UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, APPLICANT v VERDIENT FOODS INC., RESPONDENT

LRB File No. 103-19; May 24, 2019
Vice-Chairperson, Barbara Mysko; Board Members: Aina Kagis and Ken Ahl

Counsel for the Applicant, Union: Dawn McBride
Counsel for the Respondent, Employer: Katherine S. Melnychuk

Interim Application – Unfair Labour Practice – Arguable Case – Employee terminated allegedly after assisting Union in its certification application – Employer asserts employee terminated because of work performance – Board finds that Union demonstrated an arguable case that 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 prior to the hearing on the certification application – The Union has not established a meaningful risk of irreparable harm – Board concludes that labour relations harm to Union if employee not reinstated does not outweigh labour relations harm to the Employer if employee reinstated.

Interim Application – Unfair Labour Practice – Remedy – Board declines to order requested remedy of reinstatement – The Union's application for interim relief is dismissed.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision on an Application for Interim Relief seeking reinstatement of an employee to his position at Verdient Foods Inc. [the "Employer" or "Verdient"]. Verdient is in the business of dry fractionation of pea products, and operates a fractionation plant in Vanscoy, Saskatchewan. The individual who is the subject of the Interim Application was employed in the Quality Assurance and Quality Control ["QA/QC"] Department.

[2] On February 21, 2019, the United Food and Commercial Workers, Local 1400 [the "Union"] filed a Certification Application for all employees of Verdient, except for specified exclusions.[1] On March 4, 2019, a Notice of Vote was sent to employees, with a deadline of March 18, 2019. The Employer filed a Reply to the Certification Application, objecting to the inclusion of certain positions in the bargaining unit, specifically QA/QC Inspectors, Administrative Assistants, and Lab Technicians. A hearing is scheduled to deal with the Employer's objections, on July 10, 11 and 12, 2019.

[3] One of the QA/QC Inspectors, Martin Lapointe ["Lapointe"], was terminated on April 18, 2019. A related Unfair Labour Practice Application was filed by the Union on April 26, 2019.[2] In that application, the Union submits that the Employer has been or is engaging in an unfair labour practice (or a contravention of the *Act*) within the meaning of clauses 6-62(1)(a), (b), (g), and (i) of *The Saskatchewan Employment Act* [the "*Act*"]. On April 29, 2019, the Union filed this Interim Application requesting the reinstatement of Lapointe to his position with the Employer.

[4] In the Unfair Labour Practice Application, the President of the Union, Norm Neault ["Neault"], states:

> …
>
> 5. *Martin Lapointe was an employee of the Employer commencing on March 12, 2018. His initial position was lab technician and in August 2018 he moved into the position of QA/QC Inspector. This QA/AC Inspector position is one of the positions the employer seeks to exclude.*
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> 6. *Martin Lapointe was a lead organizer for UFCW 1400, and the Union believes this became known to the employer. Martin Lapointe was active in promoting the organizing campaign in the following ways:*
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>   a. *He was the main lead in the certification drive;*
>   b. *He was the main person who had other employees sign union cards;*
>   c. *He participated in the earlier certification application to the Canada Labour Board and collected the $5.00 union membership fee;*
>   d. *He was involved in meeting with the Union lawyer respecting the employer's application for exclusions under the certification order; and*
>   e. *He returned the $5.00 membership fee when the federal certification was discontinued and the provincial application was made.*
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> 7. *Martin Lapointe had never been reprimanded or disciplined for any reasons regarding performance, attendance, attitude, or productivity; with the exception that he was written up once in or about December 2018. The discipline in December was for not informing his*

[1] LRB File No 040-19.
[2] LRB File No 101-19.

manager that he was going to safety training, improper preparation of samples and improper logging of garbage tote. All three issues were included in one write up.

