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ORDER NO. 1654
Case No. 108/18/LRA
C/R Case No. 85/18/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

Case No. 108/18/LRA
Workers United Canada Council,

the “Applicant”,

- and -

FAIRFIELD INN AND SUITES BY MARRIOTT WINNIPEG,

the “Respondent”,

- and -

N.S., M.T., D.C. and G.Q.,

the “Persons Concerned”.

C/R Case No. 85/18/LRA
Workers United Canada Council,

the “Applicant”,

- and -

FAIRFIELD INN AND SUITES BY MARRIOTT WINNIPEG,

the “Respondent”,

- and -

M.T., T.E., G.U., E.T., D.C., N.E., D.F., S.H., N.S. and G.Q.,

the “Persons Concerned”.

BEFORE: Blair Graham, Q.C., Vice-Chairperson

T. Henderson, Board Member

D. Strutinsky, Board Member

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

INTERIM SUBSTANTIVE ORDER

1. On April 10, 2018 and May 7, 2018, the Applicant, through counsel, filed an application and amended application with the Manitoba Labour Board (the "Board"), seeking Remedy for Alleged Unfair Labour Practices contrary to Sections 5, 6, 7, 10(2) and 17(b) of *The Labour Relations Act* (the "Act") (Case No. 85/18/LRA).
2. On May 11, 2018, the Applicant filed another Application with the Board seeking Remedy for Alleged Unfair Labour Practices contrary to *The Labour Relations Act* as a whole, including in particular sections 5, 6, 7, and 17(b) of the *Act* (Case No. 108/18/LRA). The Applicant is requesting that the Board exercise its power to issue an Interim Order pursuant to section 31(2) of the *Act*.
3. On May 14, 2018, the Board, in accordance with Rule 29.3(1) of the *Manitoba Labour Board Rules of Procedure* (the "Rules"), set a preliminary date of hearing, namely May 25, 2018, to address Interim Relief regarding Case No. 108/18/LRA.
4. On May 15, 2018, the Respondent, through counsel, filed correspondence with the Board requesting an extension of time to file a Reply on Case No. 108/18/LRA.
5. On May 15 and 16, 2018, the Applicant, through counsel, filed correspondence requesting that mediation be arranged.
6. On May 16, 2018, the Board, following consideration of correspondence filed by the Respondent regarding an extension of time to file a Reply in Case No. 108/18/LRA, informed the parties that the Board does not have the discretion to grant the request pursuant to Rule 4(4) and Rule 29.3(1) of the *Manitoba Labour Board Rules of Procedure* (the "Rules").
7. On May 16, 2018, the Applicant requested an adjournment of the hearing scheduled for May 25, 2018. The Board, noting the consent of the Respondent, granted the adjournment sought and the matter was rescheduled to May 28, 2018.
8. On May 17, 2018, the Respondent, through counsel, filed its Reply respecting Case No. 108/18/LRA, requesting that the Application be dismissed in its entirety. Further, in the alternative, that the Application for Interim Order be dismissed on the basis that it is unfair, unreasonable and not consistent with the objectives of the *Act*, and that this is not a case that satisfies the requirements for the Board to grant an Interim Order.

9. On May 23, 2018, the Applicant, through counsel, filed documentation seeking leave of the Board pursuant to Rule 4(1) of the *Rules* to amend the original application to include additional Persons Concerned.
10. Between May 23, 2018, and May 24, 2018, counsel for both parties filed correspondence regarding the requested amendment to the original application.
11. On May 25, 2018, the Board, pursuant to Rule 4(1) of the *Rules* **GRANTED** leave to amend the application. In addition, the Board informed the parties that they may make submissions at the outset of the hearing on May 28, 2018, regarding the extent to which the amending paragraphs can be utilized in support of the request for interim relief.
12. On May 28, 2018, the Board conducted a preliminary hearing regarding the request for interim relief.
13. Subsection 31(2) of the *Act* states:

“Interim Order

31(2) The board may adjourn any hearing under this section on such terms and conditions as it deems fit and may, in furtherance of the objectives of this Act or to prevent hardship to any party to the hearing, make one or more of the orders referred to in clauses (4)(a) to (i) on an interim basis, and on such terms and conditions as it deems fit, pending a final determination of the complaint.”

