The Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant and DEL ENTERPRISES LTD. operating as ST. ANNE'S CHRISTIAN CENTRE, Respondent

LRB File Nos. 087-04 to 092-04; December 17, 2004
Vice-Chairperson, Angela Zborosky; Members: Pat Gallagher and Ken Ahl

For the Applicant: Alex Lenko
For the Respondent: Lucy Mazden, Sharon Karol, Ed Golemba and Jean Golemba

Unfair labour practice – Dismissal for union activity – Lay-off – Union organizers laid off during organizing drive – Employer cites business and performance reasons for lay-offs – Board concludes that employer's reasons for lay-offs not credible or coherent – As employer failed to establish good and sufficient reason for lay-offs, Board finds violation of s. 11(1)(e) of *The Trade Union Act* and orders reinstatement of and monetary loss for affected employees.

***The Trade Union Act*, ss. 5(d), 5(e), 5(f), 5(g), 11(1)(a) and 11(1)(e).**

REASONS FOR DECISION

Background:

[1] Del Enterprises Ltd. operating as St. Anne's Christian Centre (the "Employer" or "St. Anne's"), operates a personal care home located in Ituna, Saskatchewan. On April 6, 2004 Canadian Union of Public Employees (the "Union") commenced organizing the employees of the Employer, primarily through the efforts of two of the employees, part-time caregivers Moira Markle and Joanne Ord. Both were laid off without a date of recall on April 19, 2003, ostensibly because of a decline in the number of residents in care. On April 30, 2004, the Union filed these applications pursuant to ss. 5 (d), (e), (f) and (g) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") (LRB File Nos. 087-04 to 092-04) alleging that, in terminating Ms. Markle and Ms. Ord, the Employer had committed unfair labour practices in violation of ss. 11(1)(a) and (e) of the *Act*, and requesting that Ms. Markle and Ms. Ord both be reinstated and paid their monetary loss.

[2] The Employer's replies to the applications proper allege, *inter alia*, that the Employer had no knowledge of union activity by the employees and that Ms. Markle and Ms. Ord were laid off because the number of residents in care had declined.

[3] On June 9, 2004, the Board heard an application for interim relief seeking reinstatement of Ms. Markle and Ms. Ord. An Order was granted on June 14, 2004, reinstating Ms. Markle and Ms. Ord to their positions and ordering compensation for monetary loss. The Board also made an Order requiring the Employer to post the Order and Reasons for Decision in the workplace.

[4] These applications were heard on September 15, 2004.

[5] On August 23, 2004, Ms. Markle was again terminated from her employment, allegedly for just cause. Along with applications filed by the Union pursuant to ss. 5 (d), (e), (f) and (g) of the *Act* (LRB File Nos. 219-04 to 221-04) alleging a violation of ss. 11(1)(a) and (e) of the *Act*, the Union filed a second application pursuant to s. 5.3 seeking as interim relief the reinstatement of Ms. Markle. On September 29, 2004 the Board ordered that Ms. Markle be reinstated to her former position and ordered that the Employer pay her monetary loss. The applications proper in LRB File Nos. 219-04 to 221-04 are scheduled to be heard on January 25, 2005.

Evidence:

[6] Although the reverse onus in s. 11(1)(e) of the *Act* would usually dictate that the Employer proceed first with its evidence, the Employer did not accept that the Union had proved the threshold requirements that the employees had been terminated and that the employees had been involved in union activity. Therefore the Union proceeded first to call its evidence while retaining the right to call further evidence following the Employer's evidence.

[7] Ms. Markle has worked as a caregiver on a casual basis for the Employer for approximately eleven months. She has also been employed as a caregiver at Deer Park Villa in Ituna where she is a member of the Union that, at the time of the hearing, was engaged in strike action. She testified that she had been approached by a number of staff of the Employer asking if she knew how to organize a union. On April 7, 2004, while attending a union meeting at Deer Park Villa, she asked union representative Aina Kagis about unionizing St. Anne's. Ms. Kagis explained the process to Ms. Markle and indicated that she would send Ms. Markle union cards to be signed by the employees.

Ms. Markle received the union cards on April 13, 2004 and she and fellow employee, Ms. Ord, began getting signatures on the cards on their time off.

[8] Ms. Markle testified that she believed that initially the Employer did not know about her organizing efforts but she believes that changed by Monday, April 19, 2004 prior to her receipt of a lay-off notice. On Sunday, April 18, 2004, as was her usual practice, Jean Golemba, a manager, phoned Ms. Markle to find out what hours Ms. Markle was working at Deer Park Villa in order that she could be scheduled on her off hours at St. Anne's. Ms. Markle also heard that, around that time, Ed Golemba was yelling at the workplace, "they don't need a union in here." In cross-examination Ms. Markle acknowledged that this was hearsay and that she did not actually witness Mr. Golemba saying this. In her examination in chief, Ms Markle testified that during the morning of April 19, 2004 she received a notice of lay-off which indicated that St. Anne's was forced to reduce its staff due to a large decline in resident numbers. Ms. Markle also testified that she did not get to complete the organizing drive prior to her lay-off but had by that time collected eight signed union cards from the seventeen employees working there.

[9] Ms. Markle testified that manager Sharon Karol gave her the lay-off notice when Ms. Markle was walking down the street in her hometown of Kelliher. Ms. Karol drove up to her, stopped her car and handed her an envelope with the letter in it. Ms. Markle testified that she had had no prior discussions with the Employer about her hours of work or the lack of work at St. Anne's. There was no mention of a recall date in the letter.

[10] Ms. Markle produced the schedules at St. Anne's for the period from March to August, 2004 and testified about how the schedules should be read. The schedules are usually prepared one week in advance. She indicated that two casual employees who were hired after her are still employed at St. Anne's and she believes they have not been affected by the decline in residents. Caregivers Theresa and Laurel were hired as casual employees and trained in March, 2004 while Yvonne was hired and trained in April, 2004. Since Ms. Markle's initial lay-off on April 20, 2004, Laurel has quit. Ms. Markle made the observation that the schedules show that Theresa worked four shifts and Yvonne worked eight shifts in April, 2004. Ms. Markle further observed that

the schedules show that, following her and Ms. Ord's lay-offs, the length of the shifts may have been reduced but no shifts have been discontinued and the shifts that would have been assigned to her or Ms. Ord have been redistributed to others.

