

**DISMISSAL NO. 1909**  
**CASE NO. 391/08/LRA**

**IN THE MATTER OF: *THE LABOUR RELATIONS ACT***

**- and -**

**IN THE MATTER OF: An Application by**

**The Canadian Union of Public Employees,**

**Applicant,**

**- and -**

**Melissa Lehman,**

**Person Concerned,**

**- and -**

**TRAILBLAZERS LIFE CHOICES INC.,**

**Employer/Respondent.**

**BEFORE: W.D. Hamilton, Chairperson**

**C.W. Lorenc, Board Member**

**J.R. Moore, Board Member**

**SUBSTANTIVE ORDER**

**WHEREAS:**

1. On December 12, 2008, the Applicant filed an Application (the “Application”) with the Manitoba Labour Board (the “Board”), on its own behalf and on behalf of the Person Concerned, asserting that since on or about November 25, 2008, the Respondent:
  - (a) Did interfere with the right of an employee (the Person Concerned) to be a member of a Union; to participate in the activities of a Union; and to participate in the organization of a Union;
  - (b) Did interfere with the formation of and selection of a Union;

- (c) Discharged from employment the Person Concerned who was a member of a union and who was participating in Union activities;
- (d) Did at a time when the Applicant was attempting to enlist members from among employees of the Employer, discharged the Person Concerned who was a member of the Applicant Union
- (e) Did deny the Person Concerned, who was exercising rights confirmed upon her under *The Labour Relations Act*, rights or benefits to which she would have been entitled except for the exercise of the right;

all of which is contrary to Sections 5(1), 5(3), 6(1), 7(b), 7(c), 9 and 17 of *The Labour Relations Act (The Act)*.

2. As to remedial relief, the Applicant sought the following remedies:
  - (a) Order the Respondent to reinstate the Person Concerned.
  - (b) Order the Respondent to compensate the Person Concerned for any loss of salary or benefits she has occasioned (*sic*) as a result of the unfair labour practice; or
  - (c) Order the Respondent to pay to the Person Concerned two thousand dollars (\$2,000.00) for the interference with her rights under *The Act*.
  - (d) Order the Respondent to pay the Applicant the sum of two thousand dollars (\$2,000.00) for the interference with the rights of the Applicant under *The Act*.
  - (e) Order the respondent to cease and desist from any further activities which may constitute unfair labour practices in connection with the Applicant's organizing drive.
3. On January 14, 2009, following an extension of time, the Employer, through counsel, filed its Reply denying that it had violated any provision of the *Act* and, for the reasons set forth in the Reply, asserted that the Person Concerned was terminated for cause on or about November 25, 2008, at which time the Person Concerned was paid *ex gratia* severance wages of two weeks. In particular, the Employer asserts that the decision to terminate the employment of the Person Concerned was neither connected to nor did it arise out of any alleged union activities or participation in union activities on the part of the Person Concerned.

4. On February 3, 2009, the Employer, through counsel, filed copies of various Exhibits that had been referred to in the Reply of the Respondent.
5. On March 31 and April 1, 2009, the Board conducted a hearing, at which time the Applicant, the Person Concerned and the Employer appeared before the Board. All parties were represented by counsel.
6. At the outset of the hearing on March 31, 2009, the Employer alleged that the Application did not disclose a *prima facie* case pursuant to Sections 7 and 9 of the *Act*. While the Employer did not dispute that the Person Concerned was an employee up to and including November 25, 2008, or that the Person Concerned was discharged on that date, the Employer submitted that, by reference to the critical date of November 25, 2008, there was no evidence, in a *prima facie* sense, that the dismissal of the Person Concerned occurred "... at a time when a union is seeking to be certified as the bargaining agent of a unit of employees of the employer or is attempting to enlist members from among employees of the employer ..." [See Section 9 of the *Act*]. The Board heard evidence on the issue of whether a *prima facie* case had been established and after hearing evidence and submissions, determined that the Applicant had established a *prima facie* case and, accordingly, the Respondent would be required to call its evidence first.
7. The Board, following consideration of material filed, evidence and argument presented, determined that a number of principles and/or material facts govern the disposition of the Application, including the following:
  - a. The Board, having ruled that a *prima facie* case had been established, the onus falls on the Employer, pursuant to the reverse onus provisions in Sections 7 and 9 of the *Act*, to establish, on the balance of probabilities, that the termination of the employment of the Person Concerned on November 25, 2008, was not related to the Person Concerned's union membership, participation in the Applicant Union, the fact that she was or is involved in organizing a union or was otherwise exercising a right under the *Act* and that any of these activities was not one of the motivating factors/reasons for the dismissal of the Person Concerned.
  - b. An improper motive, as recited in (a), that may be found to exist does not have to be the dominant motive for the reverse onus provisions of the *Act* to be applied in a given case. See the principles referred to in the Board's decision in ***Juniper Centre Inc. - and - United Steelworkers of America - and - T. Sollis et al*** (1992), M.L.B.D. No. 2 ("***Juniper***"), particularly the principles summarized at pages 6, 7 and 8.
  - c. Sections 5, 6 and 17 of the *Act* are not "reverse onus" provisions and the onus falls on the Applicant to establish, on the balance of probabilities, a breach of one or more of those Sections.

