

CITATION: Carr v. O'Reilly, 2024 ONSC 4412
COURT FILE NO.: CV-24-00095733-0000
DATE: 2024/08/08

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JENNIFER CARR

Applicant

– and –

SEAN O'REILLY, NORMA DOMEY,
STÉPHANIE FRÉCHETTE, EVA
HENSHAW, MARK MUENCH, STACY
MCLAREN, WAHEED KHAN, DAVE
SUTHERLAND, MORGAN CRANNY,
SAMAH HENEIN, JOHN PURDIE,
PIERRE POTVIN, EMMANUEL
COSTAIN, AND CHRIS ROACH

Respondents

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) Chris Trivisonno and Logan Stack, for the
) Applicant

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) Jamie Macdonald and Jessica Warwick, for
) the Respondents

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) **HEARD:** June 24, 2024

2024 ONSC 4412 (CanLII)

REASONS FOR JUDGMENT

RYAN BELL J.

Overview

[1] This is an oppression application under s. 253 of the *Canada Not-for-profit Corporations Act* (“*CNFPCA*”).¹

[2] The applicant Jennifer Carr is the elected President of the Professional Institute of the Public Service of Canada (“*PIPSC*”). Ms. Carr is currently facing investigations into several

¹ S.C. 2009, c. 23.

complaints against her. The investigations are ongoing. On April 10, 2024, the respondents – the directors of PIPSC – placed Ms. Carr on “administrative leave” with pay because they were concerned that her conduct could put the integrity of the investigations at risk. Ms. Carr was not given notice of the motion before the Board or an opportunity to make submissions to the Board before she was placed on administrative leave, nor was the matter referred to a Special General Meeting of PIPSC’s members.

[3] Ms. Carr argues that she has been suspended from her elected duties and responsibilities as President of PIPSC in a manner contrary to PIPSC’s By-laws, Policies, and the *CNFPCA*. She asserts that the respondents styled her suspension as an administrative leave in order to avoid sending the matter to a Special General Meeting. Ms. Carr says she reasonably expected that the respondents would not suspend her without permitting her to make submissions, providing her with a right of appeal, or seeking the authorization of PIPSC’s members at a Special General Meeting. She also reasonably expected that the respondents would conduct the complaints process and any discipline of her in a manner consistent with PIPSC’s By-laws and Policies.

[4] Ms. Carr argues that the respondents’ decision to suspend her on April 10, 2024 and their conduct throughout the complaints process is oppressive or unfairly prejudicial to, or unfairly disregards her interests as President of PIPSC. She submits that the motion to place her on administrative leave should be quashed, she should be reinstated to her position as President, and the respondents should be prohibited from excluding her from her duties without seeking authorization from PIPSC’s members at a Special General Meeting.

[5] The respondents see things differently. They say they became concerned that Ms. Carr was interfering in the investigations by failing to keep the complaints and the investigation process confidential, ignoring warnings not to speak with the complainants, and accessing information discussed in closed Board meetings. The respondents therefore placed Ms. Carr on administrative leave with pay in order to protect the integrity of the investigations.

[6] The respondents distinguish between administrative leave with pay pending the outcome of an investigation – which they say is non-disciplinary – and a disciplinary suspension under PIPSC’s Policies. They say that an administrative leave does not constitute a removal from office requiring the authorization of PIPSC’s members. The respondents say Ms. Carr’s expectation that she would not be placed on administrative leave without being permitted to make submissions, provided with a right of appeal, or in the absence of a Special General Meeting, is unreasonable, because it would “tie the hands” of the Board in its efforts to protect the integrity of the investigations.

[7] The respondents also say they did not oppress Ms. Carr because their conduct satisfied the business judgment rule: their decision to place Ms. Carr on administrative leave was reasonably necessary and justified to preserve the integrity of the investigations, and made in good faith. As for Ms. Carr’s claim that the respondents have acted oppressively throughout the complaints process, the respondents argue that any breaches of procedural fairness should be dealt with following the completion of that process, through the appeal mechanisms available to Ms. Carr.

[8] This application was heard on a Monday. On the Friday afternoon before the hearing, the respondents called a Special General Meeting for July 27, 2024. The text of the Special Resolution before PIPSC’s members reads in part:

BE IT RESOLVED that Ms. Carr be placed on an administrative leave with pay, even if that leave amounts to a “suspension from office” or “removal from office”, until the final completion of the investigations into all allegations of misconduct that are outstanding at the time of this Special General Meeting.

[9] On consent of the parties, on August 16, 2024, I ordered an interim stay of the Special General Meeting scheduled for July 27, 2024 pending the release of these reasons for judgment.