8. *On April 17, Martin Lapointe was interviewed by Union legal counsel on the issue of the employer's request for exclusion of his position of quality assurance inspector from the bargaining unit. He reviewed the job description of his position provided by the Employer to the Union as well as other job descriptions for other positions also sought to be excluded from the bargaining unit. Following this interview he questioned several employees respecting their job description in preparation for the upcoming hearing respecting the bargaining unit.*

9. *Shortly after engaging in these activities, Martin Lapointe was given notice that his employment had been terminated effective immediately (the "Termination"). The Termination was carried out without notice. He was terminated at a meeting with representatives of the employer being Amanda Barbosa, Marina Tim and an unknown HR representative. He was given no reasons for the termination. Further he had never been told prior to this termination that the employer had any concerns with respect to this job performance. After the termination meeting he emailed Marina Tim asking for the reasons for the termination of his employment and she has never responded.*

10. *At the time of the termination, the Employer requested Martin Lapointe to sign a Release, releasing the employer from any actions arising from the termination of his employment. The Release was not explained to him nor his rights under the Saskatchewan Employment Act to challenge his termination under these circumstances. The Union submits that the signing of this Release by Martin Lapointe was done through coercion and he was unaware of what he was signing.*

[5] The hearing of the Interim Application was held on May 17, 2019. The parties filed sworn evidence from four individuals: Lapointe, Amanda Martins Barbosa ["Barbosa"], Neault, and Lily Olson ["Olson"].[3] The parties filed written briefs and books of authorities, and made oral submissions outlining their respective positions. The Board has reviewed all the materials, which it has found helpful. At the close of the hearing, the Board indicated that it would reserve its decision.

Argument on Behalf of the Parties:

[6] The Union submits that Lapointe was terminated as a way of intimidating employees and discouraging them from testifying at the upcoming certification hearing. Lapointe was a lead in the Union's organizing drive, and held one of the positions that the Employer seeks to exclude from the bargaining unit. The Union interviewed Lapointe on April 17, 2019, after which he questioned a number of other employees about their job duties. He was terminated the next day.

[3] Affidavits of Martin Lapointe, sworn April 28, 2019 and May 15, 2019; Unfair Labour Practice Application, sworn by Norm Neault, April 19, 2019; Affidavit of Lily Olson, sworn April 26, 2019.

[7] According to the Union, the first stage of the test imposes a low bar, and that bar has been met. On the second part, the balance of convenience, the Board is called upon to assess the relative labour relations harm. As compared to labour relations harm, mere financial and administrative harm carry lesser weight. The statutorily enshrined reverse onus in the underlying Unfair Labour Practice Application is indicative of the degree of potential harm that this Board is called upon to assess. The labour relations harm to the Union far outweighs any labour relations harm to the Employer.

[8] On the question of anti-union animus, the Board can draw an inference from the timing of the termination and "the lack of concerns raised directly with Mr. Lapointe about his job performance and the complete lack of any reasons for terminating him". While the Board in similar cases is most often concerned with voter oppression, there is a significant chilling effect in this case. Due to the anticipated harm, the Union requests an order that the termination be set aside, that Lapointe be reinstated with back pay and other benefits, and that the Employer post the Board's Reasons.

[9] The Employer argues that the Union has failed to satisfy either stage of the test. The suggestion that there is "arguable case" cannot be sustained on the basis of "simple allegations". No evidence has been led to suggest that management was aware of Lapointe's involvement with the Union, and no inference can be drawn as to timing because the organizing drive and vote were over when the termination occurred.

[10] On the balance of convenience question, the Employer argues that the Union has failed to show that irreparable harm will follow if the Interim Application is dismissed. This is hardly a delicate time or a fragile workplace, and there is no risk of a chilling effect on the Union. There is no risk of labour relations harm to the Union. On the other hand, an alleged history of performance issues has impacted workplace morale and risked the integrity of Verdient's product. For these reasons, the Interim Application should be dismissed.

Evidence:

[11] Olson, Neault, and Lapointe convey a common set of facts. Lapointe was a lead organizer for the Union. He was active in promoting the organizing campaign in a number of ways, by being involved in the earlier certification application filed with the Canada Labour Board and collecting the requisite membership fee, and by engaging employees to sign support cards. Lapointe was aware that the Employer sought to exclude certain positions. At a meeting with legal counsel on

April 17, he agreed to speak with other employees about their job duties in preparation for the upcoming hearing, which he did the same day.