- d. In a given case, the Board may be required to balance conflicting interests to decide whether it ought to "infer" an improper motive (i.e. "anti-union" animus) on the evidence as a whole. The Board must distinguish between unlawful conduct, which the Board can remedy under the *Act*, and conduct that may be regarded as unfair, but, nevertheless, lawful conduct, the latter of which the Board cannot remedy under the foregoing Sections of the *Act*. The fact that an employee asserts that a dismissal is unfair; that the employer may have behaved improperly or falsely accused an employee; that a dismissal is simply unjust; or that the notice provided was insufficient, do not, standing alone, fall within the remedial jurisdiction of the Board under Sections 5, 6, 7, 9 or 17 of the *Act*. Issues such as these may be pursued in other forums. The Board accepts the principle enunciated in many authorities, as follows:

... As Adams has pointed out in Canadian Labour Law beginning at Page 490, labour relations boards in exercising their supervisory responsibility concerning the relevant statutory provisions in such complaints, must examine an employment termination to determine whether membership or activity in a trade union was present in the mind of the employer in making the decision to dismiss an employee, either as a main reason, or one incidental to it or as one of many reasons, regardless of priority, for the termination. He notes that the improper motive need not be the dominant motive and that employers are unlikely to confess to an anti-union animus which, therefore, requires labour relations boards to rely upon circumstantial evidence as the bases (*sic*) of inferences concerning employer motivation. ...

[See *Alberta Strip Miners Union, Local 1595, Canadian Labour Congress - and - Edmonton Society for the prevention of Cruelty to Animals - and Katherine Wakeford*, [1987] Alta. L.R.B.R. 336, at p. 10.]

In accessing whether or not an improper motive exists, the Board is entitled to look at factors such as the timing of the termination, the credibility of the reasons offered and whether the response is a proportionate one.

- e. The Board does not function as surrogate arbitration board or court of law when assessing whether or not the reasons given for a termination meet tests which may be applicable in these other forums. The assessment of the reasons given go to establishing whether or not union participation or activity was present in the mind of the employer at the time or was one of the factors leading to the decision to terminate.
- f. The fact the Person Concerned and the representative of the Employer may have, on one or two occasions, discussed union matters does not, standing alone, constitute an unfair labour practice.

- g. As credibility findings are required to be made in respect of a number of factual issues in this case, the Board has adopted the guidelines distilled in the seminal case of *Farnya v. Chorney*, [1952] 2 DLR 353 (B.C.C.A.), (*O'Halloran, J.*), particularly the principle noted at page 357d at P. 357:

... In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would reasonably recognize as reasonable in that place and in those conditions.

- 8 After applying the principles outlined in paragraph 6 to the factual circumstances of this case, the Board has determined the following:

- a. The Employer has satisfied the Board, on the balance of probabilities, that its decision to terminate the employment of the Person Concerned on or about November 25, 2008, was neither on account of nor influenced by the fact the Person Concerned was a member of the Applicant; participated in the activities of the Applicant or was participating in the organization of the Applicant. Further, the Board is satisfied, on the balance of probabilities, that the Respondent has met its onus in respect of Sections 7 and 9 of the *Act* and that the decision to terminate the employment of the Person Concerned was not related to the fact that she had participated or was participating in union activities; was or involved in organizing a union [contrary to Sections 7(b) and (c) as alleged in the Application] or that the decision to terminate the Person Concerned was affected by the Person Concerned's membership in the Applicant [contrary to Section 9].
- b. Regardless of whether the Person Concerned feels that the decision to terminate her employment as an ETC Store Manager, a position to which she was promoted and accepted on September 19, 2008 [Ex. 4], was unfair, the Board is satisfied that, given the effluxion of time between September 19, 2008, and November 25, 2008, the Respondent did develop concerns regarding the Person Concerned's performance and the decision to end the employment relationship at that time was on account of those reasons and not which were contrary to the *Act*, as alleged. Critical to this finding is the Person Concerned's admission, on cross-examination, that after September 19, 2008, she never spoke of union matters again with Ms. Donna McGeough, the Executive Director of the Employer.
- c. Having made the foregoing findings, the required nexus between the Person Concerned's participation in union activities and her dismissal on November 25, 2008, has not been established. Accordingly, it follows that the Application will be dismissed.

**T H E R E F O R E**

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by the Applicant, The Canadian Union of Public Employees, on December 12, 2008.

**DATED** at **WINNIPEG**, Manitoba, this **11th** day of **June 2009** and signed on behalf of the Manitoba Labour Board by

*"W.D. Hamilton"*

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**W.D. Hamilton, Chairperson**

*"C.W. Lorenc"*

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**C.W. Lorenc, Board Member**

*"J.R. Moore"*

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**J.R. Moore, Board Member**

WDH/dr

**NOTES**

**REQUEST FOR REVIEW BY MANITOBA LABOUR BOARD OF A DECISION, ORDER, ETC., OF THE BOARD**

a. Subsection 143(3) of *The Labour Relations Act* of Manitoba, C.C.S.M. Chapter L10, provides:

**Board review.**

**143(3)** The board or a panel of the board may

- (a) review and vary or rescind any decision, order, direction, declaration or ruling that it or another panel has made; and

- (b) rehear a matter that it has heard or that another panel has heard.
- b. Request for review by the board of its decision, order etc. must be made by application to the board within ten days of the making of the board decision, order, etc.

Section 17 of the *Manitoba Labour Board Rules of Procedure* (being *Manitoba Regulation 184/87R*, published in the *Manitoba Gazette Part II*) provides:

**Application for review of board decision**

**17(1)** Where an application is made to the board under subsection 143(3) of the Act, to review, rescind, amend, alter or vary any decision, order, direction, declaration or ruling made by it, the applicant, in addition to the material required to be filed under section 2, shall

- (a) file a concise statement of any new evidence with such evidence being verified by statutory declaration;
- (b) file a statement explaining when and how the new evidence became available and the applicant's reasons for believing that the new evidence so changes the situation as to call for a different decision, order, direction, declaration or ruling; and
- (c) in the absence of any new evidence, file a concise statement showing cause why the board should review or reconsider the original decision, order direction, declaration or ruling.

**Time limit for review**

**17(2)** Except by leave of the board, no application under subsection 143(3) of the Act for a review of any decision, order, direction, declaration or ruling made by the board shall be reviewed by the board after more than 10 days have elapsed following the date of the making of the decision, order, direction, declaration or ruling.

**JUDICIAL REVIEW OF FINAL DECISION OF THE MANITOBA LABOUR BOARD**

Subsection 143(6) of *The Labour Relations Act* of Manitoba provides:

**Judicial review of final decision**

**143(6)** Notwithstanding any other Act, a final decision, order, direction, declaration or ruling, but not a procedural, interim or any other decision, order, direction, declaration or ruling, of the board or a panel of the board may be reviewed by a court of competent jurisdiction solely by reason that the board or the panel failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, if

- (a) the applicant for review has first requested the board or the panel, as the case may be, to review its decision under subsection (3), and the board or the panel has decided not to undertake a review, or has undertaken a review and rendered a decision thereon, or has failed to dispose finally of the request to review within 90 days after the date on which it was made;
- (b) the board has been served with notice of the application and has been made a party to the proceeding; and
- (c) no more than 30 days have elapsed from, as the case may be, the decision by the board or panel not to undertake a review, or the date of the decision rendered by the board or panel on the review, or the expiration of the 90 day period referred to in clause (a).

### **REASONS FOR DECISION**

It is the policy of the Manitoba Labour Board that, where a party to the proceedings is adversely affected by an Order or by a decision of the Board, within ten (10) calendar days of the date on which the Board's Order or decision was signed, that party may request the Board in writing to furnish written reasons for its Order or decision. The Board then may consider such request for reasons for its Order or decision and shall notify the requesting party as to whether reasons will be provided.