[10] The issues I must determine are as follows:

- (i) When the respondents placed Ms. Carr on administrative leave, did they effectively suspend her?
- (ii) What were Ms. Carr’s reasonable expectations?
- (iii) Did the respondents act in a manner that is oppressive or unfairly prejudicial to or unfairly disregards Ms. Carr’s interests or, does the business judgment rule afford a defence to the respondents?
- (iv) If the respondents acted in a manner that is oppressive or unfairly prejudicial to or unfairly disregards Ms. Carr’s interests, what are the appropriate remedies?

[11] For the following reasons, I find that the respondents suspended Ms. Carr from her elected duties as President of PIPSC on April 10, 2024. They did so without the authorization of PIPSC’s members at a Special General Meeting. I find that the respondents breached Ms. Carr’s reasonable expectations and acted in a manner that is oppressive and unfairly prejudicial to and unfairly disregards her interests as President of PIPSC. The April 10, 2024 motion to place Ms. Carr on administrative leave is quashed. Ms. Carr is reinstated to her position as President. The respondents are prohibited from suspending Ms. Carr from her duties as President without seeking authorization from PIPSC’s members at a Special General Meeting.

Issue 1: When the respondents placed Ms. Carr on administrative leave, did they effectively suspend her?

[12] The answer to this question informs the reasonable expectations analysis. Ms. Carr submits that she was effectively suspended from her duties and responsibilities as President, without being afforded the procedures and protections set out in the relevant governance documents.

[13] Appendix 2 of the President Policy requires that the President be afforded “procedural fairness in the processing of the allegations against them” and that the respondents “act fairly and with impartiality.” Appendix 2 expressly states “[s]uspension or expulsion from office or membership of a member of the Board of Directors may only occur by ordinary resolution at a

Special General Meeting.” The same language is included in PIPSC’s Policy on Conduct, which applies to all PIPSC members.

[14] PIPSC’s President Policy is consistent with s. 130(1) of the *CNFPCA* which provides that removal of directors can only occur if authorized by members of the corporation by ordinary resolution at a special meeting. The *CNFPCA* does not distinguish between temporary and permanent removal.

[15] When she was elected, Ms. Carr signed a Service Agreement. Ms. Carr agreed to ensure that PIPSC conducted its affairs in an efficient manner and in accordance with its By-laws, Policies and Directives, to behave in a respectful manner towards all members and employees, and to maintain confidentiality and avoid intentional disclosure of confidential information to third parties. The Service Agreement provides that allegations of misconduct will be dealt with under the President Policy (s. 1.5). The Service Agreement also provides that with the exception of economic adjustments, there will be no changes to the President’s terms and conditions between triennial reviews (s. 2.3).

[16] In support of her position that the respondents effectively suspended her from her duties, Ms. Carr makes three main arguments: (i) the applicable By-Laws, Policies, and her Service Agreement do not use the term administrative leave; (ii) the weight of the evidence supports a finding that the respondents styled her suspension as an administrative leave in order to avoid sending the matter to a Special General Meeting; and (iii) the effect of the administrative leave was to exclude or remove Ms. Carr from her duties as President. I consider each of these arguments in turn.

(i) *No reference to administrative leave in the governance documents*

[17] The term administrative leave does not appear in PIPSC’s By-laws, the President Policy, or Ms. Carr’s Service Agreement. By contrast, Ms. Carr’s Service Agreement specifically provides for annual leave, bereavement leave, and sick leave.

[18] The respondents submit that a board of directors has an implied power to put a director on a temporary leave, notwithstanding the absence of express authorization in the by-laws, as part of the broad powers granted to the board to manage the corporation: *George v. The B.C. Wildlife Federation*, 2016 BCSC 718, at paras. 23, 52. Given the broad powers of the directors contained in the by-laws, the court in *George* was not satisfied that Mr. George had been removed from the board of the not-for-profit corporation: *George*, at paras. 22, 52.

[19] PIPSC’s Policies state that the Board is responsible for “the direction, supervision and discipline of the President, in accordance with the Institute’s Policies, Bylaws and Regulations.” By-law 15.2.1 provides that the Board shall “exercise the authority of, and act on behalf of, the Institute on all matters, subject to these By-Laws and to policy decisions of General Meetings.” The respondents argue that, similar to *George*, PIPSC’s members would expect the Board to use its broad powers under the By-laws to preserve the integrity of the investigations if Ms. Carr interfered with the complaints and the investigation process, notwithstanding the absence of express authorization in PIPSC’s By-laws and Policies to place Ms. Carr on administrative leave.