14. As outlined by the Board in *The Brandon Professional Firefighters/Paramedics Association v. City of Brandon, 2012 CarswellMan 187 [2012] M.L.B.D. No. 24*, if one of the above-noted statutory prerequisites are fulfilled (namely furthering the objectives of the *Act* or preventing hardship to a party to a proceeding), the Board, in exercising its discretion to grant or refuse interim relief, will be guided by the following principles:
 - (a) granting interim relief prior to the parties having a full opportunity to give *viva voce* or other evidence ought to be reserved for extraordinary circumstances;
 - (b) the Board must be satisfied that the complaint is not frivolous and vexatious and that there is an arguable case advanced by the party seeking interim relief;
 - (c) if that threshold is satisfied, the Board must consider the effects on the parties that may result from granting or not granting the interim relief sought, in order to determine whether granting the relief on an interim basis is fair, reasonable and consistent with the objectives of the *Act*; and
 - (d) in considering the specific terms and conditions of the interim relief, the Board must consider what order will best fulfill the objectives of the legislation.

15. The Applicant points to several factors which it submits make this a compelling and appropriate case for the granting of interim relief. Those factors include, but are not limited to:
- (a) an apparent but ill-defined relationship between the Respondent and another hotel, located across the parking lot (the Homewood Suites by Hilton, Winnipeg) and the owner of those two hotels, MLS Management. According to the Applicant, the relationship between those three entities heightens the risk that one or more of those entities can undertake activities which will constitute unfair labour practices or otherwise undermine the Applicant's attempts to properly represent the interests of the bargaining unit members. The Applicant refers to certain changes in the way laundry work has been performed in the past, relative to how such work is being performed currently, as an example of the inter-relationship between the work being performed by employees of the two hotels;
 - (b) a pattern of minimal discipline being imposed on Housekeeping Department employees prior to the certification in September 2017 of the Applicant as the bargaining representative of the employees (including Supervisors) in that department, compared to a pattern of extensive discipline on those employees, who now comprise the bargaining unit, following certification. In the materials filed by the Applicant, there are references to a pattern of escalating discipline on individuals in the bargaining unit known to be active in the Union (M.T. and D.C.) and several other of the Persons Concerned who are known to be friends of M.T. and D.C., and of each other. The Applicant submits that the pattern of discipline imposed on such individuals is extremely concerning from a labour relations perspective for at least four reasons:
 - i. the discipline appeared to increase in frequency following the receipt by the Respondent of a letter dated April 3, 2018 from counsel for the Union, advising that she was investigating a number of complaints of unfair labour practices and that the Respondent should cease and desist from any such practices;
 - ii. most of the discipline imposed related to breaches of cleanliness standards and were arguably excessive in relation to the relatively minor issues identified (e.g. a single hair on the floor of a room). Moreover, the discipline was imposed in the absence of any additional instruction and training being provided to the employees involved and without regard to the role which should have been fulfilled by room "Inspectors", none of whom were subject to discipline;
 - iii. the discipline is targeted at employees known to be or thought to be active in the Union;

- iv. in three cases, the discipline imposed was the termination of the employment of three bargaining unit employees. The Applicant submits that the terminations were harsh and excessive punishments relative to the minor nature of the incidents in question and the prior disciplinary records of the dismissed employees. The Applicant, as part of the interim relief sought herein, seeks the reinstatement of one of those employees, N.S.
 - (c) the alteration of the terms and conditions of employment of the employees within the bargaining unit specifically related to employee benefits and particularly health benefits. Those alterations resulted in the employees paying more for less coverage than had previously been the case. Employees in the bargaining unit were advised of such changes in April 2018; and
 - (d) the issuance or reissuance of a memo dated April 28, 2018 to all “Associates” reminding them that English was the only language to be spoken while an Associate was on duty in all areas of the hotel, subject to certain noted exceptions. The Applicant submits that the reissuance of the memo, shortly after the filing of one of the Applications herein, was part of an effort to intimidate the supporters of the Applicant, the great majority of whom are of Filipino origin.
16. Interestingly, for each of the above-noted points made by the Applicant, there are cogent counterpoints made by the Respondent. Those counterpoints are:
- (a) the ownership of the Respondent and its relationship with the Homewood Suites is not designed to, nor has it had the effect of undermining the Applicant’s ability to represent the employees in the bargaining unit. The ownership structure and its rationale and effects will likely be the subject of extensive evidence when the Applications proceed on their merits. Those issues should not be “prejudged” as part of a request for interim relief;
 - (b) the Respondent opened in May 2011. The Homewood Suites opened in March 2014. Both hotels are owned by MLS Management, but were managed by another company. Effective August 1, 2017, the Respondent took over the management and operation of the Fairfield Inn and Suites (the “Fairfield”). One of the important reasons which caused the Respondent to take over the management and operation of the Fairfield was a noticeable and concerning decline in the scores on surveys from guests provided by Marriott International, the franchisor of the Fairfield. Immediately following MLS Management assuming the operation and management of the Fairfield, the guest survey scores from Marriott International improved to some extent. However, according to the Respondent, those survey scores began to decline again from and after January 2018 (a few months following certification). As a result of that decline, Marriott International communicated with the Respondent, advising it of the decline in survey scores and warning the Respondent that if a

specified level of improvement was not achieved by June 2018, Marriott International would be in a position to terminate the franchise agreement with the Respondent. According to the Respondent, such a development would have grave consequences, because the Respondent's ability to finance its operations is contingent on the "branding" provided by Marriott International;

- (c) according to the Respondent, the pattern of discipline imposed on bargaining unit employees from and after August 2017, was the result of the Respondent's concerted efforts to improve the survey scores and to manage its operations so as to preserve the Marriott International branding and its own financing; it was not an attempt to undermine the Applicant's representation of bargaining unit members. The Respondent also submits that the discipline imposed was part of a performance management program to improve its operations and that the performance management program was implemented in all of its departments, not just the Housekeeping Department (which was the only department represented by a certified bargaining agent). Employees in the other non-unionized departments have also been subject to discipline during the relevant periods and employees in the Housekeeping Department have received less discipline than employees in the Front Desk Department, a smaller department;
 - (d) the Respondent also reviewed the specific discipline imposed on specific bargaining unit employees, asserting that all employees had been subject to appropriate and progressive discipline and that such discipline did not exclusively relate to issues of cleanliness but also health and safety, customer service and attendance;
 - (e) issues relating to a change in employee benefits arose as a result of the Respondent discovering errors made by the prior management company relating to the wrong class of benefits being assigned to employees and the deduction of the wrong amount of premiums from employees. Those errors required immediate correction;
 - (f) the workplace language memo was circulated as a result of a finding made in a Brand Standards Audit conducted by a third party hired by Marriott International, and was not an attempt to intimidate or frighten members of the bargaining unit.
17. Within the above-noted factual context, the Applicant argues that interim relief is required in this case to "press the pause button on the campaign of intimidation" in which the Respondent has allegedly engaged. The Applicant relies on information in its Application(s) and supporting statutory declarations, in which members of the bargaining unit have expressed fear and distress based on a belief that Union supporters are being targeted for unfair and inappropriate discipline.
18. The change in disciplinary practices, the alteration of benefits, the changes in the laundry operations at the two hotels and the English language memo have all occurred at a time when the Applicant is negotiating with the Respondent for a first Collective Agreement.

Therefore, the Applicant is vulnerable because its relationship with its members has not matured and solidified. The Applicant submits that if interim relief is not granted, its ability to gain the confidence of the bargaining unit members will be seriously harmed. The Applicant also submits that the granting of the interim relief which it seeks, will further one of the objectives of the Act, by encouraging collective bargaining.

19. In contrast, the Respondent submits that this is not a case which warrants the granting of interim relief. The Respondent is concerned that the Applicant's broad and sweeping requests for interim relief are not supported by conclusive evidence that any unfair labour practices have been committed. The Respondent also submits that there is an insufficient evidentiary foundation to establish that the interim orders which the Applicant seeks are necessary to protect the Applicant from harm. Counsel for the Respondent questions whether Manitoba law recognizes the vulnerability of a bargaining agent once certification has been granted. The Respondent points out that most of the case law relied upon by the Applicant relates to alleged unfair practices committed during an organizational drive, not after certification has been granted.
20. The Board is dealing with an interim application, which has been heard on an expedited basis, in which the presentations of both counsel were completed in a half day. The Board is very mindful that the full hearing of these matters will likely involve extensive evidence from multiple witnesses which will be introduced over many days. It is also highly probable that much of the evidence at the full hearing will be vigorously contested. The Board is aware of the risk of granting interim orders based on a limited evidentiary foundation, which may influence or distort the nascent relationship between the Applicant and the Respondent.
21. Accordingly, in considering the request for interim relief, the Board has been particularly cognizant of the two factors referred to in subsection 31(2) of the Act. Those factors are effectively prerequisites to the granting of interim relief. Will an interim order further the objectives of the Act? Will an interim order prevent hardship to any of the parties to these proceedings?
22. The Board has concluded that given the unique factual background of the case, the granting of a narrowly focused interim order will serve to further the objectives of the Act.
23. In reaching this conclusion, the Board has carefully considered the principles earlier outlined herein. The Board is satisfied that the circumstances of the parties are extraordinary and that some interim relief is justified, notwithstanding that the parties have not yet had an opportunity for a full hearing with respect to the background facts, many of which are likely to be vigorously contested. The Board is also satisfied that the Applicant's complaints are not frivolous or vexatious. The Applicant has an arguable case to present, but the Board also understands that the Respondent will be advancing a rigorous and substantial defence and will strive to prove that no unfair labour practices have been committed.

24. Although the Board has concluded that this is an appropriate case for granting interim relief, part of its reasoning has involved a careful consideration of the potential effects on the parties of granting or refusing to grant the interim relief. Ultimately the Board has concluded that narrowly focused interim relief will be fair, reasonable and consistent with the objectives of the *Act*. In view of all of the foregoing, the Board has also attempted to grant interim relief on specific terms and conditions which will best fulfill the objectives of the *Act*, while at the same time reflecting the circumstances of the parties and their current relationship with each other.
25. In terms of the specific interim relief to be granted, the Board denies the Applicant's request for the immediate reinstatement of N.S. to her former position within the bargaining unit, pending a final determination of the applications(s). The Respondent has put forward facts, including a series of prior disciplinary penalties which, if accepted, would provide an arguable basis for N.S.'s dismissal. The merits of the dispute relating to N.S.'s dismissal can only be properly determined after a full hearing. Any harm which N.S. may have suffered, as a result of the actions of the Respondent, can be remedied by an order of reinstatement and the payment of appropriate compensation, after a full hearing.
26. The Board is also unwilling to issue an Interim Order that the Respondent cease and desist from engaging in unfair labour practices and/or from further disciplining any members of the bargaining unit as a whole, or all of the Persons Concerned. At this stage of the proceedings, when a significant number of the background facts have not yet been conclusively determined, such a broad and general order is unwarranted. Nonetheless, an order directing the Respondent to refrain from terminating the employment of individuals who have been identified as being active in the affairs of the Union, except for just cause, namely M.T. and D.C. is warranted, but subject the Respondent having access to a process for terminating the employment of those two individuals for just cause, regardless of their activities with the Union. In addition, an order addressing the manner in which a decrease or increase in the rate of wages of any employee in the bargaining unit, or the alteration of any other term or condition of employment of any such employee, until the earlier of the effective of a Collective Agreement between the parties, or the Board's decision(s) on the merits of the Application(s), is appropriate, because such an order will encourage collective bargaining and will otherwise fulfill the objectives of the *Act*.

T H E R E F O R E

27. The Board **ORDERS** that the Respondent, Fairfield Inn and Suites by Marriott Winnipeg:
 - (a) refrain from terminating the employment of M.T. and/or D.C. until the earlier of the effective date of a Collective Agreement between the parties or the Board's

decision(s) on the merits of the Application(s), except for just cause, or with the consent of the Applicant, or the concurrence of this Board, on an expedited application by the Respondent;

- (b) effective the date of this Order and continuing until the earlier of the effective date of a collective agreement between the parties or the Board's decision(s) on the merits of the Application(s), shall not, without the consent of the Bargaining Agent, decrease or increase the wages of any employee in the bargaining unit, or alter any other term or condition of employment of any such employee; and
- (c) post a copy of this Order in a conspicuous place in the workplace for a period of seven days.

DATED at WINNIPEG, Manitoba this 4th day of June, 2018, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

Blair Graham, Q.C., Vice-Chairperson

"Original signed by"

T. Henderson, Board Member

"Original signed by"

D. Strutinsky, Board Member

ABG/bjg/acr/lo-s