[12] Lapointe began working for Verdient as a Lab Technician on March 12, 2018. In August 2018, he moved into the position of QA/QC Inspector. Throughout the course of his employment as a QA/QC Inspector, he has not been reprimanded or disciplined for any reason in relation to performance, attendance, attitude or productivity, except for one occasion in December 2018. On that occasion, the Employer combined three issues in one write-up, including improper sample preparation, improper logging of garbage tote, and failure to inform management of his attendance at safety training. On April 18, 2019, he was terminated without notice. He was required to sign a release for the purpose of accessing his severance pay and did not review the release prior to signing.

[13] There is a discrepancy between the affidavits of Neault and Olson and the affidavit of Lapointe. Neault and Olson claim that Lapointe has not been reprimanded or disciplined for any reason in relation to performance, attendance, attitude or productivity, except on the occasion in December 2018. By contrast, Lapointe claims that, *in his job as QA/QC Inspector*, he has never been reprimanded or disciplined for any reason regarding performance, attendance, attitude, or productivity, with the exception of the December 2018 incident. He goes on to acknowledge that he "was also informed during [his] 3 month probation (March-May 2018) that there were areas in which the employer sought improvement".

[14] The Employer's sole affidavit was sworn by Amanda Martins Barbosa ("Barbosa"), a Quality Assurance/Food Specialist at Verdient, and manager of human resources for the Quality Assurance and Quality Control Department. Barbosa was Lapointe's direct supervisor throughout his employment. At all material times, there have been four QA/QC Inspectors at Verdient. QA/QC Inspectors work alongside Lab Technicians, Operators, and Lead Hands to ensure the fractionation process is efficient and to ensure product integrity. The Inspectors rely on each other to perform their duties accurately and effectively. According to Barbosa, Lapointe's work performance directly impacted the job duties of the other QA/QC Inspectors.

[15] Barbosa says that she personally observed and was advised of a pattern of work performance issues including slow performance, inaccuracies in record keeping, and neglecting to complete required tasks, traced to May 2018. These performance issues were significant.

Barbosa affixed to her affidavit a warning letter dated May 31, 2018, in which Lapointe was given 14 days to improve his performance or face termination. There are performance issues noted on June 5 and June 6, but despite this, Lapointe continues to be employed, and an approximately six-month break in demonstrated performance issues ensues. A detailed outline of concerns resumes on December 7, 2018 and continues until the eventual termination in April 2019.

[16] Lapointe filed a second affidavit in reply to Barbosa's affidavit. In his reply, Lapointe suggests that Barbosa's affidavit contains numerous factual inaccuracies and misrepresentations, particularly around his work performance. By taking issue with Barbosa's affidavit, the Union invites the Board to make assessments of credibility and weigh competing evidence. That is not the role of the Board at this stage. The affidavits make clear that the Board will grapple with credibility at the substantive hearing on the Unfair Labour Practice Application, but at this stage, the Board's role is restricted to answering the two-stage test before it.

Relevant Statutory Provisions:

[17] The following provisions of the *Act* are applicable:

> *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.*
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> *(2) No employee shall unreasonably be denied membership in a union.*
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> *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.*
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> *6-6(1) No person shall do any of the things mentioned in subsection (2) against another person:*
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> *. . .*
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> *(c) because the person has made an application, filed a complaint or otherwise exercised a right conferred pursuant to this Part[.]*
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> *(2) In the circumstances mentioned in subsection (1), no person shall do any of the following:*
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> *(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;*
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> *(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[.]

(h) to require as an condition of employment that any person shall abstain from joining or assisting or being active in any union or from exercising any right provided by this Part, except as permitted by this Part;

(i) to interfere in the selection of a union

. . .

(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*
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> *(b) agreeing with any union for 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*
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> *(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.*
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> *(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
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> *. . .*
>
> *(d) make an interim order or decision pending the making of a final order or decision.*

Analysis:

Onus of Proof:

[18] The Union acknowledges, and the Board agrees, that the onus on the Interim Application rests with the applicant. The Union also acknowledges that the reverse onus that operates on the underlying Unfair Labour Practice Application does not apply at the interim stage.[4] The Union suggests that the reverse onus is germane to the Board's assessment of the two-stage test, which the Board will consider in turn.