[20] In my view, the respondents' reliance on *George* is misplaced. In *George*, there was no question that Mr. George had been suspended from his positions as a director, vice president, and a member of the executive committee. The issue was whether that suspension to the end of his current elected term was tantamount to removal from the board, something that could only be accomplished by special resolution of the members: *George*, at para. 20; *Society Act*, s. 31.² The suspension in *George* was also of a finite duration unlike the administrative leave imposed in this case.

[21] The legislative provision at issue in *George* is similar to s. 130(1) of the *CNFPCA*, which speaks to removal of directors only if authorized by the members by ordinary resolution at a special meeting. However, in *George*, there was no equivalent to Appendix 2 of the President Policy, which expressly requires an ordinary resolution of the members before suspension or expulsion from office may occur.

[22] Finally, I note that in *George*, Mr. George was provided with notice that if he did not voluntarily step down, the matter would go before the full board of directors for consideration. It is not disputed that no notice was given to Ms. Carr.

[23] Nor am I persuaded by the respondents' argument that administrative leave – unlike a suspension – is non-disciplinary in nature and ought to be inferred as part of the Board's powers in relation to the President and the complaints process. The Board is responsible for the direction, supervision and *discipline* of the President, in accordance with PIPSC's By-laws and Policies. In February 2024, PIPSC's Acting General Counsel characterized Ms. Carr's alleged conduct as disciplinary in nature. It is that alleged conduct the respondents rely on as the reason for placing Ms. Carr on administrative leave.

[24] Eva Henshaw, the Acting President, agreed on cross-examination that speaking with complainants, as Ms. Carr is alleged to have done, is itself a disciplinary matter because it would involve a form of misconduct. The matter would therefore be subject to Appendix 2 of the President Policy which sets out the disciplinary process for allegations against the President of misconduct or breach of obligations. The governing documents establish a code or framework to deal with disciplinary matters involving the President. In these circumstances and based on a plain reading of the governance documents, I would not import the further concept of administrative leave by attaching a "non-disciplinary" label to it. In any event, as I discuss below, the effect of placing Ms. Carr on administrative leave is to remove her from her duties and responsibilities as President and is disciplinary in nature.

[25] My conclusion is reinforced by the fact that Ms. Carr's Service Agreement clearly distinguishes between "Duties, Obligations and Authorities" (Part 1), including how allegations of misconduct are to be addressed (s. 1.5), and Annual Leave (Part 7) and Sick Leave (Part 8). To read in the concept of administrative leave would change the President's terms and conditions, something that is not permitted between triennial reviews.

² R.S.B.C. 1996, c. 433.

(ii) The respondents' evidence

[26] The respondents' evidence on cross-examination compels a finding that placing Ms. Carr on administrative leave was the same as suspending her. The evidence I rely on includes the following.

[27] On cross-examination, Ms. Henshaw agreed that administrative leave does not appear in PIPSC's By-laws, Policies, or in Ms. Carr's Service Agreement. At the same time, she admitted that Ms. Carr's alleged conduct was subject to the President Policy which requires procedural fairness.

[28] It was put to Ms. Henshaw that in relation to the powers, duties, and rights of the President, there is no difference between administrative leave and suspension. Ms. Henshaw agreed: "Administrative leave can be wide or narrow. In this circumstance, that is correct."

[29] Ms. Henshaw's evidence also suggests that the respondents styled Ms. Carr's suspension as an administrative leave in order to avoid sending the matter to a Special General Meeting:

450 Q. Fair to say that administrative leave was presented to the board as a way to temporarily relieve Ms. Carr from her duties without suspending her. Correct?

A. Correct. To protect.

451. Q. And without sending the matter to a special general meeting?

A. Correct.

[30] On cross-examination, the Complainant³ – one of the respondents – also agreed that administrative leave does not appear in PIPSC's By-laws, the President Policy, or in Ms. Carr's Service Agreement. The Complainant agreed that the decision to place Ms. Carr on administrative leave temporarily removed Ms. Carr from her role as president.

[31] Finally, the "FAQs on President Jennifer Carr's leave" on PIPSC's website are telling. While PIPSC states in its responses to the FAQs that Ms. Carr will be on leave for an "indeterminate period", it denies that Ms. Carr has been suspended or removed from her position as position as President. At the same time, however, PIPSC states that Ms. Henshaw was appointed Acting President pursuant to a provision of the Policies that is only triggered when there is a vacancy in the office. Notwithstanding PIPSC's assertions to the contrary, on a plain reading, PIPSC's own website suggests that Ms. Carr has been removed – at least on a temporary basis – from her role as President, giving rise to a vacancy in the office that had to be filled.