[11] Ms. Markle's observations about the changes in work hours and scheduling are generally borne out by a review of the schedules by the Board. In March, 2004, prior to the lay-offs, casual employee Laurel worked four shifts, casual employee Theresa worked five shifts and casual employee Yvonne had not yet been hired. In April, 2004 Theresa, Laurel and Yvonne were scheduled for and worked at least 8, 2 and 7 shifts respectively. In May, 2004, Theresa, Laurel and Yvonne were scheduled for and worked at least 11, 4 and 16 shifts respectively. In June, 2004, Theresa, Laurel and Yvonne were scheduled for and worked at least 8, 4 and 13 shifts respectively. In July, 2004, Laurel appears to have quit and Theresa and Yvonne continued to work a number of shifts. A review of the schedules also makes it apparent that, while the remaining employees experienced relatively no reduction in the number of their shifts, part-time caregivers Barb and Sharon appear to have fairly substantial increases in the number of their shifts following the lay-offs. In addition, caregiver Betty who is not on the schedule for the month of March, 2004 is scheduled for anywhere between 18 and 21 shifts per month for the months of April through July, 2004. The schedules also reveal that, commencing April, 2004, the six and one half hour day time shift and six and one half hour evening shifts were both reduced to six hour shifts. The number of shifts overall have clearly remained the same following the lay-offs.

[12] On the basis of her records, Ms. Markle testified that her hours of work varied but she averaged 66 hours per month since June, 2003 and 44 hours per month since November, 2003. The Board calculation is somewhat different, arriving at 55 hours per month averaged since June, 2003 (although August, 2003 was not available) and 44 hours per month averaged since November, 2003. Ms. Markle acknowledged in cross-examination that she worked as a cook for the Employer for some period of time in July and through to September 23, 2003. She spent the next eight and one half months on the floor as a caregiver. While working as a cook she worked 8 a.m. to 4 p.m. approximately 15 days per month.

[13] In her examination in chief, Ms. Markle testified that, since the interim Order for her reinstatement was granted on June 14, 2004 and despite her further availability, she worked only six hours in June, three six-hour shifts in July and three eight-hour shifts in August, 2004 before she was terminated on August 23, 2004 (it may be noted that Ms. Markle was reinstated on an interim basis in relation to that termination on September 29, 2004). Ms. Markle testified that the number of caregivers working at St. Anne's did not change over time except for the one casual employee (Laurel) who had quit and then when Ms. Markle was terminated in August, 2004. It was Ms. Markle's understanding that the only other staff reduction was a kitchen assistant position that was eliminated in October, 2003. The only other reductions were with respect to hours of work on the day and evening shifts as noted above.

[14] Ms. Markle testified concerning a series of letters exchanged between the Union and the Employer following the interim Order for her reinstatement made on June 14, 2004. It was her understanding that the Union had contacted the Board inquiring how to enforce the interim Order of the Board. She testified that she received a copy of correspondence from the Board Registrar dated July 14, 2004 which indicated that an order of the Board must be enforced through an application to the Court of Queen's Bench and that, in relation to the Union's concern about monetary loss, the loss was ongoing and therefore any decision by the Board's Executive Officer would be premature. Ms. Markle received a copy of the letter dated July 19, 2004 from the Union to the Employer that advised that the Union was giving consideration to filing such an application with the Court and indicated that it "would greatly appreciate a peaceful resolution to this matter." Ms. Markle also testified that she received a copy of a letter from the Employer to the Union dated July 26, 2004 which reiterates the Employer's position that, in its view, the Union has never represented the employees of the Employer and that it had no knowledge of any union activity at the time of the lay-offs. The Employer further maintained that it was unfairly ordered to reinstate the employees, give them hours that were not available and was unfairly ordered to pay monetary loss which imposed a great hardship upon it. The Employer advised that it believed it had scheduled Ms. Markle and Ms. Ord with the same number of hours they had in the month prior to their lay-offs and that the Employer had reduced overall staff hours by 80 in September, 2003 and 63 in April and May, 2004. The Employer also indicated in its correspondence that Ms. Markle and Ms. Ord had performance problems and had been

disciplined. The Employer closed its letter by stating: “So lets talk about peaceful resolution. Perhaps the most peaceful resolution is resignation before termination with cause takes place.”

[15] Ms. Markle expressed anger over the Employer’s letter and denied any wrongdoing. She denied receiving any discipline, verbal or written and was aware of only one complaint concerning her performance and it was from Ms. Golemba while she was working as a cook in the kitchen in 2003. She was transferred from her position as a cook to one of a caregiver when the prior cook, who had worked for the Employer for a long period of time, wished to return to work as a cook.

[16] Ms. Markle stated that it was her understanding that Del Enterprises Ltd., (which is owned by Dianne Olech, Mr. Golemba and Lucy Mazden), owns St. Anne’s. Ms. Markle’s other place of employment, Deer Park Villa, is not privately owned but the CEO is Lucy Mazden and Dianne Olech is a board member.

[17] In cross-examination Ms. Markle denied that Ms. Golemba advised her that the chicken she cooked was raw and that the food she cooked was dry. She stated that the only performance concern brought to her attention while she was a cook was from Ms. Golemba who advised her that residents had complained that the meat she cooked was tough. She stated that she did not receive any discipline in relation to her work as a cook.

[18] Ms. Markle was also asked questions in cross-examination concerning her behaviour with residents and in particular about an incident that occurred on March 4, 2004. She testified that when giving medication to a resident she did not say, “I’m not your slave” but rather said words to the effect of “I’m here to help you. I’m not your servant. If you don’t try, you won’t be able” and that the resident agreed with her. Ms. Markle stated that she never refused to do anything for any resident but that she often encouraged residents to attempt to do things on their own so that they did not lose the ability to do things for themselves. She stated that she did not attempt to hide this and told Ms. Karol about this incident. She was not disciplined for this incident or any other behaviour as a caregiver. In cross examination it was also suggested to Ms. Markle that

she acted inappropriately with respect to smoking breaks although Ms. Markle denies receiving any discipline or being talked to about it by the Employer.

[19] Also in cross examination, Ms. Markle elaborated on some problems she had with management including that Ms. Karol did nothing when Ms. Markle reported that a fellow employee was saying untrue things about her and that she was required to give an injection to a diabetic when she was not properly trained to do so.

[20] Ms. Ord resides in Kelliher, Saskatchewan and has worked as a caregiver on a permanent part-time basis for the Employer since October 2002. Ms. Ord gave testimony concerning her involvement in the union organizing drive with Ms. Markle. She believes that, while the Employer did not initially know that an organizing drive was being carried out, in a town as small as Ituna, it was apparent to her that the Employer had found out about the union drive. Like Ms. Markle, Ms. Ord received a lay-off notice in the morning of April 19, 2004 that stated that she was being laid off due to a large decline in resident numbers. Again there was no mention of a recall date. When Ms. Karol delivered this notice to Ms. Ord at her home on April 19, 2004 she did not mention that Ms. Ord would ever be recalled to work.

[21] Also pursuant to an interim Order of the Board dated June 14, 2004, Ms. Ord was reinstated to her employment. She testified that prior to her termination on April 19, 2004 she worked as a permanent part-time employee but that after she was reinstated by Order of the Board she was scheduled only as a casual employee. She did not understand why the Employer reinstated her in that limited manner and was not advised by the Employer of its reasons for doing so. Ms. Ord testified that she was scheduled for a greater number of hours as a permanent part-time employee and produced some of her work schedules in evidence. She indicated that from the commencement of her employment in July, 2003 to the date of her lay-off in April, 2004, she worked 80 to 110 hours per month. Since her return in June, 2004, she worked 70 hours in July and 111 hours in August. The higher number of hours worked in August was due to being able to pick up two to three extra shifts beyond those hours for which she was scheduled. It was Ms. Ord's observation that there were employees with less service time who were not affected by the decline in resident numbers and that the hours

she lost were distributed among those employees. Since Ms. Ord's reinstatement in June, 2004, she has advised the Employer that she is available for additional shifts.

[22] Ms. Ord testified that she had never been disciplined by the Employer and had not received a verbal warning or a counseling session. She did recall an incident where she was spoken to about her behaviour although it was not in a disciplinary manner. She indicated that she had "played cupid" with two senior residents. When told by management that she should not have done this, she agreed that it was not appropriate. The Employer has had no other discussions with her about her work performance or her ethics, either prior to her termination or following her interim reinstatement. In cross-examination, Ms. Ord elaborated that the extent of her involvement in playing cupid was to get the two residents talking to one another because both had mentioned to her their interest in one another. She did not take one to the other's room but merely suggested to both that they talk to each other. She also suggested to the female resident that she could listen to the male resident play the violin. Ms. Ord acknowledged that some of the staff were not happy about this but she was unaware of any reaction from the families.

[23] In her examination in chief, Ms. Ord described how much she enjoys her employment and how she has volunteered her time at St. Anne's in addition to the hours she works there. She attends residents' birthday parties and brings the animals she keeps on her hobby farm to St. Anne's for the residents to see.

[24] In cross-examination Ms. Ord was confronted with an incident where she had contacted a resident's family at home. Ms. Ord described an occasion where a resident was upset and had expressed that he felt abandoned by his daughter. Ms. Ord contacted the resident's daughter to see if she could come and talk to him. Ms. Ord indicated that it would not be normal practice for a caregiver to contact a family at home but she did so on this occasion because manager Ms. Karol was off work and Ms. Ord did not want to contact Ms. Karol at home about the matter. Ms. Ord stated that she was not disciplined or spoken to about this matter.

[25] In cross-examination Ms. Ord acknowledged that she apologized to each of the board members of the Employer for upsetting them and going behind their backs

in starting a union. In re-examination, the Union's representative asked why she would apologize to the board members. Ms. Ord responded in a tearful manner that she did so in order to keep her job because she loved her work, even though she did not feel she had to apologize. When questioned further why she testified that she believed the Employer knew about the organizing drive, Ms. Ord, visibly upset, said that, when Ms. Karol talked to her after she was reinstated by interim Order of the Board about making an apology, Ms. Karol told her that all she had to do was go and talk to them and she would have her job back. She stated that Ms. Karol also told her that if she dropped this application or took her name off it, she would still have her job "that her job would be secure." Ms. Karol said Ms. Ord just needed to talk to the owners about it. Ms. Ord then spoke to Ms. Mazden and Mr. and Ms. Golemba. Mr. and Ms. Golemba were sympathetic to her, accepted her apology and told her "everything would be okay." On further questioning by the Employer, Ms. Ord indicated that she told Ms. Mazden that the union organizing "was not done against her or Ms. Karol" but that the employees wanted more wages. She indicated that she told Ms. Mazden that she would call the Board the next day and have her name taken off this application and that Ms. Mazden said "that would be a good idea."

[26] Ms. Ord was questioned about the basis for her statement that the Employer knew that she was involved in union organizing. Ms. Ord responded that it is a small community and she had heard about Mr. Golemba being upset and making statements in the kitchen that "they don't need a union in here." She also stated that she and Ms. Markle were talking to many of the employees about joining a union and that could not have gone unnoticed or not talked about for long in a small town. Ms. Ord also stated that she believed that her conversation with Ms. Karol about making the apology to the board members and her conversations with board members strongly suggested the Employer knew about the union activity and that it was the reason for her lay-off.

[27] Following the testimony of Ms. Markle and Ms. Ord, the Union closed its case with the right to recall further evidence following the Employer's evidence.

[28] Sharon Karol has been the Employer's business manager for eight years. She testified that many of the residents of St. Anne's are admitted there following an

assessment by home care after their release from the hospital. Home care develops a care plan for the caregivers to follow.

[29] The reply filed by the Employer did not mention any performance problems as the reason for the lay-off of Ms. Markle and the only concern mentioned about Ms. Ord is in relation to ethical conduct and missing/being late for shifts (although the Employer stated that this would be dealt with by the supervisor when necessary). Despite this position taken in the reply, Ms. Karol testified about complaints she had received from other employees about the work performed by Ms. Markle and Ms. Ord. For example, she stated that Ms. Markle should have brought a glass of water and made a bed for a 96 year old resident who experienced many health problems in order to make her as comfortable as possible. She disagreed with Ms. Markle that staff should encourage residents to do as much as possible for themselves. She also stated that staff complained that Ms. Markle was unpleasant, did not smile and was not a team player, given that she did not help out her fellow employees with resident care or help them hang Christmas decorations, often choosing to watch television instead. However, in response to a question whether Ms. Markle may have made a complaint to her about other staff, Ms. Karol stated that the "women are always bickering" and that "if she dealt with every complaint that they said about each other, she would spend all her time on that."

[30] Ms. Karol testified that the staff communicates about resident care through the use of a memo book. This is important, as the Employer is not able to closely supervise staff. If a staff member does something wrong, it is recorded in that book, although the names of the staff are not used. Ms. Karol stated that when the staff read the memo book, they should know when a problem pertains to them, even though their names are not used.

[31] Ms. Karol testified concerning other performance issues involving Ms. Markle. They included:

(i) a formal complaint from resident Pauline Hawes, who told Ms. Karol she feared making the complaint because she felt Ms. Markle would be angry and seek retribution; and

(ii) many residents complained about Ms. Markle's cooking and Ms. Karol confronted her on one occasion about uncooked chicken.

[32] Ms. Karol also testified concerning a performance issue involving Ms. Ord. The family of a resident complained that Ms. Ord contacted the family at home when she could not settle the resident down and that Ms. Ord asked a family member questions about the resident at the family member's place of work, even though Ms. Karol told the staff that only she and the activity person could talk to the family.

[33] Ms. Karol testified that on approximately April 15 or 16, 2004 she learned that three residents would be leaving St. Anne's on May 1, 2004. She passed this information on to a member of the board of the Employer, "Diane." It was determined that the Employer would lay off Ms. Markle and Ms. Ord based upon their poor work performance. Diane prepared the lay-off notices and delivered them to Ms. Karol on April 19, 2004. Ms. Karol testified that in February, 2004 she had called a meeting with the owners of St. Anne's to discuss the work performance of Ms. Markle and Ms. Ord. At this meeting, some of the owners wanted Ms. Markle's and Ms. Ord's employment terminated immediately while some owners said they should be reprimanded and observed. It was decided to reprimand them and observe their performance. Ms. Karol testified that their work performance further declined and, in March, 2004 when resident numbers declined and the owners asked for a recommendation of who to lay off, Ms. Karol suggested Ms. Markle and Ms. Ord. The notices of lay-off to Ms. Markle and Ms. Ord were identical and read as follows:

> *With regrets, we wish to inform you that due to a large decline in our resident numbers, we are forced to reduce our staff.*
>
> *Enclosed please [find] your RECORD OF EMPLOYMENT.*

It should be noted that the record of employment for Ms. Ord indicates that her last day of work was May 3, 2004. The record of employment for Ms. Markle indicates that her last day of work was April 26, 2004. It appears that the lay-offs were effective immediately when delivered on April 19, 2004 but that the dates on the records of

employment differ because they take into account the notice/pay-in-lieu of notice requirements in *The Labour Standards Act*, R.S.S. 1978, c. L-1.

[34] Ms. Karol testified that, since the decline in residents on May 1, 2004, the hours of the employees' shifts have been reduced by one half hour in each of the day shift and the evening shift. Also, one eight hour shift of office work was eliminated, although this had no effect on the caregivers. It was stated in the replies filed by the Employer that following the lay-offs, the shifts that would have been assigned to Ms. Ord and Ms. Markle were assigned to the supervisor (who performed administrative duties) who had one shift per week eliminated. This was not elaborated upon in testimony but, in any event, it is not borne out by the evidence submitted by the Union. In addition to the observations of the Board concerning the increased shifts made available to casuals Theresa, Laurel and Yvonne and part-time caregivers Sharon, Dianne and Betty following the lay-offs (see paragraph 11 of these Reasons), in the full month prior to their lay-offs (March, 2004), Ms. Ord and Ms. Markle combined for a total of at least 23 shifts worked. This is obviously far greater than the approximately four to five shifts required to bring the supervisor up to her regular number of hours per month as a result of losing her one eight hour shift per week.

[35] Ms. Karol testified that she had no knowledge of any union activity in the workplace. Ms. Karol also testified that she found the June 14, 2004 interim Order of the Board to be "unfair."

[36] In cross-examination, Ms. Karol was somewhat evasive in answering questions about whether there was discipline or at least some formal discussions or counselling for performance problems including the issue of Ms. Markle's uncooked chicken. Ms. Karol stated that she believed many residents were too scared to report a problem with a staff member for fear of what that staff member might do to them. She confirmed that problems were just written in the memo book without the caregiver's name and "if the shoe fits, [that staff person] should wear it." Ms. Karol acknowledged that Ms. Markle continued to work in the kitchen following the incident of the raw chicken and that one warning should have been enough for Ms. Markle. In relation to the complaint by Ms. Hawes, Ms. Karol acknowledged that she heard about this complaint from a staff member prior to Ms. Markle's lay-off on April 19, 2004, however, it was not

until after Ms. Markle's lay-off that Ms. Karol approached Ms. Hawes to solicit a formal complaint. There had been no investigation of the matter and Ms. Karol had not sought Ms. Markle's response to the complaint at any time. Ms. Karol also acknowledged in cross-examination that Ms. Markle had continued to work with Ms. Hawes with no further concerns.

[37] With respect to the allegation involving Ms. Ord's improper communication with a resident's family, in cross-examination Ms. Karol acknowledged that there was no written policy on communication but that Ms. Ord should know what was expected of her based on a meeting in February 2004 where it was stated that only Ms. Karol and the activity person could speak to the family.

[38] Ms. Karol stated that the Employer does not conduct performance evaluations of the employees although it makes observations and notes in some circumstances. She stated that the Employer does not address work performance concerns with the staff because the staff would retaliate against the residents.

[39] In cross-examination, Ms. Karol was questioned about a letter she wrote to the Union dated July 26, 2004, following the Board's interim Order to reinstate Ms. Markle and Ms. Ord. In that letter she states that she does not understand the Union's involvement and states she is not aware of any union activity taking place. In the letter she indicates that Ms. Markle and Ms. Ord have been disciplined and that there have been many complaints about their performance. When questioned further on this point, Ms. Karol acknowledged that by "discipline" she means that the incidents were written in the memo book with no names mentioned. She accepted that this is characterized more accurately as "documenting," not "discipline," stating that she "doesn't like discipline because she's afraid of what it might do."

[40] In cross-examination Ms. Karol testified that the Employer did not advise the staff in February, 2004 that lay-offs would occur and stated that the staff know that when resident numbers decline, their hours are cut and when the number of residents increases back to 23 or 24, the staff get their hours back.

[41] In relation to the February meeting where Ms. Ord's and Ms. Markle's performance was discussed by the owners Ms. Karol acknowledged that she did not actually reprimand Ms. Ord or Ms. Markle but instead observed their performance and advised management. She further stated in cross-examination that the lay-offs were due to work performance, that there was a decline in the number of residents and the Employer chose who would be laid off on the basis of poor work performance.

[42] In response to questions from the Board concerning the testimony and documentary evidence filed it was clarified that there was a reduction in working hours available by 63 in each of April, May and every month leading up to the date of the hearing. This number is composed of approximately 32 hours of office work (8 hours once per week for four weeks) and 31 hours of caregiver work (a half hour off both the day and evening shifts each day of the month equaling one hour per day for the 30 or 31 days of the month). It was also clarified that Ms. Markle and Ms. Ord had not been given a written reprimand nor had they been reprimanded in the formal sense. Ms. Karol stated that she did not like to do this "because they're [Ms. Markle and Ms. Ord] working late at night and we don't know what they'd do to them [the residents]."

[43] Lucy Mazden is an owner of the Employer. St. Anne's has been in operation for approximately eight years and serves 17-26 residents. She testified that Ms. Karol called a meeting for February 2, 2004 to discuss various complaints about the work performance of Ms. Markle and Ms. Ord. At the meeting she recommended that they be terminated but indicated that it would be up to the board to make a decision about their continued employment. Ms. Mazden indicated that she believed that if 50% of staff complained about a co-worker it was cause for dismissal. Ms. Mazden testified that, while the lay-offs of Ms. Markle and Ms. Ord were for strictly financial reasons (because resident numbers had declined), she was glad that Ms. Karol had recommended that it be Ms. Markle and Ms. Ord who were laid off. She indicated that the only time that Ms. Markle and/or Ms. Ord would be recalled would be if the Employer had a "full house." It was Ms. Mazden's view that an employee cannot be guaranteed lifetime employment and that an employer needs to be able to lay off staff of its choosing. Ms. Mazden stated that it is her responsibility to ensure that the residents are happy. Ms. Mazden indicated that she feels that quality of care is a good marketing tool

and that the rates that the Employer charges residents are at least less than half of what others charge.

[44] Ms. Mazden entered the Employer's financial statement for the year ending December 31, 2003 into evidence and commented that the Employer had suffered a loss of 49% from 2002 to 2003. She provided the numbers of residents for the period April 2003 to August 2004. While the numbers usually stayed in the range of 21 to 23 for 2003 she acknowledged that they had only 18 residents in August and September of 2003 with few lay-offs. She indicated that she reduced the hours available to staff by 20 in September, 2003 and that an employee had left in September, 2003. By January, 2004, the numbers were back up to 23, for March and April they declined to 20, followed by 17 and 19 in May and June respectively. Although the evidence was not entirely clear when the Employer made a reduction to the six and one half hour day shift, it had been reduced by one half hour at least by May 1, 2004. There was also one half hour reduction to the six and one half hour evening shift effective May 1, 2004. The result of these reductions was less overlap between the hours worked by the day and evening shifts. In addition to these reductions to caregiver staff, there was a reduction in hours to the office employee of eight hours once per week. Ms. Mazden testified that the Employer hired three casual staff in February, 2004, one of whom quit prior to this hearing. The other two were not laid off when resident numbers declined and Ms. Markle and Ms. Ord were laid off. By July and August, 2004, the number of residents rose to 20 and 22 respectively.

[45] In cross-examination, Ms. Mazden admitted that, following May 1, 2004 after Ms. Markle and Ms. Ord were laid off, the number of shifts had not decreased, only the time of the shifts had been reduced, that is, there was a reduction in the number of hours available to work.

[46] In response to questions concerning the method of dealing with complaints about employee performance out of concern for the safety of the residents, Ms. Mazden testified that as an owner she entrusts that responsibility to Ms. Karol and if her style is to write notes in the memo book, that is acceptable. In cross-examination Ms. Mazden acknowledged that the only performance problem in relation to Ms. Markle was the undercooking of the chicken and for Ms. Ord was the incident where she played

cupid. Ms. Mazden indicated that her method of determining whether an employee is valuable is based on talking to the residents about their observations and determining who are their favourite caregivers.

[47] In cross-examination Ms. Mazden testified that she had co-authored the letter dated July 26, 2004 to the Union that was signed by Ms. Karol. That letter, which followed the Board's interim Order for reinstatement of Ms. Markle and Ms. Ord, states: "So lets talk about a peaceful resolution. Perhaps the most peaceful resolution is resignation before termination with cause takes place." At the hearing Ms. Mazden confirmed, "in this case it's [termination is] the best resolution."

Statutory Provisions:

[48] The following provisions of the *Act* are relevant to these proceedings:

> *5. The board may make orders:*
>
> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
>
> *(e) requiring any person to do any of the following:*
>
> *(i) refrain from violations of this Act or from engaging in any unfair labour practice;*
>
> *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*
>
> *(f) requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice, or otherwise in violation of this Act;*
>
> *(g) fixing and determining the monetary loss suffered by any employee, an employer or a trade union as a result of a violation of this Act, the regulations or a decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or trade union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;*
>
> *. . .*

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > *(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;*
> >
> > . . .
> >
> > *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purposes of bargaining collectively;*

Argument:

[49] Mr. Lenko, on behalf of the Union, argued that Ms. Markle and Ms. Ord were terminated in violation of s. 11(1)(e) of the *Act* and relied on the following cases: *Jason Meroniuk v. Rural Municipality of Preeceville No. 334*, [2002] Sask. L.R.B.R. 353, LRB File Nos. 063-02, 064-02 & 065-02 and *Canadian Union of Public Employees, Local 3990 v. Core Community Group Inc.* [2001] Sask. L.R.B.R. 131, LRB File Nos. 017-00 to 022-00. He argued that the Employer had not shown good and sufficient reason for the lay-offs unrelated to union activity, that there was no explanation for the coincidence of

timing between the union activity and the lay-offs and that the Employer had not established credibility of the lay-off process. He asked the Board to consider the strength or weakness of the Employer's explanations for the lay-offs in light of the nature of the union activity occurring, the nature of the collective bargaining relationship and the impact of the Employer's actions on these employees and their co-workers. Mr. Lenko described Ms. Markle and Ms. Ord as hard-working employees who were very caring of the residents and who had not been the subject of any prior discipline. He further pointed out the Mr. Golemba did not deny making anti-union statements. In the circumstances, he said, the Employer had failed to satisfy the onus of proof imposed upon it by s. 11(1)(e) and requested that Ms. Markle and Ms. Ord be reinstated and paid their monetary loss.

[50] Ms. Mazden, on behalf of the Employer, argued that the terminations of Ms. Markle and Ms. Ord were not related to their union activity. The Employer continued to deny knowledge of any union activity, stated that reinstating these employees would cause it hardship and requested that the Board revoke its interim Order of reinstatement and payment of monetary loss. Ms. Mazden explained that Mr. Golemba's presence at the hearing was as a partner of the business only and that he could not participate in the hearing, ostensibly because he is hard of hearing.

Analysis and Decision:

[51] In *Core Community Group, supra*, the Board reviewed several decisions of the Board which examined the application of s. 11(1)(e). At pages 144 through 149, the Board stated:

> *There have been numerous proceedings over the years alleging violation of s. 11(1)(e) of the Act and the provision has been the subject of much comment by the Board. In Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Moose Jaw Exhibition Co. Ltd., [1996] Sask. L.R.B.R. 575, LRB File Nos. 131-96, 132-96 & 133-96, the Board summarised the principles applicable to the determination as follows, at 583-85:*
>
> > *In this instance, the Board is asked to determine if the decision to terminate Mr. Kaufhold's employment was made for the purpose of discouraging activity in support of the Union. The importance of this determination, and the Board's approach to it, was recently summarized in Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Moose Jaw Exhibition Co. Ltd., [1996]*

Sask. L.R.B.R. 575, LRB File Nos. 131-96, 132-96 & 133-96 as follows, at 583 to 585:

> *The Board has always attached critical importance to any allegation that the suspension or dismissal of an employee may have been affected by considerations relating to the exercise by that employee or other employees of rights under the Act. In a decision in Saskatchewan Government Employees' Union v. Regina Native Youth and Community Services Inc., [1995] 1st Quarter Sask. Labour Rep. 118, LRB Files No. 144-94, 159-94 and 160-94, the Board commented on this matter as follows, at 123:*
>
> > *It is clear from the terms of Section 11(1)(e) of the Act that any decision to dismiss or suspend an employee which is influenced by the presence of trade union activity must be regarded as a very serious matter. If an employer is inclined to discourage activity in support of a trade union, there are few signals which can be sent to employees more powerful than those which suggest that their employment may be in jeopardy.* ***The seriousness with which the legislature regards conduct of this kind is indicated by the fact that the onus rests on the employer to show that trade union activity played no part in the decision to discharge or suspend an employee.***
>
> *The Board made further comment on the significance of the reverse onus under Section 11(1)(e) of the Act in The Newspaper Guild v. The Leader-Post, [1994] 1st Quarter Sask. Labour Rep. 242, LRB Files No. 251-93, 252-93 and 254-93, at 244:*
>
> > ***The rationale for the shifting to an employer of the burden of proof under Section 11(1)(e) of the Act to show that a decision to terminate or suspend an employee was completely unaffected by any hint of anti-union animus has, in our view, two aspects. The first is that the knowledge of how the decision was made, and any particular information regarding the employment relationship involving that employee, is often a***

> ***matter available exclusively to that employer.*** *The trade union knows of the termination or suspension, knows of the union activity, and asserts that there is a link between them of anti-union animus. A decision that this link does in fact exist can often only be established on the basis of information provided by the employer. Whether this is described as a legal onus of proof, which is the basis of the challenge made by the employer to the courts, or whether it is seen as an evidentiary burden, an employer must generally be able to provide some explanation of the coincidence of trade union activity and the suspension or termination in question.*
>
> ***The second aspect of the rationale, which is particularly important in a case, such as this one, where union activity with an employer is in its infancy, addresses the relative power of an employer and a trade union.*** *An employer enjoys certain natural advantages over a trade union in terms of the influence it enjoys with employees, and the power it can wield over them, particularly where the power to terminate or discipline is not subject to the constraints of a collective agreement or to scrutiny through the grievance procedure. In these circumstances, the vulnerability of employees, and their anxieties, even if exaggerated, about the position in which they may be put by communicating what they know of the circumstances surrounding the dismissal to trade union representatives, and possibly to this Board, makes it difficult for the trade union to compile a comprehensive evidentiary base from which they may put their application in its fairest light.*

As the Board has pointed out, it is not sufficient to meet the onus of proof under Section 11(1)(e) of the Act for an employer to demonstrate the existence of a defensible business reason for the decision to suspend or terminate an employee. In United Steelworkers of America v. Eisbrenner Pontiac Asüna Buick Cadillac GMC Ltd., [1992] 3rd Quarter Sask. Labour Rep. 135, LRB File Nos. 161-92, 162-

92 and 163-92, the Board made the following observation in this connection, at 139:

> ***When it is alleged that what purports to be a lay-off or dismissal of an employee is tainted by anti-union sentiment on the part of an employer, this Board has consistently held, as have tribunals in other jurisdictions, that it is not sufficient for that employer to show that there is a plausible reason for the decision.*** *Even if the employer is able to establish a coherent and credible reason for dismissing or laying off the employee - and we are not persuaded that the reasons put forward by Eisbrenner are entirely convincing* ***-those reasons will only be acceptable as a defence to an unfair labour practice charge under s. 11(1)(e) of the Act if it can be shown that they are not accompanied by anything which indicates that anti-union feeling was a factor in the decision.***

An important element of the task of this Board in assessing a decision which is the subject of an allegation made pursuant to s. 11(1)(e) of the Act is the evaluation of the explanation which is offered by an employer in defence of the decision to dismiss. In this respect, the Board has emphasized that our objective is somewhat different than that of an arbitrator determining whether there is "just cause" for dismissal. In The Leader-Post decision, supra, the Board made this comment, at 248:

> ***For our purposes, however, the motivation of the Employer is the central issue, and in this connection the credibility and coherence of the explanation for the dismissal put forward by the Employer is, of course, a relevant consideration.*** *We are not required, as an arbitrator is, to decide whether a particular cause for dismissal has been established. Nor, like a court, are we asked to assess the sufficiency of a cause or of a notice period in the context of common law principles.* ***Our task is to consider whether the explanation given by an employer holds up when the dismissal of an employee and some steps taken in exercise of rights under the Act coincide. The strength or weakness of the case an employer offers in defence of the termination is one***

> ***indicator of whether union activity may also have entered the mind of the Employer***.
>
> *As the Board has pointed out on a number of occasions, the fact that trade union activity is taking place does not mean that an employer is prevented altogether from taking serious disciplinary steps against an employee. The onus imposed on an employer by s. 11(1)(e) of the Act is not impossible to satisfy. There is no question, however, that it is difficult to meet. In order to satisfy ourselves that the grounds stated for a decision to dismiss an employee do not disguise sentiments on the part of an employer which run counter to the purposes of the Act,* ***it is necessary for us to evaluate the strength or weakness of the explanation which is given for a dismissal, in the light of other factors, including the kind of trade union activity which is going on, the stage and nature of the collective bargaining relationship, and the possible impact a particular disciplinary action may have on the disciplined employee and other employees.***

On this type of application we are not concerned with assessing whether the employee was terminated for just cause, but rather, as stated in International Union of Operating Engineers v. Quality Molded Plastics Ltd., [1997] Sask. L.R.B.R. 356, LRB File Nos. 371-96, 372-96 and 373-96, at 376:

> ***The Board is attempting to assess the coherence and credibility of the reasons for dismissal in the context of the employee's activities in support of the trade union, the timing of the termination, the stage of collective bargaining and the likely impact of the termination on the employees in the bargaining unit.***
>
> [emphasis added]

[52] In this case, the Board accepts the evidence of the Union that Ms. Markle and Ms. Ord were engaged in a union organizing drive at the time of their lay-offs. They were clearly attempting to exercise their rights under the *Act*. The Board finds that the lay-offs by the Employer amounted to discrimination regarding a term of Ms. Markle's and Ms. Ord's employment and that the lay-offs amounted to coercion and intimidation with a view to discouraging their union activity. The Board also finds that the lay-offs amounted to a "discharge or suspension" within the meaning of the *Act* such that there is a presumption that Ms. Markle and Ms. Ord were laid off contrary to the *Act*. In the event that is incorrect, in the particular circumstances of this case, the lay-offs were tantamount to termination, in particular because there was no expectation of being recalled to work and no expression of intention by the Employer to recall these two

employees. As a result, the onus of proof reverts to the Employer to prove it had good and sufficient reason to lay off Ms. Markle and Ms. Ord.

[53] In the present case, the Employer alleged that it had good and sufficient reason to lay off Ms. Markle and Ms. Ord, untainted by any anti-union sentiment. It stated that it had a decrease in resident numbers and it was necessary to lay off employees otherwise it would suffer financial hardship. The Employer stated that it chose Ms. Markle and Ms. Ord specifically because of their poor work performance. An examination of the evidence discloses, however, that the Employer dealt with the potential financial hardship caused by what appears to have been a temporary decline in residents, by decreasing the number of hours that caregivers worked on the day and evening shifts (thereby lessening the overlap of hours by the staff that worked those shifts) and by decreasing the hours worked by the part-time office staff person. It is apparent that it was not necessary to lay off Ms. Markle or Ms. Ord or, in fact, any employee, in order to accomplish this reduction. A review of the schedules after the lay-offs makes it abundantly clear that the number of shifts remained the same and the shifts were simply redistributed among the remaining employees. Further, the suggestion by the Employer that it had to redistribute those hours to the office person who lost eight hours per week is overstated as Ms. Markle and Ms. Ord lost many more shifts than what would be required to make up the hours the office person lost. In addition, there was no clear attempt to redistribute hours to those employees who lost time as a result of the decrease of the day and evening shifts by a half hour. For example, Theresa, a casual employee who is not guaranteed a particular number of hours and who worked very few shifts prior to the lay-offs worked more shifts after the lay-offs. Another example is Yvonne, a casual caregiver who was not even hired until April, 2004, who worked 16 and 13 shifts in May and June 2004 respectively. There were also other caregivers, specifically Dianne and Sharon who had their shifts increased and Betty who was not scheduled for March, 2004 yet worked 18 –21 shifts in each of the next four months.

[54] The evidence is also very clear that Ms. Markle and Ms. Ord were never disciplined for any performance issues prior to being laid off. While there is one instance where Ms. Markle may have improperly cooked a chicken (and we do not conclude that she did), that occurred several months prior to her lay-off and before she

was offered the caregiver position that she worked in for a period in excess of eight months. There is also an allegation that Ms. Markle spoke in an improper manner to a resident but again, even if this were true, it occurred in excess of a month prior to the lay-off and she was not disciplined for the conduct. There is also the allegation in relation to Ms. Ord that she acted unethically by playing cupid with two residents. Again, this is not conduct for which Ms. Ord was disciplined and the impropriety of what she had done is in question. It is no excuse for the Employer to say that it did not discipline employees during the course of their employment for fear of what they might do to the residents. The evidence in this case clearly points to the Employer conjuring up indiscretions and performance problems after the fact in order to attempt to provide justification for choosing these two employees for a lay-off that was not necessary in the first place.

[55] The Employer offered no credible explanation for the timing of the lay-offs in relation to the union activity in which Ms. Markle and Ms. Ord were involved. The union organizing drive had only been underway for a week when Mr. Golemba was heard to say that the staff did not need a union there. This evidence, while hearsay in nature, is accepted by the Board on the basis that the two union witnesses testified about it in a consistent manner, it was credible and, more importantly, it went uncontradicted by the Employer. This is notable because it was a very serious allegation and Mr. Golemba was present throughout the hearing yet the Employer's representative chose not to have him testify. Although the Employer stated that he was not there to participate, it was apparent to the Board that, while Mr. Golemba did have some difficulty with his hearing, he appeared to understand the nature of the proceedings and responded verbally throughout the course of the hearing. Even if Mr. Golemba did not hear the witnesses' testimony, it was open to the Employer's representative to explain the comment that was made and appropriate assistance could have been made available to him to help him understand any other questions posed to him.

[56] What is particularly troubling to the Board is the evidence of Ms. Ord in relation to discussions she had with Ms. Karol and the apologies she made to the Employer representatives following the Board's interim Order for her and Ms. Markle's reinstatement. The evidence, which went uncontradicted by the Employer, left the Board

with the distinct impression that the Employer's reason for choosing these two employees for lay-off was their involvement in the union organizing drive. Even if that were not true, it is apparent to the Board that the Employer attempted to interfere with Ms. Ord's rights under the *Act* to proceed with this application by telling her that her job would be secure if she apologized and withdrew her name from this application. This is the very type of conduct that the *Act* seeks to prevent and could have formed the basis for an additional finding of an unfair labour practice had the same been argued by the Union. The Board is pleased to see that Ms. Ord did not withdraw her claim in light of this illegal activity by the Employer.

[57] Despite the conclusion by the Board that the Employer likely knew of the union activity, it is not necessary for the Union to demonstrate that the Employer had actual knowledge of union activity. In this case, the Employer offered no credible explanation for the coincidence in the timing of the lay-offs and the union activity. What is very suspicious is the fact that Ms. Golemba contacted Ms. Markle on April 18, 2004 to find out her hours of work at Deer Park Villa in order to schedule her at St. Anne's, yet by the morning of April 19, 2004 the decision had been made to lay off Ms. Markle and Ms. Ord. In fact the notices and records of employment had been signed that very morning. Further, there was no explanation for the urgency with which these notices were delivered that very same morning of April 19, 2004. One also questions why the Employer took the trouble of traveling to each of Ms. Markle's and Ms. Ord's home towns to hand-deliver a lay-off notice that morning when the lay-offs were clearly not urgent (even if the lay-offs were necessary, which the Board finds that they were not). This is also particularly unusual where the Employer appears to have considered the appropriate notice periods pursuant to *The Labour Standards Act* and even chose to provide payment through the notice periods (the evidence in relation to Ms. Ord was clear on this point) rather than having Ms. Markle and Ms. Ord work. Given the Employer's financial concerns, paying Ms. Markle and Ms. Ord rather than having them work through the notice periods is also somewhat suspicious because the Employer would have had to pay an additional employee to actually work those shifts. Overall, the timing of the lay-offs was simply too coincidental in relation to the timing of the union activity. This results in a finding by the Board that Ms. Markle and Ms. Ord were laid off due to their union activity.

[58] On the whole of the evidence, we find that the Employer's reasons for the lay-offs of Ms. Markle and Ms. Ord are simply not credible or coherent. Firstly, the Board finds that there was no need to lay off any employees, however, even if there was such a need, there was no prior discipline of any kind; the alleged incidents of poor work performance and unethical behaviour relied on by the Employer are out of all proportion to a response in the nature of a lay-off that essentially amounted to a termination. The timing of the response makes no sense unless the inference is drawn that it is related to union activity. The Employer has not satisfied the onus of establishing good and sufficient reason for the lay-offs as required by s. 11(1)(e) of the *Act*.

[59] We find that the Employer committed an unfair labour practice within the meaning of s. 11(1)(e) of the *Act.* The Board orders that Ms. Markle and Ms. Ord be reinstated to their employment with the Employer, without any loss of seniority, within ten (10) days of the date of this Order under the same terms and conditions as they existed prior to their lay-offs on April 19, 2004. The Board also orders the Employer to pay to Ms. Markle and Ms. Ord the monetary loss suffered by each of them from the date of their lay-offs to the date of reinstatement. The Board will appoint a Board Agent for the purposes of: (i) facilitating discussion between the Union and the Employer relating to the terms of reinstatement and the amount of monetary loss suffered by Ms. Markle and Ms. Ord; (ii) examining the Employer's, Ms. Markle's and Ms. Ord's records relating to reinstatement and the monetary loss; and (iii) and interviewing any of the Employer's employees relating to reinstatement and the monetary loss. The Board Agent will be directed to report back to the Board within sixty (60) days of the date of the Order, or such further period of time as the Board's Executive Officer may allow, whether the parties have reached an agreement and whether the Board should issue any further orders or hold any further hearings relating to the provision of information, the terms of Ms. Markle's and Ms. Ord's reinstatements or the calculation and determination of monetary loss suffered by Ms. Markle and Ms. Ord. In addition, the Board orders that its Order and these Reasons for Decision be immediately posted in the workplace and remain there for a period of fourteen (14) days from the date of the posting. Finally, the Board orders that the Employer distribute a copy of the Board's Order and these Reasons for Decision to all employees of the Employer by ordinary mail at their last known addresses within 14 days of the date of the Order.

[60] The Board reserves jurisdiction to determine any further issues arising out of these Orders or the Board Agent's report.

DATED at Regina, Saskatchewan, this **17th** day of **December, 2004.**

LABOUR RELATIONS BOARD

Angela Zborosky, Vice Chairperson