



**GOVERNMENT OF PRINCE EDWARD ISLAND  
LABOUR RELATIONS BOARD**

M. Lynn Murray, B.B.A., LL.B.  
Chairman

Roy J. Doucette  
Chief Executive Officer

DEPARTMENT OF LABOUR  
P.O. BOX 2000  
CHARLOTTETOWN  
PRINCE EDWARD ISLAND  
C1A 7N8

**IN THE MATTER OF UNFAIR LABOUR PRACTICE COMPLAINT**

**BETWEEN: INTERNATIONAL UNION OF OPERATING ENGINEERS  
LOCAL 942** **COMPLAINANT**

**AND: CHARLOTTETOWN CLINIC MANAGEMENT COMPANY** **RESPONDENT**

**DECISION**

1. This Complaint, Application No. 90-016, was filed July 10, 1990. The complaint would relate solely to Section 10 (1)(b, c, d) of the Act which reads as follows:

10. (1) No employer, employer's organization or an agent or any other person acting on behalf of an employer or employers' organization shall

(b) participate or interfere with the formation, selection or administration of a trade union or other labour organization or the representation of employees by a trade union or other labour organization; or contribute financial or other support to such trade union or labour organization;

(c) suspend, transfer, refuse to transfer, lay-off, discharge, or change the status of an employee, or alter any term or condition of employment, or use coercion, intimidation, threats or undue influence, or otherwise discriminate against any employee in regard to employment or any term or condition of employment, because the employee is a member or officer of a trade union or has applied for membership in a trade union;

(d) refuse to employ any person because such person is a member or officer of a trade union or has applied for membership in a trade union or require as a condition of employment that any person shall abstain from joining or assisting or being active in any trade union or from exercising any right provided by this Part;"

2. The Complainant requests by way of remedy that, "Employee be immediately re-instated as a permanent employee of the Clinic and be fully compensated for all lost wages and benefits resulting from the Employer's actions."

3. As required by the provisions of Section 11 (1), the Chief Executive Officer inquired into the complaint and has advised the Board that he was unable to effect a settlement of the matters complained of.

4. Hearings were held on August 28 and September 4, 1990.

5. The complainant, Deborah Morrison, was employed by the Respondent for six years as a Ophthalmological Assistant, working three days per week with Dr. G.P. O'Hanley, an Ophthalmology Surgeon. She was fully qualified for this position, had continued to upgrade her qualifications and, in the opinion of Dr. O'Hanley, was a very competent, conscientious and successful employee.

Carolyn MacLeod, a trained Ophthalmological Assistant, also worked with Dr. O'Hanley; her position was full time, five days per week. Ms. MacLeod was also fully qualified for her duties and appears to be a fully competent member of this team.

6. On July 6, 1990, Ms. Morrison was advised by letter from Mr. A. Allen, Clinic Manager, that she was to be laid off effective July 6, 1990. In lieu of notice of layoff, she was to be given six months pay.

Mr. Allen's letter stated that he had been advised by Dr. O'Hanley that the workload of the Ophthalmology Department was such that the Department no longer required one full-time and one part-time employee. Mr. Allen stated it was the decision of the employer (Charlottetown Clinic) to reduce the staffing to the existing one full-time employee only. The letter goes on to state the reduced workload has been a result of the consultant study conducted in November, 1989 and implemented changes which created increased efficiency in the patient appointments and the department as a whole.

7. On April 26, 1990, the Complainant Union filed an application for certification with the Board, for a unit of employees of the Clinic, including the Ophthalmological Assistants. While the employer initially opposed the application, this opposition was subsequently withdrawn. The union was certified on June 12, 1990 without a representation vote.

8. Ms. Morrison was active in the organization of the union, was Shop Steward and a member of the negotiating committee. Her involvement was well known to management and other employees.

9. Dr. O'Hanley testified that he had been concerned about the management of his practice for some considerable time. In the fall of 1989 he had concluded that it was "out of control", that he was under great pressure to see more and more patients, a situation which was confirmed in evidence by both Ms. Morrison and Ms. MacLeod. While Dr. O'Hanley felt that he was continuing to give appropriate treatment to his patients, he was becoming very concerned about the effect of his workload on his personal life and that of his family.

10. As a result of these concerns, Dr. O'Hanley engaged a consultant specializing in office management and physicians' practices to review his situation and to make recommendations for improvement. This was done in the fall of 1989, and a verbal report was given to Dr. O'Hanley, much of it involving the scheduling of patients according to specific procedures, with effort being made to curtail visits other than those scheduled for designated slots. Dr. O'Hanley has testified that he noticed significant improvement in the pace of his days, his time was more manageable, he had a reasonable lunch break on most days, and he was able to leave the office at a reasonable time in the afternoon.

11. Dr. O'Hanley testified that in late spring of 1990 he began to question the necessity of having two assistants involved in his practice. He testified that, in his experience, physicians with practices similar to his would normally employ only one assistant and he felt that the reorganization of his schedule could allow him to reduce his staff to that level. He testified that he became convinced of this in June when Ms. Morrison was on vacation, when in his opinion his practice was managed well with Ms. MacLeod as his sole assistant.

12. Dr. O'Hanley was forthright in acknowledging that he was aware of Ms. Morrison's active involvement with the union. He insisted, however, that the decision to reduce his staff, effectively

terminating Ms. Morrison, had nothing to do with her union involvement and was related solely to reorganization of his practice. He admitted that he had not discussed the staff reduction with either Ms. Morrison or Ms. MacLeod; he explained that all physicians had been cautioned about discussing employment matters with employees during the union certification process. He expressed his continuing confidence in Ms. Morrison's ability and testified that he would willingly rehire her if an appropriate opportunity presented itself.

13. Ms. Morrison testified to her six years of successful employment with Dr. O'Hanley and to her responsibility for a significant number of procedures. She confirmed Dr. O'Hanley's assessment of those duties, explained her qualifications and pointed to her continuing education in her field.

Ms. Morrison disagrees with Dr. O'Hanley's assessment of the changes in workload and resulting efficiency of the practice. She testified that coffee breaks were still taken "on the run", lunch hours were often shortened and that the patient load continued to be extremely heavy with the staff of two. She agreed that the consultant's study had helped to make the practice more manageable, that changes to the appointment book had made things somewhat better, but the problems were far from solved. She did not agree that the practice could be properly managed with one assistant only.

14. Ms. Morrison testified that she noticed subtle changes in attitude when the union activity became known to management. She felt that Dr. O'Hanley was aware of her union involvement and that Mr. Allen, Charlottetown Clinic Manager, was also aware of her leading role in the union. She testified that she had not been made aware of her status in reference to future jobs at the Clinic, nor had any offers been made to her since her termination. She remains convinced that her termination is directly related to her union activities and that the reorganization of the practice did not warrant the action.

She testified that several supervisors were actively involved in campaigning against the union and that in her opinion Mr. Allen was definitely opposed to union activity at the Clinic.

15. Carolyn MacLeod testified that she too was aware of the difficulties in managing the practice and agreed that changes were required. She concurs with Ms. Morrison that the patient load has not been effectively reduced and is of the opinion that the practice is at least as heavy as it was prior to the consultant's study. She explained that Dr. O'Hanley now does certain tasks which Mr. Morrison used to do --workups, histories, etc. and that if anything the waiting list is probably longer.

She confirmed that Ms. Morrison was well known as a leader in the union organization and that in her opinion Dr. O'Hanley would be well aware of that fact.

In cross-examination, Ms. MacLeod agreed that work such as filing could be done by a clerk as well as by an ophthalmologic assistant. She agreed that Dr. O'Hanley had reduced his own workload and that he is not having to work as hard each day. She insists, however, that the workload is too much for one ophthalmological assistant.

16. Ms. Rita Kennedy, L.N.A. at the Clinic for 12 1/2 years, testified about two incidents involving management's attitude to union activity. She testified that about two years ago Mr. Allen, Clinic Manager, cautioned her about being involved in the union. She also testified that Dr. Harry Callaghan, a physician and senior partner, had told her to "mind her P's and Q's or she would be in the same position as Debbie Morrison." She testified that she took that to mean that Debbie Morrison's union activity had resulted in her termination, and she could be similarly discharged if she continued her support for the union.

17. Several other witnesses testified to the perceived anti-union animus of supervisors and management and to the high level of stress in the workplace during the organization and certification

process. None was able to specifically identify situations where Dr. O'Hanley engaged in anti-union activity but outlined instances where supervisors had displayed hostility and anti-union attitudes.

18. The Board, in reaching a decision in cases such as this, must attempt to balance the right of the employer to manage its affairs efficiently with the statutory right of employees to be protected from employer interference in the exercise of their rights.

19. It is not the responsibility of the Board to agree or disagree with Dr. O'Hanley's decision that one assistant was sufficient to manage his practice effectively. While such a determination might be properly within the jurisdiction of a grievance arbitration, the Board must limit itself to the determination of whether Dr. O'Hanley's decision to recommend the layoff of Ms. Morrison was solely for the reasons he has stated, or whether there were other anti-union reasons associated with the decision.

20. Labour Relations Boards in Canadian jurisdictions have tended to follow a similar pattern of decision making in cases such as this one. In this regard, reference is often made to the case of United Electrical, Radio and Marine Workers of America v. DeVilbiss (Canada) Limited (1975) O.L.R.B. Reports, Sept. 6/78. At p. 681, the Board identifies four factors as relevant in its determination of that case: (1) the existence of a pattern of anti-union activity, (2) the extent of the respondent's knowledge of the existence of union activity and of the employee's involvement in that activity, (3) the manner in which the employee was discharged, and (4) the credibility of the witnesses.

21. The complainant has argued that there was a pattern of anti-union activity by the employer beginning prior to the organization activities and continuing after the layoff of Ms. Morrison. There can be little doubt that the employer was not in favour of becoming unionized, evidenced at least by the employer's initial opposition to the application for certification. Evidence indicates that certain supervisors attempted to persuade other employees not to support the union, but at that time supervisors were being included by the union as members of the proposed bargaining unit.

Evidence of several witnesses pointed to a higher level of stress and tension around the time of certification and in the time following; but, in the experience of the Board, such is not unusual. Ms. Morrison is the only employee who has been subject to layoff, there is no evidence to support a contention that other employees have resigned as a result of employer pressure.

The remarks of Dr. Callaghan, neither denied or corroborated, are considered by the Board as isolated, albeit somewhat ill advised, but not part of a consistent pattern of employer activity.

In the opinion of the majority, the facts in the case do not lead to the conclusion that the activity of the employer constitutes a pattern of anti-union activity.

22. There can be no doubt that the employer was aware of union activity and of the complainant's significant role in that activity. Ms. Morrison was very forthright about her involvement; and if her appearance as a witness is an indicator, she would be a forthright and articulate representative of her union. This factor obviously raises suspicions as to the motives for her termination and must be weighed carefully by the Board in reaching its decision.

23. Ms. Morrison was given six months pay in lieu of notice as severance pay, a settlement significantly greater than that called for by the staff policy. Dr. O'Hanley explained that he felt an obligation to Ms. Morrison and that she should be given some financial security while seeking a new job. He reiterated that he would willingly rehire her if he felt his practice subsequently required additional assistance. While the severance amount may be somewhat

generous, it is not excessive in relation to the Clinic's overall payroll and does not constitute, in the opinion of the Board, evidence of an anti-union animus.

24. The Board is faced with the difficult task of examining the evidence of the witnesses to determine if there is something other than the factual and circumstantial evidence to be taken into account. Does the evidence indicate something behind the scenes, which otherwise might not be apparent and which would lead the Board to a particular conclusion?

In this case, the respondent relied solely on the testimony of Dr. O'Hanley. His testimony was careful and open; he seemed to take pains to insure that he was being accurate and that he was sure of the questions being asked. Witnesses for the complainant testified to his integrity. There is nothing in his testimony that would lead the Board to question the truthfulness of his evidence, evidence that includes the specific denial that Ms. Morrison's termination was for union activity and his insistence that her termination was solely related to the reorganization of his practice.

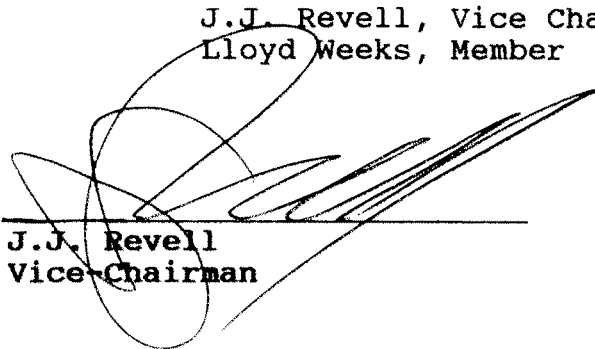
Ms. Morrison's testimony was equally forthright and impressive. It is clear that she is firmly convinced that there is more to her termination than that which her employer, including Dr. O'Hanley, admits. The respondent's other witnesses, by demeanor and directness, seemed, in the opinion of the Board, equally convinced of the factual reliability of their evidence.

25. There is much in the circumstances of this case to raise suspicions with the Board. It is difficult to be fully satisfied with the explanation that Ms. Morrison's known activities as an active union participant, including leadership roles, did not in some way influence her termination. Nevertheless, based on the facts of the case and evidence presented to the Board, we are unable to conclude that the termination of Ms. Morrison was for anti-union activities and a violation of Section 10 of the Act.


26. The complaint is dismissed.

**FOR THE MAJORITY**

J.J. Revell, Vice Chairman  
Lloyd Weeks, Member

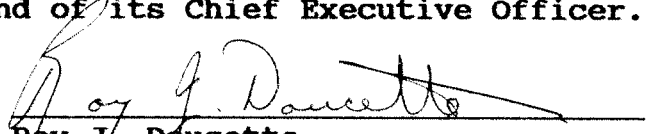


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J.J. Revell  
Vice-Chairman



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Lloyd Weeks  
Member

THIS DECISION made by the Labour Relations Board on October 19, 1990 and issued under the hand of its Chief Executive Officer.



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Roy J. Doucette  
Chief Executive Officer

**MINORITY DISSENT**

1. I dissent from the majority decision in certain aspects.

2. The difficult question to be determined is whether the reason given for Ms. Morrison's termination is the true reason. The following quote from Canadian Labour Law by George C. Adams at page 490 includes the points mentioned in the DeVilbiss case plus some others.

"Improper motive does not have to be the dominant motive. Since employers are not likely to confess to an antiunion animus, tribunals have to rely on circumstantial evidence to draw inferences about employer motivation. These considerations may include evidence of the manner of discharge and the credibility of witnesses as well as the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous antiunion conduct and any other peculiarities."

3. A review of the sequence of events from November, 1989 until July, 1990 arouses suspicions because of the timing of the termination and the manner of justification of the termination. Consider the following:

- Consultant's advice was sought in November, 1989 to remedy scheduling problems indicated by hectic workdays, an overcrowded waiting room and too many patients seeking appointments with Dr. O'Hanley. Verbal recommendations were given at the time of the study with respect to scheduling, improved work station setup and filing. Dr. O'Hanley testified that by February the new appointment schedule had been implemented. Prior to the changes, the workload averaged 45-50 patients per day, and following the changes there was an average of 43 patients per day. The practice was more orderly but still very busy.

- Apparently Dr. O'Hanley didn't contemplate any changes in staff complement until late spring. The union's application for certification was filed on April 26, 1990. Ms. Morrison was one of the organizers.

- A letter from the consultant dated May 10, 1990, opened with the comment that he's glad to hear his recommendations have improved the running of the practice and states that the detailed written recommendations are outlined in writing for Mr. Allen as requested. Why was a written report requested at this time, when changes had been implemented by February?

- During May, some supervisors pressured employees to sign letters objecting to union certification. The employer contested the union's application.

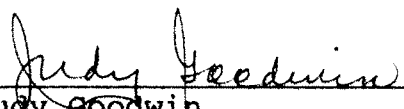
- Debbie Morrison was laid off on July 6, 1990 following a certification order issued on June 12, 1990 and prior to negotiations commencing. Reduced work load attributed to the implementation of the consultant's study is stated as the reason for termination. It appears that the consultant's recommendations are used to justify a reduced workload which in reality didn't exist.

4. If one views the messages received by employees over the past couple of years, there is evidence of consistent antiunion activity by representatives of the Charlottetown Clinic. During previous rumblings of unionization, the Clinic Manager told employees that if they supported the union they would be on the street and that there were contingency plans for dissolution of the Charlottetown Clinic partnership. This spring, some supervisor told some employees that if they didn't sign letters to denounce the union they would lose their jobs. After the union was certified, one of the main union activists was laid off for reasons not believed by employees, and Dr. Callaghan's comments confirmed that Ms. Morrison was terminated because of her union activities. In a small, closeknit organization with little turnover, these messages and actions by the Clinic Manager, supervisors and a senior partner convey an escalating pattern of antiunion activity.

5. The circumstances surrounding the manner of the layoff are a departure from practice and exhibit other peculiarities. It is clear that immediate termination with six months severance pay is an obvious departure from the Clinic Staff Policy Manual requirement for two weeks written notice of layoff and no provision for severance pay except in the case of retirement. If the layoff was indeed necessary

for the reasons stated and the Clinic had money for six months salary, why wasn't Ms. Morrison given six months notice of layoff and kept on staff during that time period? Ms. Morrison saw the severance pay as a buyoff to get her out of the workplace. Since the termination is not in accordance with stated policy, it can more readily be inferred to be for antiunion reasons.

6. In summary, I find that the genuineness of the stated reason for layoff is questionable; there is evidence of antiunion activity by representatives of the employer; the employer was knowledgeable of Ms. Morrison's active leadership role in the union and the manner of discharge deviated significantly from stated employer policy. For these reasons I feel that Ms. Morrison's termination was caused by her union activity.

  
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Judy Goodwin  
Member