Analysis:

[19] The Board's authority to grant interim relief is rooted in clause 6-103(2)(d) of the *Act*, which reads:

> *(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
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> *. . .*
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> *(d) make an interim order or decision pending the making of a final order or decision.*

[20] There are two preconditions for an application for interim relief.[5] First, to ensure jurisdiction, the applicant must have filed an underlying application. The grant of interim relief is ancillary to the underlying application. In this case, the underlying application is the Unfair Labour Practice Application, and a related application is the Certification Application. Second, the

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[4] *Canadian Union of Public Employees Local 1949 v Legal Aid Saskatchewan*, 2018 CarswellSask 445, 2018 CanLII 91940 at para 28, LRB File Nos 164-18; 165-18 (SK LRB) ["*Legal Aid*"]; *United Steel, Paper And Forestry, Rubber, Manufacturing, Energy Allied Industrial And Service Workers International Union (United Steelworkers) v Evraz Wasco Pipe Protection Corporation*, 2016 CanLII 98635 (SK LRB) ["*Evraz*"] at para 39.

[5] *Active Electric Ltd. (Re)*, [2018] SLRBD No 11; 24 CLRBR (3d) 150 ["*Active Electric*"] at paras 8-9 (majority reasons).

applicant must serve a formal application along with affidavit evidence. Both preconditions have been satisfied in this case.

[21] The Board's power to grant interim relief is discretionary.[6] In considering the governing legal principles, the Board in *Active Electric Ltd. (Re*), [2018] SLRBD No 11, recited and relied on excerpts from *Saskatchewan Government and General Employees' Union v Saskatchewan (Government)*, 2010 CanLII 81339 (SK LRB) ["*SGEU*"]. The pertinent summary from *SGEU* reads 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 Board 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. See: Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Property Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn), [1999] Sask. L.R.B.R. 190, LRB File No. 131-99. See also: Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre, 2010 CanLII 42668, LRB File No. 083-10. As with any discretionary authority under the Act, the exercise of the Board's authority to grant interim or injunctive relief must be based on a sound labour relations footing in light of both the broad objectives of the Act and the specific objectives of the section allegedly offended.*
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> *[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 strength 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". See: Re: Regina Inn, supra. See also: Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre, 2010 CanLII 42668, LRB File No. 083-10. The Board has also used terms like whether or not the applicant is able to demonstrate that a "fair and reasonable" question exists (which should be determined after a full hearing on the merits) to describe this portion of the two-part test. See: Re: Macdonalds Consolidated, supra. Simply put, an applicant seeking interim relief need not demonstrate a probably violation or contravention of the Act as long as the main application reasonably demonstrates more than a remote or tenuous possibility.*
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> *[32] The second part of the test – balance of convenience - is an adaptation of the civil irreparable harm criteria to the labour relations arena. See: Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suite 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. 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. See:*

[6] *Legal Aid* at para 28.

> *Grain Services Union, Local 1450 v. Bear Hills Pork Producers Ltd. Partnership, [2000] Sask. L.R.B.R. 223, LRB File No. 079-00. The Board will also balance the relative labour relations harm that is anticipated to occur prior to the hearing of the main application without intervention by the Board compared to the harm that could result should a remedy be granted. See: Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Regina Exhibition Association Limited, et. al., [1997] Sask. L.R.B.R. 667, LRB File No. 266-97; United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Con-Force Structures Limited, [1999] Sask. L.R.B.R. 599, LRB File No. 248-99; and International Association of Fire Fighters, Local 1318 v. South Saskatchewan 911, [2001] Sask. L.R.B.R. 97, LRB File No. 037-01. In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm. See: Retail, Wholesale and Department Store Union, Local 455 v. Tai Wan Pork Inc., [2000] Sask. L.R.B.R. 219, LRB File No. 076-00.*

