1975 CarswellOnt 661
Ontario Labour Relations Board

1975 CarswellOnt 661, [1975] O.L.R.B. Rep. 308

Carleton University Academic Staff Association (Applicant) v. Carleton University (Respondent) v. Employees (Objectors)

T.E. Armstrong, Q.C. Chairman, and Board Members P.J. O'Keeffe and J.E.C. Robinson, Q.C.

Judgment: April 4, 1975
Docket: Doc. 7435-74-R

Counsel: *J. Sack, Prof. J. Vickers, Dr. D. Savage* and *Dr. G. Bennett* for the applicant.
B. Stewart, K. Kort, Dr. D. Brown, R.A. Wendt, A. Larose and *C. Kelly* for the respondent.
No one for the objectors.

Decision of *T.E. Armstrong, Q.C., Chairman*, and *Board Member J.E.C. Robinson, Q.C.*:

1 This is an application for certification of full-time academic staff of Carleton University in the City of Ottawa.

2 The applicant, not having previously proven its status before the Board, adduced the following evidence in support of its contention that it qualifies as a trade union within the meaning of section 1(1)(n) of the Act. The applicant's predecessor, the Carleton College Academic Staff Association, was formed in 1952. At its inaugural meeting on November 18, 1952 - at which twenty-six persons, comprising a majority of the members of the College's instructional staff, were present - a constitution was adopted. The constitution dealt with the essential organizational structure of the Association, including its purpose, conditions of membership eligibility, officers and the manner of their election, membership meetings, duties and responsibilities of an executive council, yearly dues and provisions for constitutional amendment. At a subsequent meeting permanent officers were elected.

3 Between 1952 and 1975, numerous constitutional amendments were made. In 1957 the name of the Association was changed to the Carleton University Academic Staff Association. There is no evidence before us to warrant a finding that the amendments were not properly made.

4 In February 1975, a revised constitution was mailed to "all faculty who were paid up members in good standing on February 7", together with an explanatory letter from the Association's President and a ballot in the following form:

> I accept the revised constitution [_]
>
> I do not accept the revised constitution [_]

5 The result of the ballot was: 292 in favour of the revised constitution, 44 opposed, and 10 spoiled ballots. If this mailed referendum is treated as a vote to amend the constitution, it appears to have been carried out in accordance with the amending provisions of the constitution then in force. In any event, the entire constitution was voted upon and accepted by a substantial number of the respondent's faculty.

6 The revisions accepted in February 1975 included an expansion of the Association's purpose clause to include "the regulation of employment relations between the University and the academic staff" and the total revision of the membership clause to make all full-time academic staff ("excluding the President, Vice-President(s) and such other persons coming within

the definition of section 1(3) of the Labour Relations Act") eligible for membership. The President of the Association testified that the purpose of the revisions in February 1975 was to "clarify the Association's status and to make explicit things that had always assumed to be the fact".

7 In our view, the applicant has the essential ingredients of an "organization", including a duly adopted constitution and elected officers. It admits to membership persons who are employees covered by the Labour Relations Act. Its objects include the regulation of relations between the University and the members of the Association. It has, with minor structural alterations, existed for over twenty-two years, and has, from time to time, engaged in negotiations over salaries, pensions, tenure and other matters relating to the employment relationship. The respondent, while recognizing that it is for the Board to satisfy itself that the applicant has status, stated that it "did not oppose the Board finding the applicant to be a trade union". On the basis of the evidence and the representations of the parties, we find that the applicant is a trade union within the meaning of section 1(1)(n) of the Act.

8 Following lengthy negotiations, the parties advised the Board that, except for the classification "Department Chairman", they had reached agreement on the description of the bargaining unit, subject to the Board's concurrence. The unit agreed to, which the Board is prepared to adopt, is as follows:

> All full time academic staff and professional librarians employed by the Respondent in the City of Ottawa in the Regional Municipality of Ottawa-Carleton save & except President, members of the Board of Governors elected by the Senate, Assistant to the President, Vice President Academic, Assistant to the Vice President Academic, Deans, Assistant Deans, Directors of Schools, University Librarian, Assistant to the University Librarian & Sections Heads for Bibliographic Processing, Central Library Services & Systems.
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> *Note 1*: The unit does not include persons engaged in non-academic administrative positions such as faculty registers, the University registrar, his associate registrars, development officers, information officers & secretary to the Board of Governors, & persons currently employed in departments such as physical plant, finance, administrative services, student services, computer centre, planning, analysis & statistics, continuing education.
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> *Note 2*: The unit includes teaching associates but does not include sessional lecturers (part time), technical aides, research officers, laboratory directors or supervisors, program consultant, graduate teaching assistants and persons engaged primarily in research at the University under a grant appointment nor does it include demonstrators, technical officers or field instructors other than those primarily engaged in teaching.