³ The Complainant has been identified as the Complainant in the documents filed with the court in order to preserve the confidentiality of the ongoing investigations.

(iii) The effect on Ms. Carr's ability to perform her elected functions as President

[32] The fact that Ms. Carr is unable to perform her elected functions as President because she has been placed on administrative leave is not seriously challenged. The motion adopted by the respondents placed Ms. Carr on administrative leave which “excludes the President from all duties as the President, and all institute-partner supported events.” The motion took effect immediately and excludes Ms. Carr from her role for an indefinite period. On cross-examination, Ms. Henshaw admitted that Ms. Carr has been excluded from all her powers, responsibilities, and duties as President. These powers now vest in Ms. Henshaw as Acting President. The respondents continue to prohibit Ms. Carr from accessing her President’s email account, her personal PIPSC email account, her calendar, her Google account, and the Board’s Google drive. She is prohibited from accessing PIPSC’s books and records, and from accessing PIPSC’s offices. Ms. Carr continues to be prohibited from communicating with any PIPSC staff.

[33] As a result of the respondents’ actions, Ms. Carr has been unable to attend meetings of the National Joint Council where public service bargaining agents and the Treasury Board meet to address critical workplace issues. Ms. Carr plans to seek re-election for another terms as President at the Annual General Meeting in November. While the respondents argue that her term as President has not been put to an end, it clearly has been put “on hold” and she has been entirely excluded from it. And although Ms. Carr is not precluded from seeking re-election, she is concerned that her ongoing administrative leave will affect her ability to do so. It is difficult to see how this would not be the case. Ms. Carr cannot review her emails, her calendar, Board documents, or PIPSC documents to respond to the complaints against her.

[34] Ms. Carr was placed on administrative leave by the respondents for matters they admit are disciplinary in nature. Even if the respondents did not intend the administrative leave to be disciplinary, having regard to the totality of the evidence, I have no hesitation in finding that the administrative leave imposed is disciplinary in its effect on Ms. Carr. I find that in the circumstances of this case, Ms. Carr’s administrative leave is functionally equivalent to a suspension from the office of President.

Issue 2: Were Ms. Carr’s expectations reasonable?

(i) The applicable legal principles

[35] Under s. 253(1) of the *CNFPSCA*, the court has wide discretion to grant an oppression remedy. The wording of s. 253 is substantially the same as the oppression provision in the *Canada Business Corporations Act*;⁴ accordingly, the general principles of oppression apply: *ACTRA Performers’ Rights Society v. Re: Sound*, 2023 ONSC 3533, at para. 7.

[36] Oppression “seeks to ensure fairness – what is ‘just and equitable’”: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 58. There is a two-part inquiry for oppression: (i) does the evidence support the reasonable expectation asserted by the claimant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct falling

⁴ R.S.C. 1985, c. C-44.

within the terms “oppression”, “unfair prejudice”, or “unfair disregard” of a relevant interest: *BCE*, at para. 95.

[37] Not every unmet expectation, though reasonably held, constitutes oppression: *BCE*, at paras. 67, 89. At the same time, the inquiry into reasonable expectations should not be approached unduly narrowly, given the equitable nature of the remedy: *Pereira v. TYLT Technologies Inc.*, 2023 ONCA 682, at para. 31. The relevant factors to consider include the nature of the corporation, general commercial practice, past practice, preventative steps, the relationship between the parties, representations and agreements, and the fair resolution of conflicting interests: *BCE*, at para. 72.

[38] In considering whether a failure to meet reasonable expectations rises to conduct that is oppressive or unfairly prejudicial to, or unfairly disregards a relevant interest, actual unlawfulness, bad faith, or an intention to harm are not required: *Wood Estate v. Arius3D Corp.*, 2014 ONSC 3322, at para. 127, cited with approval in *Wilson v. Alharayeri*, 2017 SCC 39, [2017] 1 S.C.R. 1037, at para. 42. Bad faith can still, however, inform the analysis: *Wilson*, at para. 24.

[39] Oppression connotes conduct that is “coercive and abusive” and “a visible departure from standards of fair dealing”: *BCE*, at paras. 67, 92. Unfair prejudice involves conduct that is less offensive than oppression and that may admit of a less culpable state of mind, but that nevertheless results in unfair consequences: *BCE*, at paras. 67, 93. Unfair disregard involves “ignoring an interest as being of no importance, contrary to the stakeholders’ reasonable expectations”: *BCE*, at paras. 67, 94.