[22] It is by now well established that the legal principles governing interim applications under *The Trade Union Act*, RSS 1978, cT-17 ["*The Trade Union Act*"] remain applicable to interim applications under the current legislation.[7]

[23] The Board, in assessing an application for interim relief, must make a determination on a case-by-case basis, giving consideration to multiple factors, including: the particular facts of the matter, the goals of the *Act*, the policy objectives of the provision alleged to have been violated, and the nature of relief sought.[8]

[24] The Board is not in a position to make determinations on disputed facts, assess credibility, or weigh evidence.[9] The Board must bear this in mind when considering the various points of contention before it. Matters such as the nature and extent of any performance issues and the circumstances surrounding the signing of the release can only be resolved at the main hearing.

Has the Union Demonstrated an Arguable Case?

[25] The first stage of the test requires the Board to determine whether the underlying Unfair Labour Practice Application discloses an arguable case. This is not a rigorous standard. The Union is not required to demonstrate a probable violation or contravention of the *Act*. The Board considers whether the Application discloses facts that, if established at the full hearing, would prove the alleged unfair labour practice claim. The Board is not to "place too fine a distinction on the relative strength or weakness" of the Union's case.[10]

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[7] *Legal Aid* at para 27.
[8] *Saskatchewan Government and General Employees' Union v Saskatchewan (Government)*, 2010 CanLII 81339 (SK LRB) ["*SGEU*"] at para 34.
[9] *Ibid* at para 30.
[10] *Ibid* at para 31.

[26] The Union in describing its unfair labour practice claim, relies primarily on clause 6-62(1)(g) of the *Act*, which reads as follows:

> *(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[.]*

[27] The precursor to clause 6-62(1)(g) is clause 11(1)(e) of *The Trade Union Act*. The Board in *United Steel, Paper And Forestry, Rubber, Manufacturing, Energy Allied Industrial And Service Workers International Union (United Steelworkers) v Evraz Wasco Pipe Protection Corporation*, 2016 CanLII 98635 (SK LRB) ["*Evraz*"] relied on *Regina Native Youth* for the Board's description of the purpose of clause 11(1)(e):

> *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.*[11]

[28] In *Evraz*, the Board observed that the protection from employer retaliation now "has a constitutional dimension", as per section 2(d) of the *Charter*. That constitutional dimension is situated in the "right to join with others and form associations",[12] as declared by the Supreme Court of Canada in *Mounted Police Association of Ontario v Canada (Attorney General),* [2015] 1 SCR 3, 2015 SCC 1 at para 66.

[29] Subsection 6-62(4) of the *Act* sets out the presumption that is operative on the underlying Unfair Labour Practice Application:

> *6-62 …(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:*

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[11] *Saskatchewan Government Employees Union v Regina Native Youth and Community Services Inc*., [1995] 1st Quarter Sask Labour Rep 118 at 123, LRB File Nos 144-94; 159-94; 160-94 ["*Regina Native Youth*"], cited in *Evraz* at para 52.

[12] *Evraz* at para 54, citing *Mounted Police Association of Ontario v Canada (Attorney General)*, [2015] 1 SCR 3, 2015 SCC 1 at para 66.

> *(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.*

[30] When a union can show that an employer has terminated an employee who was exercising a right pursuant to Part VI of the *Act*, the burden of proof shifts to the employer to prove that the employee was terminated for good and sufficient reason. This presumption is germane to the Board's determination of whether the Union has an arguable case on the basis of subsection 62(1)(g) of the *Act*.

[31] The Union relies on the factual assertions in Lapointe's affidavit to argue that it has satisfied the first stage of this test. Lapointe was a lead organizer for the Union, he met with counsel to discuss the upcoming hearing on April 17, 2018, had related conversations with others on that same day, and then was terminated on April 18, 2019 at noon. Lapointe occupied one of seven positions that the Employer sought to exclude from the proposed bargaining unit and during the day preceding his termination, was preparing for the hearing in relation to those exclusions. Lapointe was terminated shortly after the representation vote was held and prior to the hearing on the Employer's objections. Lapointe's role with the organizing drive, the timing of the termination, and his activities preceding the termination, combined, raise questions about the Employer's motives.