9 It was further agreed that the Board should determine the question of the inclusion or exclusion of the Department Chairman with the least possible delay, either by means of a further hearing by the Board itself, or by the appointment of a Labour Relations Officer, with the parties to advise the Registrar as soon as possible as to the procedure which they prefer.

10 On the basis of the revised unit description, it is clear that the applicant has filed evidence of membership on behalf of more than 65 per cent of the persons included in any unit which the Board may find to be appropriate, regardless of what disposition is ultimately made on the status of Department Chairman. The respondent contended, however, that in the peculiar circumstances of this case, the Board should order a representation vote, as it is empowered to do under section 7(2) of the Act, notwithstanding the fact that the applicant, on the membership count, is in a certifiable position. Counsel did not contend that the membership evidence was invalid in any respect; rather, he argued that there were special circumstances present in the instant case which justified a departure from the Board's virtually invariable practice of granting outright certification where it is satisfied that more than 65 per cent of the employees in the bargaining unit were members of the applicant on the terminal date.

11 Counsel's argument may be summarized as follows:

> (a) The composition of the applicant's executive council, as approved by the referendum vote in February 1975, was subsequently altered by a by-law enacted by the executive council. This purported change, it was argued, is of dubious constitutional validity and may well have created uncertainties in the minds of the members on an important structural

component of the organization. Any such uncertainties, according to the respondent, could best be resolved by a representation vote.

(b) Having regard to the unique collegial nature of a university faculty and the well-established commitment to democratic decision-making within the faculty community, questions of trade union representation ought to be decided by a freely-conducted vote.

(c) In a letter dated February 7, 1975, to all members, the applicant had represented that a final determination of its entitlement to be certified by the Board would be made by means of a representation vote conducted by the Ontario Labour Relations Board. In the light of this commitment to members, the Board ought to exercise its discretion under section 7(2) and direct such vote.

12 We have no hesitation in rejecting the first two arguments. Any confusion or uncertainty as to the structure of the applicant is a matter which could not be cured by any representation vote which the Board might order. It is to be noted that the respondent specifically conceded that this structural question was not being raised as a matter affecting the applicant's status as a trade union under the Act. In finding that the applicant is a trade union, we have considered this matter and have concluded, independently of any admission by the respondent, that the applicant's status is unaffected by any uncertainty - if indeed there be any - concerning the composition of its executive council.

13 As to the second argument, we have no evidence before us to support a finding that the style of government in an academic community is sufficiently unique to justify a departure from our normal practice of granting outright certification where the applicant has met the membership requirements of section 7(2) of the Act.

14 In support of its third argument, the respondent relies, in part, on the text of a letter to the Registrar dated March 20, 1975, from a person purporting to be a member of the respondent's faculty. Although served with notice of the hearing and advised of the consequences of his failure to appear at the hearing and support the representations contained in his letter, the writer did not, in fact, appear. We cannot, therefore, treat the contents of that letter as evidence before us nor can we give it any weight in reaching our decision.

However, the respondent also relies on the following passage from the applicant's letter of February 7 which, it will be recalled, accompanied the ballot on the proposed revisions of the applicant's constitution and which, incidentally, predated all of the evidence of membership filed in support of the application:

> It should be noted that this Constitutional Referendum does NOT constitute a certification vote. According to our lawyer, these changes are necessary BEFORE CUASA can file an application requesting certification. The Labour Relations Board would administer the actual certification vote WITHOUT THE INVOLVEMENT of the officers of CUASA.

This passage, counsel contended, would naturally lead a recipient to believe that the applicant would not be certified unless and until the Board conducted a representation vote amongst the persons in the unit found to be appropriate for collective bargaining.

15 Counsel for the applicant, on the other hand, argued that the passage quoted above did not amount to a representation that a vote would necessarily be held by the Board. Rather, he argued, read in context, it merely distinguished the applicant's internal referendum on the constitutional revisions from any vote which the Board might conduct on an application for certification. He contended that, in any event, it could not reasonably be construed to detract from the clear wording of the membership documents in which members authorized the applicant to bargain collectively on their behalf and to apply for certification as bargaining agent to the Ontario Labour Relations Board.

16 Both interpretations suggested are plausible, although it seems to us that a recipient of the letter would be more likely to read it in the sense suggested by the respondent. However, it is, at the very least, equivocal. We therefore cannot reject the possibility that some may well have assumed that a representation vote would ultimately be held.

17 In some cases the Board has held that a conditional application for membership - for example, where the union undertakes to repay the money accompanying an application for membership if it does not obtain certification - is not acceptable evidence of membership under the Act: see for example *De Laval Company Limited*, 52 CLLC ¶17,031; *Wheatley Manufacturing Limited*, OLRB Monthly Reports, Dec. 1964, 457. Here, however, the applications for membership are, in terms, unqualified; the applicant union is authorized to bargain on behalf of the individual applicant for membership and is further authorized to apply for certification. There is no basis, therefore, for inferring that if the applicant union is unsuccessful in its certification attempt, the individual will withdraw his request for membership. In this sense, the commitment to membership is unqualified. There is, however, a possibility that in authorizing the applicant to apply for certification, applicants for membership believed that there would be a representation vote amongst all faculty members.

18 It is clear that we have before us sufficient documentary membership evidence to enable us to exercise our discretion and issue outright certification. The difficult and unique question before us is whether the Board ought to exercise its discretion and permit the applicant's entitlement to certification to be determined in accordance with what the individual members may have believed to be the invariable practice in matters of this sort, i.e., by a representation vote. After anxious consideration, and having carefully considered the arguments of counsel, we have concluded that it would serve no one's interest for outright certification to be granted where the affected employees may have been under the misapprehension that the faculty as a body was to be guaranteed the opportunity to vote upon the question of representation. This is especially so where, as here, this possible misapprehension has been induced, however innocently, by the applicant itself. We may add that we find nothing inconsistent about an individual applicant for membership giving his unqualified support to the applicant union and authorizing the union unreservedly to act as *his* bargaining agent and at the same time supporting a secret ballot vote to determine the *collective* views of the entire faculty on the question of representation. It is at the very least possible, in view of the contents of the letter of February 7th, that this general expectation prevailed when the membership evidence was obtained. The Board is certainly not bound to ensure that this expectation is fulfilled; however, we are of the view that the fairest and most equitable resolution of this difficult problem, and the one which is most likely to dispel any lingering dissatisfaction, is to direct a representation vote.

19 For the above reasons, we are of the view that the interests of all affected persons and the purposes of the legislation are best served by the Board exercising its discretion under section 7(2) and directing an immediate representation vote. It need hardly be emphasized that the Board's decision is based upon the unique facts of this particular case and should not be construed as a departure from the Board's long-established practice of certifying automatically on the production of documentary evidence on behalf of more than 65 per cent of the members for the appropriate unit.

20 Accordingly, we direct that a representation vote be held on a date or dates prior to April 17, 1975, to be agreed on between the parties. If, within three days of the date hereof, the parties have failed to advise the Registrar of the date or dates agreed upon, the Registrar is directed to fix a date or dates within that period. We impose these terms to ensure that all eligible voters will be given the opportunity of exercising their franchise prior to the completion of the academic term.

21 The parties are directed to meet forthwith and establish the list of eligible voters. The voting constituency is the unit agreed upon by the parties as set out in paragraph 8 above including Department Chairmen. Should any of the Department Chairmen or any other disputed persons present themselves at the poll, they shall be permitted to vote and their ballots segregated and not counted until a final determination has been made as to their eligibility. The ballots of all voters on the eligible voters' list will be tabulated immediately upon the closing of the polls and the result of the poll will be recorded and announced in the usual manner.

22 Mr. N.J. Harper, Labour Relations Officer, is hereby appointed to confer with the parties forthwith as to the voting arrangements. In all other respects, the matter is referred to the Registrar.

Decision of *Board Member P.J. O'Keeffe*:

I concur with the findings of the majority in this matter except with respect to the weight they apply to a passage from the applicant's letter of February 7, 1975, and their subsequent decision to order a vote under section 7(2) of The Ontario Labour Relations Act.

The applicant has submitted clear evidence of employee support evidencing the fact that 447 out of a possible 556 employee bargaining unit have joined the applicant and that this group representing 80.3% of the bargaining unit desire to have the applicant as their bargaining agent.

The form of membership is as follows:

CARLETON UNIVERSITY ACADEMIC STAFF ASSOCIATION APPLICATION FOR MEMBERSHIP

Name_____ Department_____

Address: _____ Telephone No. _____

_____

I hereby apply for and accept membership in the above union and agree to abide by its constitution and by-laws. I hereby authorize the above union to bargain collectively with Carleton University on my behalf with respect to terms and conditions of employment. I hereby authorize the above union to apply for certification as bargaining agent to the Ontario Labour Relations Board.

DATE_____

Amount $_____ Paid by_____

Signature of applicant

Received by_____

Signature of collector

Counsel for the respondent University while being well aware that based on the applicant's membership position that the applicant is in an automatic certification position urges this board to refrain from certifying the applicant outright without a representation vote. In support of his request for a representation vote in this matter he argues in part based on a letter to the Board dated March 20, 1975 from a person purporting to be a member of the respondent's faculty. The writer of that letter, although served with notice of the Board's hearing, did not, in fact, appear at the hearing to support his allegations of improper conduct by the applicant. Further, counsel for the respondent University directed the Board's attention to the following letter, dated February 7, 1975, submitted by him as evidence going to the question of the status of the applicant union. The letter is as follows:

Dear Colleague:

As you are aware, the general meeting of CUASA held January 31st directed the Steering Committee to proceed with the constitutional revisions deemed necessary by our legal advisor to permit an application seeking the certification of CUSAS as the official bargaining agent for members of the Carleton academic staff under the protection of Ontario Labour Relations Law.

Since changes to the Constitution must be proposed by the Council, the proposed changes have the unaminous approval of the CUASA Council which is recommending that you vote in favour of the revised Constitution.

It should be noted that this Constitutional Referendum does NOT constitute a certification vote. According to our lawyer, these changes are necessary BEFORE CUASA can file an application requesting certification. The Labour Relations Board would administer the actual certification vote WITHOUT THE INVOLVEMENT of the officers of CUASA. Under our existing constitution, constitutional changes of any sort require a positive vote of two-thirds of those voting provided that those in favour of the changes constitute at least one-third of the membership. This letter, a copy of the constitution as

revised, and a ballot are being sent to all faculty who were paid-up members in good standing on February 7th and are therefore entitled to vote. The revised portions of the constitution have been underlined.

Yours sincerely,

'J.M. Vickers'

President, CUASA

Counsel for the respondent, when arguing with respect to the use of the Board's discretion under section 7(2) of the Act, directed our attention particularly to the following words from the foregoing letter: "The Labour Relations Board would administer the actual certification vote WITHOUT THE INVOLVEMENT of the officers of CUASA." These words, he contends, may have led certain of the members who signed applications for membership in the applicant to believe that the applicant would not be certified to represent the employees until the Board conducted a representation vote amongst the employees in the bargaining unit. Counsel for the respondent, when arguing his case, was very careful not to allege any wrongdoing by the applicant with respect to the membership evidence, although he did rely in part on the allegations of improper conduct by the applicant alleged in the letter of March 20, 1975, already dealt with in this decision.

I could not accept the arguments by counsel for the respondent that there was a sufficient case made out to cast a cloud on the evidence of membership that would cause this board to conduct a confirmatory representation vote of the employees in the unit in the exercise of our discretion in such matters under section 7(2) of the Act.

The Board, over a great many years, has had to cope with the proper use of our discretion under section 7(2) of the Act and there is now a great body of decisions dealing with the use of this discretion. Generally, it is fair to say that this discretion is readily applied when the Board is satisfied with a petition submitted by employees who initially joined a union and subsequently have indicated to the Board within the proper time limits for such submissions that they now no longer wish to be represented by a union. Such petitioners are required to adduce evidence with respect to the voluntariness of such petition and are subject to direct examination by the Board on the matter and to cross-examination by the parties. Again, there are a number of past cases when the Board has exercised this discretion when as a result of allegations of improper conduct the Board is satisfied on the evidence that a doubt has been cast on membership evidence. Until now, I am not aware of any occasion when the Board exercised this discretion without a full and complete inquiry into allegations of improper conduct with respect to membership evidence. In all such cases the party most adversely affected by such a decision, namely, the union, has always been notified well in advance of the hearing of such allegations and given ample opportunity to adduce its own evidence to rebut such allegations. In the instant case there are no supportable allegations of improper conduct with respect to membership evidence. There is no evidence before the Board of improper conduct. There is one piece of evidence, namely, the letter of February 7, 1975, which has been outlined in this decision which was put in by the respondent not going to the matter of the use of our discretion under section 7(2) of the Act but going to the question of the status of the applicant. Counsel for the respondent had ample opportunity to cross-examine Professor J. Vickers, the writer of the letter, with respect to the questionable paragraph in that letter referring to a Labour Relations vote. He chose, for his own purpose, not to question her on the questionable paragraph. In fairness, it could be said that Counsel for the applicant could have questioned the witness with respect to this matter also. However, we must keep in mind that this evidence was adduced going to the question of status and not to the quality of membership evidence. Consequently Counsel for the applicant was not alerted at the time to the possible consequences of this piece of evidence applied to an entirely different question relating to the use of the Board's discretion under section 7(2) of the Act.

It is of some interest to note that the bargaining unit agreed to in the instant case in a unit comprising in the main learned university professors. With this kind of applicant for union membership, and keeping in mind the type of application for membership card that they signed, I would have great difficulty in finding that the questionable paragraph in the letter of February 7, 1975, was such that they did not clearly grasp its clear meaning in the context of the whole letter, or that they could not read into the application for membership card that they subsequently signed its clear and unequivocal commitment. In the result, I would reject the respondent's request for a representation vote and being satisfied that the applicant union represents more than 65% of the employees in the bargaining unit I would certify the applicant union outright.