(ii) Ms. Carr’s expectations were reasonable

[40] Ms. Carr has identified two expectations. First, she expected that the respondents would not suspend her without permitting her to make submissions, providing her with a right of appeal, or seeking the authorization of the members at a Special General Meeting. Second, Ms. Carr expected that the respondents would conduct the complaints process and any discipline of Ms. Carr in a manner consistent with PIPSC’s By-laws and Policies, and the *CNFPSCA*.

[41] I find that both expectations are reasonable. They flow from PIPSC’s By-laws and Policies, and Ms. Carr’s Service Agreement. As discussed, Appendix 2 of the President Policy prescribes a mandatory framework that the Board is required to follow when dealing with allegations against the President of misconduct or breach of obligations set out in the Service Agreement, the By-laws, and Policies. Ms. Henshaw admitted that the President Policy applied to the matters considered at the April 10, 2024 Board meeting.

[42] Appendix 2 of the President Policy requires that the President be afforded “procedural fairness in the processing of the allegations against them” and that the respondents “act fairly and with impartiality.” Communications sent to Ms. Carr reiterate the respondents’ duty to afford her procedural fairness. The FAQs on PIPSC’s website also affirm PIPSC’s commitment to “respect and follow due process and procedural fairness” as required by PIPSC’s By-laws and Policies.

[43] Before considering suspension or removal from office, Appendix 2 of the President Policy requires the respondents to seek external counsel. The President also has a right of appeal. Suspension or expulsion from office requires an ordinary resolution at a Special General Meeting

of the members, reflecting the democratic compact PIPSC has with its members in regard to the potential removal from office of the duly elected President.

[44] Ms. Carr's Service Agreement expressly incorporates the President Policy and states that allegations of misconduct would be dealt with under that Policy.

[45] PIPSC's By-laws and Policies reflect PIPSC's consistent past practice. PIPSC is a large, sophisticated, national union, whose President is democratically elected. Section 130(1) of the *CNFPCA*, which provides that removal of directors can only occur if authorized by members of the corporation by ordinary resolution at a special meeting, confirms the governance compact between union members and their elected representatives. It was reasonable for Ms. Carr, as the democratically elected President, to expect that the respondents would conduct themselves in accordance with the governing legislation, PIPSC's By-laws and Policies, and her Service Agreement.

[46] The respondents acknowledge that, "on its face", Ms. Carr's expectation that they would conduct the complaints process and any discipline of Ms. Carr in a manner consistent with PIPSC's By-laws and Policies is reasonable. They argue, however, that this expectation was tempered by other reasonable expectations held by Ms. Carr, including that she would be required to behave in a respectful manner to members and employees, to act in PIPSC's best interests, to avoid conflicts of interest, and by maintaining confidentiality and avoiding intentional disclosure of confidential information. The respondents also argue that Ms. Carr has several "unreasonably held" expectations about how PIPSC's By-laws and Policies applied or did not apply to her as President.

[47] A consideration of whether Ms. Carr held other expectations that the respondents believe are unreasonable does not assist me in determining whether the identified expectations are reasonable. As for the respondents' "tempering" arguments, they are more appropriately considered under the second part of the oppression inquiry.

[48] The respondents argue that Ms. Carr's expectation that they would not place her on administrative leave without permitting her to make submissions, providing her with a right of appeal, or seeking the authorization of the members at a special general meeting is unreasonable for three related reasons. First, the respondents say that administrative leave is not disciplinary in nature and does not constitute a suspension under PIPSC's By-laws and Policies. I have disposed of these arguments: the administrative leave is disciplinary in nature and functionally equivalent to a suspension from office.

[49] Second, the respondents say that Ms. Carr unreasonably expected that the same procedures for taking disciplinary action would apply to any non-disciplinary direction given to the President. Again, this was not non-disciplinary direction. Ms. Carr has been suspended from her duties, functions, and responsibilities as President of PIPSC.

[50] Third, the respondents say that the practical implication of Ms. Carr's expectation is that if she continued to interfere with the investigations, "despite repeated warnings, the board's only recourse to preserve the integrity of the investigation was to call a special general meeting and potentially take the draconian step of suspending her." But that is precisely what the respondents

did: they suspended Ms. Carr and sidestepped the requirement of a Special General Meeting by labelling the suspension as an administrative leave.

[51] The respondents argue that Ms. Carr’s expectations are also unreasonable in the context of a union with a “no tolerance policy for retaliation”, and because her expectation would permit a President to interfere with investigations “without immediate fear of consequences.” These arguments ignore PIPSC’s governance practices as set out in its By-laws and Policies, Ms. Carr’s position as the democratically elected President, her Service Agreement, and the respondents’ oft-repeated commitment to follow due process and procedural fairness.

[52] In determining whether an expectation is reasonable, the court may consider whether the claimant could have taken steps to protect themselves against the prejudice they claim to have suffered: *BCE*, at para. 72. The respondents argue that Ms. Carr was repeatedly warned to maintain confidentiality of the process, to stop speaking with the complainants about their complaints, and to not access information from closed session meetings. The respondents also point to the fact that Ms. Carr was invited to suggest other temporary measures that could be put in place to prevent the interference from occurring, but she did not propose any.

[53] I place little weight on the respondents’ submissions in this regard for two reasons. First, it is instructive to consider the example given by the Supreme Court of Canada in *BCE*, at para. 78, in this context:

In determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered. Thus it may be relevant to inquire whether a secured creditor claiming oppressive conduct could have negotiated protections against the prejudice suffered. [Citations omitted.]

[54] In my view, the “negotiated protections” raised in the example in *BCE* are more akin to the procedural and substantive protections set out in the governance documents than the “repeated warnings” the respondents claim to have given Ms. Carr.

[55] Second, the allegation that Ms. Carr was “repeatedly warned” by the respondents is not supported by the evidence. Ms. Carr was cautioned about the need for confidentiality at the outset of the complaints process and was admonished by Marie-Hélène Tougas, PIPSC’s Acting General Counsel, in her letter of February 23, 2024. There were no warnings thereafter. While the respondents criticize Ms. Carr for failing to suggest other temporary measures to prevent the alleged interference from occurring, the criticism is ill-placed. By this time, restrictions had *already* been placed on Ms. Carr. On March 15, the respondents prohibited Ms. Carr from attending any in-person meetings, where any of the complainants were present. The prohibition included attending any Board meeting in-person. On March 19-20, the respondents removed Ms. Carr’s authority to supervise PIPSC’s Director of Human Resources and General Counsel.

[56] The respondents say that Ms. Carr is attempting to import expectations about the manner in which an employer might place an employee on administrative leave or suspension to the present

context. I disagree. Ms. Carr holds office as the democratically elected President of PIPSC, a large, national union. Her expectations as to how the Board would conduct itself are grounded in PIPSC's governance documents, her Service Agreement, and the *CNFPCA*.

[57] I find that Ms. Carr's identified expectations were reasonable.

Issue 3: Did the respondents act in a manner that is oppressive or unfairly prejudicial to or unfairly disregards Ms. Carr's interests?

(i) *The respondents' suspension of Ms. Carr on April 10, 2024*

[58] The respondents argue that they did not oppress Ms. Carr, nor did they act in a manner that was unfairly prejudicial to or unfairly disregarded her interests. They invoke the business judgment rule in defence of their conduct. On the totality of the evidence, I find that the business judgment rule does not afford a defence to the respondents.

[59] Under the business judgment rule – a formulation of deference to the decision of the corporation's board of directors – the court looks to see that the directors made “a reasonable decision not a perfect decision”; provided the decision taken is “within a range of reasonableness, the court ought not to substitute its opinion for that of the board”: *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.), cited in *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461, at para. 65.

[60] The respondents argue that in assessing their conduct, the interests of Ms. Carr should not prevail over another set of interests, including the interests of the complainants: *BCE*, at para. 84. The respondents argue that under PIP

[61] SC's By-laws and Policies, they were entrusted with the task of supervising, directing, and disciplining the President, and ensuring that any investigation into the President's alleged misconduct be carried out in a fair and impartial manner.

[62] The respondents submit that by the time of the Board meeting on April 10, 2024, the evidence before the Board indicated that Ms. Carr's actions could be putting the integrity of the investigations at risk. The respondents say the evidence before them showed: Ms. Carr had purportedly breached closed session protocol on three occasions; spoken to the Complainant about their complaint on at least two occasions contrary to warnings and despite Ms. Carr knowing that she was not permitted to do so; confronted the Complainant about how their complaint was impacting Ms. Carr's mental health and family, without concern for the Complainant's own feelings and interests; and reprised against the Complainant by refusing to discuss union business with them.

[63] The respondents say that they were reasonably concerned about Ms. Carr's apparent conduct. They say that the Board carefully considered the best interests of PIPSC with the assistance of the Acting General Counsel, who provided several options to the Board, and considered Ms. Carr's written explanation for the purported breach of closed session protocol. The Board, acting reasonably and in good faith, decided that the best course of action to protect the integrity of the investigations was to place Ms. Carr on a temporary administrative leave with pay until the completion of the investigations.

[64] The reasonableness of the Board's decision to place Ms. Carr on an administrative leave that was tantamount to a suspension is belied by the evidentiary record. The evidence on which I rely includes the following.

[65] Ms. Henshaw did not consult the *CNFPCA*, PIPSC's By-laws or Policies or Ms. Carr's Service Agreement before adopting the motion – had she done so, she would have seen that there is no reference to administrative leave in the governance documents. She agreed that in the circumstances before the Board, there is no difference between administrative leave and suspension. And she agreed that administrative leave was presented as a means to temporarily relieve Ms. Carr from her duties and avoid having to send the matter to a special general meeting.

[66] The Complainant's evidence went further – the Complainant agreed that the administrative leave has temporarily removed Ms. Carr from her role as President. The Complainant's evidence is entirely consistent with Ms. Tougas' letter of April 11, 2024 to Ms. Carr informing her of the adoption of the motion: "Leave with pay excludes the President from all duties as the President, and all institute-partner supported events." This evidence conflicts with Appendix 2 of the President Policy, which requires that suspension or expulsion from office may only occur by a resolution of the members at a Special General Meeting.

[67] Ms. Henshaw did not consider whether it was procedurally unfair to place Ms. Carr on an administrative leave that had the effect of temporarily removing her from her elected role as President without giving her the opportunity to address the Board. But Appendix 2 of the President Policy requires that the President be afforded "procedural fairness." The respondents have not explained why Ms. Carr was not given an opportunity to address the Board.

[68] While the respondents claim that Ms. Tougas, as Acting General Counsel, provided them with assistance and laid out several options at the meeting, there is no evidence as to how this occurred. Ms. Tougas did not provide an affidavit on the application. On its own, the absence of any evidence from Ms. Tougas significantly undermines the idea that this was a carefully considered decision.

[69] Notwithstanding Ms. Henshaw's affidavit evidence that Ms. Carr contacted more than one complainant, the evidence on cross-examination was that only the Complainant was contacted. Ms. Carr had two conversations with the Complainant (on January 26 and February 20) and a text message (on February 23). While there is conflicting evidence as to what transpired during these interactions between Ms. Carr and the Complainant (and in the case of the text message whether it constituted reprisal) there is no dispute that the respondents did not raise any concerns with Ms. Carr regarding her alleged conduct after the end of February. The issue arising from the text

message had been addressed. But then, six weeks later, the consideration of the motion on April 10, 2024 appears to have proceeded in haste. The motion does not appear on the agenda for the Board meeting. The motion was raised for the first time at the meeting. Ms. Carr was not provided with notice that the motion would be considered at the meeting. She was not provided with an opportunity to address the Board. The respondents have not explained why they acted in such haste and why they failed to afford Ms. Carr procedural fairness.

[70] In her April 11, 2024 letter to Ms. Carr, Ms. Tougas refers to Ms. Carr's April 4 meeting with Tania Lafreniere, PIPSC's Executive Director. It is alleged that during the April 4 meeting, Ms. Carr revealed she was aware of events that occurred during a closed session meeting of the Board. But Ms. Carr's evidence that the complaints process was not discussed at the April 4 meeting, and that the purpose of the meeting concerned Ms. Tougas' performance on another matter, was not challenged on cross-examination. The only witness to these interactions – Ms. Lafreniere – was instructed by Ms. Tougas not to attend the April 10 Board meeting. Again, Ms. Tougas elected not to provide evidence on the application.

[71] The events that occurred following the Board's adoption of the motion to place Ms. Carr on administrative leave, and the respondents' evidence regarding those events, are also troubling. Following the Board meeting, Ms. Tougas asked Ms. Lafreniere to convey the Board's decision to Ms. Carr. Ms. Lafreniere was not told why Ms. Carr was placed on administrative leave, excluding her from her duties as President. In her affidavit, Ms. Henshaw stated that she called the police because Ms. Carr refused to leave the building and because Ms. Lafreniere informed her that Ms. Carr had locked herself in her office. On cross-examination, Ms. Lafreniere contradicted Ms. Henshaw, testifying that she, Ms. Lafreniere, had never asked Ms. Carr to leave and that Ms. Carr had never locked her office door. On cross-examination, Ms. Henshaw conceded that she did not know if anyone had asked Ms. Carr to leave the building when they decided to call the police.

[72] The evidence undermines the suggestion that this was a carefully considered decision by the respondents. The process itself was seriously flawed: see *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2004), 250 D.L.R. (4th) 526 (Ont. C.A.), at para. 7. The Board's decision deprived the members of their right to vote on whether Ms. Carr should be suspended from the office of President.

[73] Having regard to all the evidence, I find that the respondents' decision to place Ms. Carr on administrative leave – the functional equivalent of a suspension from office – without affording Ms. Carr the protections set out in PIPSC's By-laws and Policies and without first referring the matter to a Special General Meeting of members was unreasonable. The process and the decision itself were a visible departure from the standards of fair dealing – the respondents knew the importance of procedural fairness, but chose to ignore the governance documents. The respondents acted in a manner that is oppressive to Ms. Carr's interests as the elected President of PIPSC. In addition, the respondents have acted in a manner that is unfairly prejudicial to and unfairly disregards Ms. Carr's interests as President.

(ii) The respondents' conduct of the complaints process and investigations

[74] The respondents submit that Ms. Carr’s claim they have acted oppressively through the complaints process is not a matter properly before the court because any breaches of procedural fairness in the administration of the complaint process ought to be dealt with following the completion of the investigation and any resulting decision. They argue that internal dispute resolution mechanisms should be exhausted before the court intervenes in the affairs of a non-for-profit corporation: *Polish Alliance of Canada, Branch 43 v. Polish Alliance of Canada*, 2009 CanLII 34978 (ON SC), at paras. 16, 21, and 32. *Polish Alliance* was not, however, an oppression application. In my view, the respondents’ submission fails to adequately recognize the broad and equitable nature of the oppression remedy. There is nothing in the language of the statutory provision that would limit the remedy in the manner proposed by the respondents: *UPM-Kymmene Corp.*, at para. 3.

[75] That said, in my view, it would be premature to attempt to determine whether the respondents’ conduct has oppressed, unfairly disregarded, or been unfairly prejudicial to Ms. Carr’s interests when the investigations are ongoing and the complaints themselves are not before me. The respondents acknowledge that the complaints process and any discipline of Ms. Carr must be conducted in a manner consistent with PIPSC’s By-laws and Policies.

Issue 4: What are the appropriate remedies?

[76] Under s. 253(3) of the *CNFPCA*, the court may make any interim or final order that it thinks fit. The remedy should fairly deal with the situation, with its scope determined by an assessment of what is necessary to remedy the oppression, and it should only vindicate the reasonable expectations of the complainant as corporate stakeholder, informed by the general corporate law context: *Wilson*, at paras. 27, 48-57.

[77] I agree with Ms. Carr that the only way to correct the respondents’ oppressive exclusion of her from the office of President is to quash the Board motion placing her on administrative leave and to immediately reinstate her to the position with all of its duties, powers, and rights. The reinstatement must include restoring Ms. Carr’s access to her PIPSC accounts, PIPSC’s offices, books and records. The respondents’ suggestion that the *status quo* – Ms. Carr’s suspension – should continue pending the outcome of a Special General Meeting of members would be contrary to the governance documents and would ignore the rights of PIPSC’s members to vote on the issue.

[78] I further order that the respondents are prohibited from excluding Ms. Carr from her position as President of PIPSC, with all of its duties, powers, and rights without seeking authorization from PIPSC’s members at a Special General Meeting. Any resolution that the Board proposes to put to its members for this purpose shall be consistent with the factual findings contained in these Reasons for Judgment.

Conclusion

[79] The Board motion of April 10, 2024 is quashed. Ms. Carr is immediately reinstated to the position of President of PIPSC with all of its duties, powers, and rights. The respondents are prohibited from excluding Ms. Carr from her position as President without seeking authorization from PIPSC’s members at a Special General Meeting.

[80] Ms. Carr is the successful party and is presumptively entitled to her costs of the application. The parties have submitted Bills of Costs. In the event the parties are unable to agree on costs, they may make written submissions limited to a maximum of three pages, excluding relevant attachments. Ms. Carr shall deliver her costs submissions by August 22, 2024. The respondents shall deliver their responding costs submissions by September 5, 2024. If no submissions are received within this timeframe, the parties will be deemed to have settled the issue of costs as between themselves.

Justice R. Ryan Bell

Released: August 8, 2024

CITATION: Carr v. O'Reilly, 2024 ONSC 4412
COURT FILE NO.: CV-24-00095733-0000
DATE: 2024/08/08

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JENNIFER CARR

Applicant

– and –

SEAN O'REILLY, NORMA DOMEY, STÉPHANIE
FRÉCHETTE, EVA HENSHAW, MARK MUENCH,
STACY MCLAREN, WAHEED KHAN, DAVE
SUTHERLAND, MORGAN CRANNY, SAMAH
HENEIN, JOHN PURDIE, PIERRE POTVIN,
EMMANUEL COSTAIN, AND CHRIS ROACH

Respondents

REASONS FOR JUDGMENT

Ryan Bell J.

Released: August 8, 2024