[32] Contrary to the Employer's assertion, this is not a case of the Union making "simple allegations" of an unfair labour practice. A primary issue, as demonstrated by 62(1)(g) of the *Act*, is Lapointe's union activity. The Union's affidavits disclose that he was involved in assisting the Union immediately prior to his termination. In making this observation, the Board notes subsection 6-4(1) of the *Act*, which declares that "[e]mployees 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". Clause 62(1)(g) of the *Act* must be interpreted and applied taking into account the protection for union activity as set out at subsection 6-4(1).

[33] Furthermore, timing is an issue. The Board has made clear that the timing of the decision to terminate is a relevant factor in assessing the role of union activity in a termination.[13] Here, the alleged union activity and the subsequent termination were close in time. The Union urges the Board to draw an inference about the Employer's motivation based on the timing of these events. It is not for the Board to consider, at this stage, the nuances of any arguments going to disprove those inferences. Nonetheless, the timing suggests that there is an arguable case.

[34] At this stage, the Board does not assess the strengths or weaknesses of the Union's case or the Employer's explanation for the termination, but simply seeks to determine whether the Application and written submissions disclose facts that, if proven, would form the basis of a violation of the *Act*. The Board notes that at this stage, it does not make credibility assessments or findings of fact in relation to the Employer's claims about Lapointe's performance.

[35] Taking the foregoing into account, the Board finds that the Union's Application discloses facts, which if proven, would form the basis of the alleged unfair labour practice claim. The Union has met its onus on the first stage of the test by establishing that the Union has an arguable case on the underlying Unfair Labour Practice Application pursuant to clause 6-62(1)(g) of the *Act*. The Board will now move on to the second stage.

Does the Balance of Convenience Favor the Union or the Employer?

[36] The Board in *CUPE, Local 1949 v Legal Aid Saskatchewan*, 2018 CarswellSask 445, LRB File Nos 164-18; 165-18 ["*Legal Aid*"] cited two prior cases before the Board, for their apt descriptions of the second stage of the test:

> *43 …In Aaron's Furniture and RWDSU, Re, 2016 CanLII 1307, (2016), 282 CLRBR (2d) 281 (SK LRB) ("Aaron's Furniture"), for example, the Board stated:*
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> > *[26] The second part of the test is whether or not the balance of convenience favours the issuance of an interim order. While there are other considerations…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.*
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> *44 In Saskatchewan Joint Board, R.W.D.S.U. v. Prairie Micro-Tech, [1994] S.L.R.B.D. No. 62 (Sask. L.R.B.), the Board elaborated upon what an applicant needs to demonstrate*

[13] *Regina Native Youth* at 9.

on this aspect of the inquiry. At pages 5 and 6 of those Reasons for Decision, the Board stated:

> *Whether it is described as an interlocutory injunction or an interim order...what the Board is being asked to do is to issue an order for relief in circumstances where there is no opportunity for the parties to present evidence, and no full consideration can be given to the merits of the complaints enumerated in the application. Under these conditions, it is our view that the applicant must be required to show that there will be some prejudice to them which cannot be fairly addressed if they are required to await the full hearing and determination of the main application. There are, no doubt, circumstances in which the Board would issue orders pursuant to Section 5.3 without putting the applicant to such a test, but in this kind of case, where we are being asked to issue an order without the benefit of a hearing, we feel it is necessary that the applicant provide us with a persuasive rationale for granting relief in the form of a description of the harm which will accrue to them if the order is not granted.*

[37] According to *Saskatchewan Joint Board, R.W.D.S.U. v Prairie Micro-Tech*, [1994] SLRBD No 62 (SK LRB), the applicant must provide a description of the harm that will occur if the order is not granted. In this case, the Union says that there is a risk to the certification process. The Union's concern is that employees will have been intimidated into changing their testimony, or perhaps into not testifying at all. The Union suggests that if witnesses change their testimony, and the seven proposed exclusions are granted, this will negatively impact the vote tally, and potentially prevent certification. In support of this argument, the Union suggests that "the workers who hold these positions would be understandably wary of supporting the Union in their testimony respecting their duties". As the hearing is set for July, the chilling effect continues and only intensifies with the passage of time.

[38] The basis of the Employer's objections are the exclusions it seeks. In the upcoming hearing, the Board expects to hear evidence from the parties on the roles that the Employer seeks to exclude. The Board expects witnesses to provide truthful evidence under oath. The Board appreciates that witnesses routinely have personal perspectives that frame or shape their evidence. However, the evidence may or may not be supported by documentation, such as job descriptions or job advertisements. Both the Union and the Employer will have the opportunity to lead and to test evidence in relation to the proposed exclusions. The Board's task will be to make assessments of credibility where necessary and weigh the evidence before it.

[39] The Union's argument requires the Board to make a number of assumptions and inferences. On the evidence, the Board cannot infer that the termination will impact the Board's

conclusions at the upcoming hearing. Nor can the Board assume on the existing facts that the exclusion of seven positions is going to negatively impact certification.

[40] Furthermore, it is by now well-established that the Board's preference is to avoid under-inclusive units and instead certify larger, broadly based units where applicable. Exclusions from a bargaining unit are not to be liberally granted. In a hearing to assess the proposed exclusions, the employer bears the evidentiary onus to support the exclusions. If the exclusion is, for example, on the basis of supervisory status, the employer must demonstrate on the evidence that the position fits into the supervisory exclusion under section 6-1(1)(o) of the *Act.*

[41] Given the foregoing, to demonstrate a meaningful risk of irreparable harm, the Union must disclose additional evidence of the anticipated "chilling effect" on the upcoming hearing. There is minimal evidence about Lapointe's activity on April 17. While Neault and Olson, who were not involved in the conversations, assert that Neault spoke to "several" co-workers, Lapointe states that he spoke to "other employees". As for the content of those conversations, Lapointe questioned employees about the "job duties that were in the job descriptions" provided by the Employer. While the purpose of the conversations was to prepare for the hearing, it is unclear whether Lapointe relayed that purpose to the employees. Nor is there evidence of the Employer's knowledge of Lapointe's Union activities, beyond inferences that may be drawn in relation to timing.

[42] On the existing evidence, the Board cannot reach the conclusion that, by not granting the reinstatement requested, there is a meaningful risk of irreparable harm to the Union. It is the harm that forms the basis for the Board's assessment of the balance of convenience. If there is no meaningful risk of harm to the Union, the Board cannot find that the labour relations harm to the Union outweighs the labour relations harm to the Employer.

[43] The Board acknowledges, as confirmed in *Canadian Union of Public Employees, Local 4973 v Welfare Rights Centre*, 2010 CanLII 42668 (SK LRB) ["*Welfare Rights Centre*"], that prior to concluding a collective agreement, "the Union is in its embryonic stage of its development, having recently been certified and not yet having achieved a first collective agreement".[14] Many, but not all, of the interim decisions before the Board involve organizing drives, but that does not mean that after an organizing drive, the potential labour relations harm is nil or irrelevant. The

[14] *Canadian Union of Public Employees, Local 4973 v Welfare Rights Centre*, 2010 CanLII 42668 (SK LRB) ["*Welfare Rights Centre*"] at para 18.

Board remains concerned about interference with the certification process after the organizing drive, but each case is considered on its facts.

[44] The Employer spoke to the potential harm to workplace morale flowing from the reinstatement of Lapointe under these circumstances. The Board agrees that workplace morale is a relevant factor to be considered in the balance of convenience analysis. Given the Board's conclusion on irreparable harm, the Board finds that the potential labour relations harm to the Union does not outweigh the potential labour relations harm to the Employer. The Board draws this conclusion both independent of the issue of workplace morale, and relative to it.

[45] The Employer's justification for the termination, however, is a matter that will be fully assessed at the hearing proper. The parties will have every opportunity to present their respective cases at that time.

[46] Accordingly, for the foregoing reasons, the Union's application for interim relief in this matter is dismissed.

[47] This is a unanimous decision of the Board

DATED at Regina, Saskatchewan, this **24th** day of **May, 2019.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson