show irreparable harm if the interim order is not made.*

(i) The Union's Position

[63] The Union asserts the labour relations harm flowing from Ms. Findlay's termination just prior to the representation vote is significant in that it will dissuade other employees from voting for unionization for fear that they may suffer reprisals from the Employer which might include termination. In particular, the Union relies upon *Saskatchewan Joint Board, Retail Whole and Department Store Union v Sakundiak Equipment,* LRB File No. 120-11, 200 C.L.R.B.R. (2d) 179 ["*Sakundiak Equipment*"]. There the Board stated at paragraph 45:

> *[45] With respect to the second branch of the test, the Board has acknowledged in numerous cases that firing an employee closely associated with a trade union's organizing campaign can have a chilling or dampening effect on a trade union's organizing drive. See: Chelton Suites Hotel, supra, and Startek Canada Services, supra. See also: Hotel Employees and Restaurant Employees Union, Local 206 v. Regina Inn Hotel and Convention Centre, [1999] Sask. L.R.B.R. 190, LRB File No.131-99; United Steelworkers of America, Local 5917, v. Superior Hard Chrome Inc., [1999] Sask. L.R.B.R. 721, LRB File Nos. 321-99 to 323-99; and United Food and Commercial Workers Union, Local 1400 v. Heritage Inn, [2001] Sask. L.R.B.R. 125, LRB File No. 056-01, 057-01 & 058-01. The Board is particular [sic] sensitive to this concern in the period prior to the conduct of a representative vote as now required by the Act. Prior to the conduct of the representative vote, the Union's support within the workplace is vulnerable to influence and, if the allegations are founded, the damage to the Union's reputation and the potential coercive effect on the Union's support prior to the vote could result in irreparable harm to the Union by the time a full hearing on the merits could be conducted by the Board.*

(ii) The Employer's Position

[64] The Employer asserts that labour relations harm flowing to it were interim relief ordered outweighs any labour harm to the Union if it is not. In particular it asserts that Ms. Findlay was terminated for legitimate reasons. At paragraph 49 of the Employer's Written Argument it states in part:

> *The evidence shows Ms. Findlay was terminated for cause due to serious safety violations. The Employer submits that returning Ms. Findlay to a position of responsibility for supervising a safety sensitive work environment would expose the Employer, its other employees and Ms. Findlay to unacceptable safety risks.*

[65] The Employer submits that the evidence that Ms. Findlay's termination has had a chilling effect of other employees is speculative at best.

(iii) Analysis and Decision on the Balance of Convenience Issue

[66] On this aspect of the test, the Board concludes that the Union has demonstrated that the early intervention of the Board in this dispute is warranted.

[67] The issue in this case does not arise in the context of a unionized workplace where a union has been active over a period of time. Here an organization drive has just concluded and a representative vote is currently underway. It is apparent that the general trend in the Board's jurisprudence is to ensure that such a vote is conducted fairly and where an employee is terminated at such a critical time the Union suffers labour relations harm which interim relief will be needed to staunch. See especially: *Sakundiak Equipment*, *supra*.

[68] The labour relations harm to the Employer should Ms. Findlay be reinstated must be balanced against the potential labour relations harm to the Union in the course of its union drive and the subsequent representative vote. That balance, in most cases, should be resolved in favour of the Union so as to give full effect to employees' rights under subsection 6-4 of the *SEA* and section 2(*d*) of the *Charter* to "organize in and to form, join, or assist unions and to engage in collective bargaining through a union of their own choosing". In this case, the Board is of the view that this balance of labour relations harm favours the Union and Ms. Findlay.

[69] As a result, the Board is ordering that Ms. Findlay's termination be set aside. That said, the Board is cognizant of the Employer's legitimate workplace safety concerns should

Ms. Findlay be permitted to return to workplace. Therefore, the Board is ordering that Ms. Findlay be suspended with pay, pending the outcome of the Union's unfair labour practice application in this matter at which time the true reason for her termination will be determined. The hearing of that application is scheduled for February 16 and 17, 2016.

[70] The timing of this Order is complicated because Christmas is almost upon us. Accordingly, the Board in crafting its Order will take this fact into account.

6. Conclusion and Order of the Board

[71] Therefore, the Board makes the following Interim Order pursuant to subsections 6-103(2)(d) and 6-111(1)(s) of the *SEA*:

(1) That as soon as possible after receiving the Board's Reasons for Decision and Order and in any event no later than December 28, 2016, the Employer shall post a copy of the Order and the 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 unfair labour practice application;

(2) That no later than December 28, 2016 and until the final determination of the Union's unfair labour practice application, Ms. Danielle Findlay be placed on paid leave with the Employer, and

(3) That the Board's Order shall remain in effect until such time as the Board disposes of the Union's unfair labour practice application and depending upon whether it is resolved in favour of the Union or the Employer, there may be no further obligation to employ Ms. Findlay from that time.

[72] It is not necessary on this interim relief application to make an order for monetary loss as none was requested by the Union.

[73] In conclusion, the Board wishes to thank counsel for their oral presentations and excellent written legal memoranda. They were very helpful to us in arriving at our decision.

[74] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **23rd** day of **December, 2016**.

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson