ONTARIO LABOUR RELATIONS BOARD

2277-12-U; 2313-12-M Grand River Valley Health Care Employees Union, Local 305 Affiliated with the Christian Labour Association of Canada, Applicant v. **Haldimand War Memorial Hospital**, Responding Party.

BEFORE: Mary Anne McKellar, Vice-Chair.

APPEARANCES: Jack B. Siegel, Catherine Longo, Randall Boessenkool, Amy Rideout, Marg Clark and Ann Cormier for the applicant; Jane Gooding, David Montgomery, Katz MacDonald, Kallyn Gobbett, Elaine Wielink and Catharine Cercone for the responding party.

DECISION OF THE BOARD: November 15, 2012

Introduction

1. Board File No. 2277-12-U is an application under section 96 of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act") and Board File No. 2313-12-M is an application under section 98 of the Act for an interim order. Specifically, the applicant union, Christian Labour Association of Canada ("CLAC"), seeks to have me order the interim reinstatement of Ann Cormier.

2. The parties addressed only the request for interim relief in a consultation held on November 9, 2012. Consistent with the process followed by the Board in this type of application, the parties filed declarations of a number of individuals, and those declarants were available for questioning at the hearing. The responding party ("the Hospital") chose not to question any of CLAC's declarants: Ann Cormier; Amy Rideout; and Margaret Clark. I posed a few questions to Ms. Rideout with respect to why this application was not filed until three weeks after Ms. Cormier's termination. The Hospital's declarants were Elaine Wielink, who offered some information in addition to that contained in her declaration, and Cathy Cercone, whom counsel for CLAC chose to question briefly.

3. The parties' factual allegations are set out below. As the Board has repeatedly noted in its decisions with respect to requests for substantive interim relief, it does not engage in a fact-finding exercise, nor does it simply accept (absent the agreement of the other party) the veracity of the facts asserted in the declarations: rather it gauges the robustness of the case presented by each side, having regard not only to the content of the declarations, but also its own experience in labour relations realities. Findings of fact are left to the panel of the Board assigned to hear the section 96 application.

Information Before the Board

4. As of June 2012, the Hospital employed eight individuals in its housekeeping department. Six of those employees were employed on a part-time basis, and two on a full-time basis. Ms. Cormier was a part-time housekeeper, and had occupied that position for more than seven years.

5. A new Housekeeping Supervisor, Elaine Wielink, commenced employment in mid-June 2012. Her declaration outlines certain concerns she had with respect to Ms. Cormier's attitude/performance almost immediately thereafter. These are canvassed subsequently in this decision. Two additional full-time positions in the housekeeping department were posted on August 22, 2012. Although Ms. Wielink indicated at the consultation that she had decided some time earlier to post these positions, and had simultaneously decided that filling them would necessitate the elimination of one part-time position, that is not an assertion contained in her declaration. The wording of her declaration is more consistent with the decision to eliminate a position, and specifically the decision to terminate Ms. Cormier, having been made sometime after the job competition had concluded.

6. Five of the six current part-time housekeepers, including Ms. Cormier, applied for the full-time positions. The two most senior were successful, and commenced in their new roles on September 17, 2012. That left Ms. Cormier as the part-time housekeeper with the greatest seniority or length of service.

7. Margaret Clark, the Housekeeping Supervisor until she retired in June 2012, filed a declaration on CLAC's behalf. In it she asserted that Ms. Cormier had no disciplinary record at the time of Ms. Clark's retirement, and she also asserted that her experience was that seniority was a factor the Hospital had typically considered in determining what individuals would be impacted by a shortage of work, and that the impact of such shortage had historically been confined to a reduction of hours or reallocation of work, rather than the termination of employment.

8. Ann Cormier was the third most senior of the part-time employees in the housekeeping department in June 2012. She applied for, but did not obtain either of the full-time positions, which went to the two part-time employees with greater seniority or length of service. Her employment was terminated, without cause, on October 9, 2012, effective immediately.

9. Ms. Wielink described Ms. Cormier as having a poor attitude and being resistant to the changes she was introducing to the department. She described her body language and demeanour in staff meetings, her reluctance on at least one occasion to perform her job in the manner directed, and her statement during her job interview that she preferred to work shifts "when management is not around". She also asserted that she had caught Ms. Cormier making a telephone call from a physician's private office when she should have been working. Ms. Cormier was not disciplined in respect of any of these matters.

10. CLAC commenced its organizing campaign in August 2012. Amy Rideout is the CLAC Organizer. Ms. Cormier was the inside organizer. The first meeting of employees was held off-site on August 22, 2012. There were two other off-site meetings on September 25 and 26, 2012. Ms. Cormier "handled" all membership application cards collected by CLAC.

11. Up until the time of Ms. Cormier's termination, CLAC had collected 29 cards. At that point, its campaign had been ongoing for 58 days. In the 22 days subsequent to Ms. Cormier's termination, up to the date this application was filed, it collected 7 additional cards. CLAC readily conceded that it was very close to the 40% level of apparent membership support (in a bargaining unit estimated to comprise somewhere between 70 and 100 employees).

12. Three weeks elapsed between the date of Ms. Cormier's termination, and the date that this application was filed. Ms. Rideout explained that she was attempting during that time to gather information from other employees about Ms. Cormier's termination. To that end, she attempted to contact six employees who had previously been in contact with CLAC. Five of them did not return her telephone calls or e-mails. One did speak to her on the phone, and expressed her opinion that Ms. Cormier's termination was related to her union organizing, however that individual immediately thereafter left Ms. Rideout a voice mail message stating that she did not wish to have her identity revealed (for example by filing a declaration in this proceeding) for fear that her employment would be jeopardized. Ms. Cormier's declaration also asserts that three individuals, each employed in a different area of the Hospital, expressed concern to her that their employment would be threatened if they were known to be union supporters. Two of these individuals reported to her that Ms. Cercone had said there would be "no union" at the Hospital. Ultimately, CLAC was not able to find a single current employee of the Hospital who was willing to be identified or file a declaration in this proceeding.

13. In her declaration, Ms. Cercone denied making the statements attributed to her by the anonymous individuals.

14. There was, subsequent to Ms. Cormier's termination, a meeting of the housekeeping staff at which the remaining members of the department in attendance were told by Ms. Wielink that their employment was secure. Two members of the department who did not attend the meeting received the same information from Ms. Wielink by telephone.

15. All of the Hospital managers denied any knowledge of the union's organizing campaign.

Analysis

16. Section 98 of the Act provides as follows:

> **98.** (1) On application in a pending proceeding, the Board may,

(a) make interim orders concerning procedural matters on such terms as it considers appropriate;

(b) subject to subsections (2) and (3), make interim orders requiring an employer to reinstate an employee in employment on such terms as it considers appropriate; and

(c) subject to subsections (2) and (3), make interim orders respecting the terms and conditions of employment of an employee whose employment has not been terminated but whose terms and conditions of employment have been altered or who has been subject to reprisal, penalty or discipline by the employer.

(2) The Board may exercise its power under clause (1)(b) or (c) only if the Board determines that all of the following conditions are met:

1. The circumstances giving rise to the pending proceeding occurred at a time when a campaign to establish bargaining rights was underway.

2. There is a serious issue to be decided in the pending proceeding.

3. The interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives.

4. The balance of harm favours the granting of the interim relief pending a decision on the merits in the pending proceeding.

(3) The Board shall not exercise its powers under clause (1)(b) or (c) if it appears to the Board that the alteration of terms and conditions, dismissal, reprisal, penalty or discipline by the employer was unrelated to the exercise of rights under the Act by an employee.

(4) Despite subsection 96 (5), in an application under this section, the burden of proof lies on the applicant.

(5) With respect to the Board, the power to make interim orders under this section applies instead of the power under subsection 16.1(1) of the *Statutory Powers Procedure Act.*

(6) This section applies only in respect of an alteration of terms and conditions of employment or a dismissal, reprisal, penalty or discipline that occurred on or after the day section 7 of the *Labour Relations Statute Law Amendment Act, 2005* comes into force.

> (7) This section, as it read immediately before the day section 7 of the *Labour Relations Statute Law Amendment Act, 2005* came into force, continues to apply in respect of events that occurred before that date.

17. In order to obtain an interim order, CLAC must satisfy me that the four prerequisites in section 98(2) are satisfied. Even where it does so, however, I may not order her reinstatement unless I am also satisfied that the termination of Ms. Cormier appears to be unrelated to her exercise of rights under the Act.

18. I deal with the requirements of section 98(2) first.

19. Although the Hospital denies any knowledge of the CLAC organizing campaign, it does not dispute that it was under way as of August 22, 2012. While the housekeeping department's restructuring process in the form of the job postings had started prior to that date, the impact of that restructuring on Ms. Cormier's employment occurred after the campaign was well under way. Ms. Wielink's declaration suggests that the decision to terminate her employment was made sometime after September 10, 2012, and notably, does not assert that the termination of someone was the inevitable result of the postings, although that is what the Hospital maintained at the consultation. I am therefore satisfied that the prerequisite in section 98(2) ¶1 has been satisfied.

20. The allegation that an employer has terminated the employment of an inside organizer because of union activity raises a serious question, and the Hospital conceded this to be so. I therefore conclude that the prerequisite in section 98(2) ¶2 has been satisfied.

21. Turning now to section 98(2) ¶3, it is also my view that the interim relief requested is necessary to prevent irreparable harm or to achieve other significant labour relations objectives. As the Board has noted in *UPS Supply Chain Solutions Inc.*, [2005] O.L.R.B. Rep. September/October 904, at ¶31, irreparable harm is "virtually inherent when the termination of the key inside organizer occurs during an organizing campaign, particularly where, as here, the circumstances of the discharge would not be clear to employees". Some Board decisions have appeared to measure whether there has been irreparable harm solely having regard to how the discharge of the employee for whom reinstatement is sought has affected the "pace" of card collecting. See *1319557 Ontario Limited c.o.b. Upper Gage Price Chopper*, 2009 CanLII 39216 (ON LRB) and *Novotel Canada Inc., Accor Canada Inc., Novotel Ottawa*, 2010 CanLII 21183 (ON LRB). *Patrolman Security Services Inc.*, [2005] OLRB Rep. September/October 818, at ¶65 suggests that the Board, in assessing whether there has been irreparable harm, must also consider the potential impact that the discharge of a key organizer prior to a representation vote might have on other employees' choices in a vote. This is echoed in *Sarnia Paving Stone Ltd.*, [2005] OLRB Rep. September/October 840 at ¶38, where another example of irreparable harm is noted: employees' hesitance "to cooperate with and assist the union in its litigation with an employer".

22. All of the above effects have been adverted to by CLAC in its declarations in this application. Here, the "pace" at which cards were collected slowed from 29 collected in 58 days before the termination to 6 collected in the 22 days following the termination. The declarations of Ms. Cormier and Ms. Rideout (and the latter's further information provided at the consultation) assert that the termination has had a chilling effect on employees' willingness to communicate with CLAC in its investigation of the circumstances of that termination, because of the perception that to be identified as a union supporter might jeopardize one's employment. While it is not possible to measure with any precision the extent to which the termination might affect employees' support for the union in a future representation vote conducted by secret ballot, the Board, based on its experience has concluded that a negative impact is likely or at least a distinct possibility (see *Patrolman Security Services Inc.*). Furthermore, counsel for CLAC noted that the promise of increased job security is one of the things a union can use to market the advantage of unionization to employees in the broader public sector in a period of wage restraint when significant pay hikes may not be attainable. That marketing message is significantly undermined when someone known to be the inside organizer is terminated.

23. I am also persuaded that the prerequisite set out in section 98(2) ¶4 has been satisfied, and that the balance of harm clearly favours the granting of the interim relief pending a decision on the merits in the pending proceeding. At the outset, I note that counsel for CLAC undertook to cooperate in having the section 96 application scheduled for hearing as expeditiously as possible. The Hospital does not claim to have had cause for terminating Ms. Cormier's employment. There was no indication she had ever been disciplined. The "harm" asserted is not that she will be returned to the workplace, but that the schedules and hours of work of other employees in the department will be disrupted, and potentially that her alleged negative attitude will have a corrosive effect. The Hospital's argument on this point is rendered much less compelling by the fact that Ms. Cormier continued to be employed, alleged bad attitude and all, for three weeks following the conclusion of the job competition that is now claimed to have made one housekeeping position redundant. In any event, the Board has specifically rejected the notion that employers can rely on disruption to the terms and conditions of other employees as outweighing the harm to the union if its organizer is not reinstated:

> 25. The employer asserts that Mr. Shamashadeen's discipline and work record is poor and that to require the employer to re-employ him would be unfair to the employer and to the employee with a better record who will have to be displaced. Similarly, Mr. Khan is the least senior laser operator, the position he occupied at the time of the lay off. If he was reinstated, a more senior laser operator would have to be laid off resulting in manifest unfairness to that employee.
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> 26. I disagree that reinstating the employees would be unfair to the employer. The objective of the Act's interim provisions supersede the kinds of concerns advanced by the employer.
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> (*MJ Manufacturing – A Division of Martinrea International Inc.*, 2010, CanLII 29725 (ON LRB).

24. In summary, all of the conditions set out in section 98(2) as prerequisite to the granting of interim relief have been satisfied. It remains therefore to consider whether such order is precluded by section 98(3).

25. The Hospital denies any knowledge of the CLAC organizing campaign. Consequently it asserts that I must find Ms. Cormier's termination was unrelated to her exercise of the right under the Act to be involved in that campaign. CLAC acknowledges that none of its declarants had direct knowledge that any Hospital manager knew of the campaign or Ms. Cormier's involvement in it. Nevertheless, it submits that the Hospital's assertions do not pass the "smell test" in that there are sufficient undisputed facts on which the Board could draw an inference that that there was a causal connection between Ms. Cormier's union activity and her termination:

- Ms. Cormier had not been disciplined;
- Her termination did not occur for cause;
- She was the most senior of the part-time housekeepers remaining after the job competition, and Ms. Clark declared that seniority was historically given favourable consideration by the Hospital in determining what to do in shortage of work/reduction of hours situations;
- Although the elimination of one part-time position was asserted by the Hospital to be the inevitable consequence of the reorganization, and the selection of Ms. Cormier for termination was stated to be a "no brainer", she continued to be employed in a part-time capacity for more than three weeks after the reorganization took effect;
- By the time of her termination, at least one-third of the employees who might be in a bargaining unit had signed cards over a 58-day campaign, including three offsite meetings;
- Following her termination, the balance of the housekeeping part-timers were informed of the fact of the termination and assured that their jobs were secure.

26. I think it is possible that the Board could infer from the above, the Hospital's denials notwithstanding, that it had knowledge of the CLAC campaign and Ms. Cormier's involvement in it. I note that the person in *Patrolman Security Services Inc.* who decided to discharge the union organizers denied all knowledge of their role in any organizing campaign, but the Board nevertheless concluded that their discharge was not unrelated to their union activity. While the Board of course did not make any findings of credibility in that case, since that is not the nature of a section 98 inquiry, it did note that one supervisor who knew of the individuals' role in the union was in

frequent communication with two other supervisors who denied such knowledge. Clearly, the denials were not simply accepted at face value. Similarly, in *UPS Supply Chain Solutions Inc.*, the Board was faced with a situation not unlike this one, in which the event that the employer relied on as justifying the employee's termination (there, the involvement in a scheme to divert a contract for services to the employee's own advantage; here, the implementation of the restructuring) had crystallized several weeks before the termination occurred. While the Board did not use the phrase "smell test" that counsel for CLAC used to characterize the situation before me, it did say the following, while never expressly addressing whether the person who discharged the employee acknowledged awareness of his union activity:

> 38. Had the Company terminated Mr. Mootoo's employment at or about the same time as it terminated Mr. Mottley's employment it is quite possible the Company could have succeeded in this application, but the delay and the unanswered questions surrounding the delay compel the opposite result. ... How serious could the Company have taken Mr. Mootoo's conduct if management allowed vacation schedules to dictate when they would terminate his employment? It appears to the Board that something else is going on here and it may well relate to the fact that Mr. Mootoo was a key inside union organizer. It therefore does not appear to the Board that the discharge of Mr. Mootoo or the timing of that discharge was unrelated to his exercise of rights under the Act.

27. The Hospital's declarations here also leave a number of unanswered questions, essentially relating to those facts that CLAC asserts warrant an inference that Ms. Cormier's termination was causally related to her involvement in the organizing campaign. Consequently, I am unable to conclude that Ms. Cormier's termination appears to have been unrelated to her involvement in the CLAC campaign. I am not therefore precluded by section 98(3) of the Act from making the order for interim relief sought by CLAC.

Orders

28. The Hospital is ordered to do the following:

> a) Reinstate Ms. Cormier immediately to her employment on the same terms and conditions she enjoyed prior to October 9, 2012;
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> b) Refrain from suspending, discontinuing or otherwise terminating Ms. Cormier's employment or changing the terms and conditions of her employment until the Board issues its final decision in the unfair labour practice complaint (Board File No. 2277-12-U) except with the consent of the Union or of the Board, on application by the responding party;

c) Post copies of this decision in the workplace, in locations where the employees are likely to see them, and keep them posted for at least 30 working days; and

d) Post copies of the attached Notice to Employees in the workplace in locations where the employees are likely to see them and keep them posted for at least 30 working days.

29. I remain seized of any difficulties arising out of this decision, but am not seized of the section 96 application in Board File No. 2277-12-U, which is referred to the Registrar to be scheduled for hearing as expeditiously as possible.

"Mary Anne McKellar"
for the Board

Appendix "A"

The Labour Relations Act, 1995

NOTICE TO EMPLOYEES

Posted by order of the Ontario Labour Relations Board

We have posted this notice in compliance with a direction of the Board, issued after a proceeding in which both the Hospital and the union had the opportunity to make submissions.

The Board has ordered Haldimand War Memorial Hospital to reinstate Ann Cormier ON AN INTERIM BASIS until the Board considers the reason for her discharge. A hearing before the Board will commence soon. A purpose of that hearing is to determine why Ann Cormier was discharged.

If the Board ultimately determines that Ann Cormier was discharged for reasons having nothing to do with her support for the union, the temporary reinstatement order will be revoked, and the Hospital will no longer be required to employ her.

If the Board ultimately finds that her discharge occurred because she was a union supporter, exercising her rights under the *Labour Relations Act*, the Board may confirm her reinstatement, and direct that she be compensated for all earnings and benefits lost as a result of her discharge.

> Employees in Ontario have these rights which are protected by law:
>
> An employee has the right to join a trade union of his or her own choice and to participate in its lawful activities.
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> An employee has the right to oppose a trade union, or subject to the union security clause in the collective agreement with his or her employer, refuse to join a trade union.
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> An employee has the right to cast a secret ballot in favour of, or in opposition to, a trade union if the Ontario Labour Relations Board directs a representation vote.
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> An employee has the right not to be discriminated against or penalized by an employer or by a trade union because he or she is

exercising rights under the *Labour Relations Act, 1995*, as amended.

An employee has the right not to be penalized because he or she participated in a proceeding under the *Labour Relations Act, 1995*, as amended.

An employee has the right to remain neutral, to refuse to sign documents opposing the union or to refuse to sign a union membership card.

It is unlawful for employees to be fired or in any way penalized for the exercise of these rights. If this happens, a complaint may be filed with the Ontario Labour Relations Board.

It is unlawful for anyone to use intimidation to compel someone else to become or refrain from becoming a member of a trade union, or to compel someone to refrain from exercising rights under the *Labour Relations Act, 1995*, as amended.

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 30 consecutive days.

DATED this 15th day of November, 2012.