Labour Relations Board
Saskatchewan

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

LRB File Nos. 219-04, 220-04 & 221-04; October 1, 2004
Vice-Chairperson, Angela Zborosky; Members: Marshall Hamilton and Gloria Cymbalisty

For the Applicant: Alex Lenko
For the Respondent: Lucy Mazden

Remedy – Interim order – Criteria – Board reviews criteria for granting interim relief – Where union organizer with no disciplinary record, previously reinstated by interim order of Board, subsequently terminated purportedly for just cause, employer's actions will have chilling effect on employees' perception of ability to exercise statutory rights free from fear of prejudice or retribution as well as union's ability to protect them – Board orders interim reinstatement and monetary loss.

Remedy – Interim order – Criteria – Balancing of labour relations harm – Where no compelling evidence to suggest that terminated employee constitutes threat to patient safety, employees' fear of retribution for involvement with union outweighs potential harm to employer – Order reinstating employee provides tangible assurance to employees that rights will be protected and prevents potential loss of support for and confidence in union – Board orders interim reinstatement and monetary loss.

***The Trade Union Act*, ss. 5(f), 5(g), 5.3 and 11(1)(e).**

REASONS FOR DECISION: INTERIM APPLICATION

Background:

[1] Del Enterprises Ltd. operating as St. Anne's Christian Centre (the "Employer"), 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, 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 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 be reinstated and paid for monetary loss.

[2] On June 3, 2004, the Union filed an application pursuant to s. 5.3 of the *Act* for interim relief, seeking, *inter alia*, the reinstatement of Ms. Markle and Ms. Ord pending the hearing and disposition of the applications proper.

[3] 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.

[4] The application for interim relief was heard by the Board on June 9, 2004. An Order was granted on June 14, 2004, reinstating Ms. Markle and Ms. Ord to their positions and requiring compensation for monetary loss. The Board also made an Order requiring the Employer to post its Order and Reasons for Decision in the workplace. See: *Canadian Union of Public Employees v. Del Enterprises*, [2004] Sask. L.R.B.R. ---, LRB File Nos. 087-04 to 092-04 (not yet reported).

[5] The applications proper were heard by the Board on September 15, 2004, at which time the Board reserved its decision. No decision has yet been rendered in relation to those applications.

[6] On August 23, 2004, Ms. Markle was terminated from her employment, allegedly for just cause. On August 27, 2004, the Union filed applications pursuant to ss. 5 (d), (e), (f) and (g) of the *Act* (LRB File Nos. 219-04 to 221-04) alleging that, in terminating Ms. Markle, the Employer had committed unfair labour practices in violation of ss. 11(1)(a) and (e) of the *Act*, and requesting that Ms. Markle be reinstated and compensated for her monetary loss.

[7] On September 21, 2004, the Union again filed an application pursuant to s. 5.3 of the *Act* for interim relief, seeking, *inter alia*, the reinstatement of Ms. Markle pending the hearing and disposition of the applications proper in LRB File Nos. 219-04 to 221-04.

[8] The Employer did not file a reply to the applications proper but did file affidavits at the hearing of the interim application in support of its position that Ms. Markle was terminated for cause.

[9] The Board heard the application for interim relief on September 27, 2004. A hearing has not yet been scheduled for the applications proper.

Evidence:

[10] In support of the application for interim relief the Union filed the affidavits of Moira Markle and Aina Kagis, each sworn September 20, 2004, and the affidavit of Alex Lenko, sworn September 21, 2004. A significant portion of the Union's evidence was also led at the hearing of the first application for interim relief but, as it is also relevant to this application, it will be set out in its entirety below. At the commencement of the hearing, the Employer filed the affidavit of Pauline Haas, sworn August 3, 2004, two affidavits of Sharon Karol, sworn September 21 and 25, 2004, the affidavit of Denise Zrymiak, sworn September 24, 2004 and two affidavits of Lucy Mazden, both sworn September 25, 2004. The following is a brief review of the affidavit material filed.

The Affidavit of Aina Kagis

[11] Aina Kagis is employed by the Union as a national representative. Ms. Kagis deposed that she met with Ms. Markle on April 2, 2004 at Ms. Markle's request to discuss organizing the Employer's employees. Ms. Markle indicated that she would be working with Ms. Ord to sign up support for the Union. Ms. Kagis forwarded union application for membership cards to Ms. Markle and Ms. Order for their use and followed up with them as to their progress on at least two occasions during the subsequent days. Between April 14 and April 17, 2004, employees signed eight union membership cards. Ms. Markle advised Ms. Kagis on April 19, 2004 that both she and Ms. Ord had received notices of lay-off that day. The Union filed applications alleging unfair labour practice and seeking reinstatement and monetary loss with the Board on April 30, 2004 (LRB File Nos. 087-04 to 092-04) as well as an application for interim relief on June 3, 2004. Following her reinstatement by Order of the Board, Ms. Markle advised Ms. Kagis that she had received a termination notice on August 23, 2004. On August 27, 2004, the Union filed a second set of applications alleging unfair labour practices and for reinstatement and monetary loss for Ms. Markle (LRB File Nos. 219-04 to 221-04).

The Affidavit of Moira Markle

[12] Moira Markle was hired by the Employer as a part-time caregiver on June 2, 2003. She was given a notice of lay-off by the Employer on April 19, 2004 that stated 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 your Record of Employment (sic).*

[13] The enclosed record of employment indicated for the reason for lay-off "number of residents declined." It further indicated that the last day for which Ms. Markle was to be paid was April 26, 2004 (in purported compliance with *The Labour Standards Act,* R.S.S. 1978, c. L-1.)

[14] Ms. Markle was familiar with the Union through her membership in another local at a different workplace, Deer Park Villa (also in Ituna, Saskatchewan) where the Union represents the employees. She initiated contact with Ms. Kagis on April 2, 2004 after a union meeting at the other workplace. After receiving the blank union membership cards between April 7 and 17, 2004, Ms. Markle and Ms. Ord distributed the cards to the employees and obtained signatures to eight cards. Ms. Markle spoke to Ms. Kagis on one or two occasions during this time period to provide up-dates.

[15] Ms. Markle deposed as to her belief, from examining the work schedules, that the shifts that she had been working were reassigned to another employee. There are also at least three employees hired after she was hired who continue to work for the employer. There were also fewer residents during August to September, 2003 than there were in April, 2004 but no lay-offs were initiated at that time.

[16] Ms Markle deposed that, following her reinstatement to employment pursuant to the Board's Order of June 14, 2004, her hours of work were reduced from the level they were prior to her lay-off. On August 23, 2004, approximately two months following her reinstatement, she received a termination notice which stated:

> *This letter is a notice of termination with cause, from your casual employment at St. Anne's Christian Centre. This notice is effective immediately. Any wages owing to you will be forwarded by mail.*

The Affidavit of Alex Lenko

[17] Alex Lenko is employed by the Union as a national representative. Mr. Lenko was advised by Ms. Markle on August 25, 2004 that she had been terminated from her employment. On August 27, 2004 the Union filed applications alleging unfair labour practices and reinstatement and monetary loss for Ms. Markle (LRB File Nos. 219-04 to 221-04).

[18] Appended to Mr. Lenko's affidavit is correspondence between the Union and the Employer. On July 19, 2004 the Union wrote to the Employer advising that the Union was considering an application to the Court of Queen's Bench to enforce the terms of the interim Order of the Board pursuant to s. 13 of the *Act.* The Union stated that it "would greatly appreciate a peaceful resolution to this matter." The Employer's response, dated July 26, 2004, stated that it believed it had complied with the Order. The Employer maintained that it had issued a lay-off to Ms. Markle based on a lack of available work and appeared to continue to resist the Union's involvement in this matter. The Employer stated:

> *St. Anne's Christian Centre Employees are not and never have been represented by the Canadian Union of Public Employees, thus we still do not understand your involvement. We maintain that at the time of lay off we had no knowledge of union activity in this workplace and we are not aware of any at this time. In any case that would be employees issue in which we do not intend to and never have interfered. We have been unfairly ordered to reinstate employees where we do not have hours to give them. Further we were unfairly ordered to pay them lost wages. This is a hardship to the Employer.*

While commenting that problems had occurred since Ms. Markle's reinstatement, the Employer concluded by stating:

> *So let's talk about a peaceful resolution. Perhaps the most peaceful resolution is resignation before termination with cause takes place.*

The Affidavit of Pauline Haas

[19] Pauline Haas is a 96 year-old resident at the Employer's personal care home. In an affidavit sworn on August 3, 2004, Ms. Haas described some incidents where she felt Ms. Markle treated her in a harsh, humiliating and disrespectful way. She deposed that Ms. Markle stated "I'm not your slave" in response to Ms. Haas's request for a drink of water on March 4, 2004. She further stated that, on June 27, 2004, Ms. Markle was not pleasant toward her when she asked that her bed be made and that, in response to a request that Ms. Markle put a cushion behind her, Ms. Markle stated words to the effect that Ms. Haas could have done it herself. Lastly she deposed that Ms. Markle was abrupt and disrespectful to her when she needed help to go to the bathroom on July 11, 2004.

[20] Ms. Haas stated that she did not complain about the March 4, 2004 incident to management right away, fearing retaliation by Ms. Markle. While it must have occurred prior to the date the affidavit was sworn (August 3, 2004), it is not clear when the complaint was made to management. It is also not clear if the complaint was made to management prior to the occurrence of the latter two incidents Ms. Haas described.

The Affidavits of Sharon Karol

[21] Sharon Karol is the Employer's business manager and has been employed there for eight years. Ms. Karol deposed that she has received many complaints about Ms. Markle during her employment with the Employer and called a meeting with the owners on February 2, 2004 to discuss Ms. Markle's performance, at which time one of the owners recommended Ms. Markle's termination. Apparently no action was taken at that time but, on April 19, 2004, Ms. Markle was laid off and she was selected for lay-off on the basis of her prior performance. It was following the lay-off that Pauline Haas made a complaint to Ms. Karol about Ms. Markle.

[22] Ms. Karol further deposed as to the decline in Ms. Markle's work ethic following her reinstatement by Board Order on June 14, 2004. She indicated that there had been a problem with incomplete duties and lack of teamwork and she described four specific incidents as follows:

- June 27, 2004 – the incident where Ms. Markle was unpleasant with Pauline Haas when requested to make Ms. Haas's bed;

- July 8, 2004 – Ms. Markle told a resident to "never do that again" in response to a resident stacking her dishes on the table;

- July 9, 2004 – the incident where Ms. Markle responded "when I'm ready" to a request by Ms. Haas to fix her bed;

- July 22, 2004 – Mr. Shymko, a temporary resident with an intellectual disability, complained that he had left the facility and gone to a local restaurant because Ms. Markle had told him to "get out" and that he "couldn't stay at St. Anne's" when he went to the third floor of the facility to look at a room he wished to choose for a permanent stay. Upon returning to the facility he and Ms. Karol confronted Ms. Markle at which time Ms. Markle denied saying these words to the resident. The resident was upset and it was suggested that he discuss the matter with Ms. Mazden.

Ms. Karol reported the above incidents to the owners, including Ms. Mazden, and they recommended that Ms. Markle be terminated.

[23] Ms. Karol denied knowledge of any union activity by Ms. Markle at this workplace before or at the time of termination.

[24] Ms. Karol also filed a statement sworn on September 27, 2004 relating to events which occurred on September 21, 2004. She deposed that Ms. Haas expressed concern about what happened with the affidavit she signed because her niece and her niece's daughter, Cyndi Salyniuk, visited her on September 20, 2004 and said words to the effect that if she signed the affidavit she would be in trouble. (Cyndi Salyniuk is the president of Canadian Union of Public Employees, Local 4552, which apparently is the local which represents employees at Deer Park Villa. She is not an employee of the Employer.) Ms. Karol also deposed that Ms. Haas was scared of Ms. Markle and that Ms. Haas said she would cover up in her bed and pretend she was sleeping so she would not have to speak to Ms. Markle.

<u>The Affidavit of Denita Zrymiak</u>

[25] Denita Zrymiak is an employee of Country Coffee in Ituna and was working on July 22, 2004 when Mr. Shymko came into the restaurant crying and saying that "Moira had told him to get out." Ms. Zrymiak deposed that, at Mr. Shymko's request,

she contacted Ms. Mazden, described Mr. Shymko's condition to her and put Mr. Shymko on the telephone with Ms. Mazden. Mr. Shymko left following the telephone conversation.

The Affidavits of Lucy Mazden

[26] Lucy Mazden is an owner of the Employer. She characterizes the employment of Ms. Markle as casual and deposed that during the course of Ms. Markle's employment, Ms. Karol contacted her several times to discuss Ms. Markle's work performance. At the meeting called by Ms. Karol in February 2004 to discuss employees' work performance, Ms. Mazden recommended Ms. Markle's termination because of her attitudes and values. She further deposed that Ms. Markle's lay-off in April, 2004 was due to a decline in the number of residents and that Ms. Markle was chosen on the basis of her performance.

[27] Ms. Mazden stated that Ms. Markle's performance further declined upon Ms. Markle's reinstatement by Board Order in June, 2004 and led Ms. Mazden to recommend Ms. Markle's immediate termination. Ms. Mazden deposed that she became aware of complaints from Ms. Haas and two other residents as outlined in her affidavit and the affidavits of Ms. Karol and Ms. Zrymiak. She also received reports of frequent cigarette breaks, having residents outside without proper attire and lack of teamwork.

[28] Ms. Mazden referred to what she considered the most disturbing report, received on September 21, 2004, after Ms. Markle's termination. She was advised by Ms. Karol that Ms. Haas had reported to her that she was threatened by a visitor, Cyndi Salyniuk, president of Canadian Union of Public Employees, Local 4552, that, if Ms. Haas signed the affidavit against Moira, she would be in trouble.

[29] Ms. Mazden deposed that she had no knowledge of union activity at the time of Ms. Markle's termination.

[30] Ms. Mazden swore a second affidavit on September 25, 2004, stating that she is the executive director of Deer Park Villa and that she is an advocate for adults

with intellectual disabilities who receive services at Deer Park Villa. She deposed that Mr. Shymko was a resident at Deer Park Villa who came to the Employer's personal care home on June 3, 2004 as part of a contingency plan during a labour dispute at Deer Park Villa. Ms. Mazden received a telephone call from Ms. Zrymiak, an employee at a local restaurant, on July 22, 2004 relating that Mr. Shymko was there and crying. She deposed that Mr. Shymko stated to her on the telephone that, when he was looking at a room on the third floor of St. Anne's in order to stay there permanently, Ms. Markle had shouted at him to get out of that room and that he cannot stay at St. Anne's. Ms. Mazden stated that she calmed Mr. Shymko and asked him to meet Ms. Karol back at St. Anne's. She relayed the incident to Ms. Karol and asked her and Mr. Shymko to confront Ms. Markle about this incident. Ms. Mazden stated that she received a report from Ms. Karol that, upon confronting Ms. Markle, Ms. Markle denied the allegations. Ms. Mazden stated that when she spoke with Mr. Shymko the next day in her office, he repeated the incident and expressed concern over whether Ms. Mazden believed him.

Interim Order Issued June 14, 2004

[31] On June 14, 2004, the Board issued an interim Order on LRB File Nos. 087-04 to 092-04 ordering reinstatement of Ms. Markle and Ms. Ord and compensation for monetary loss suffered by each of them pending the hearing and determination of the applications proper. The Board also made an Order requiring the Employer to post the Order and Reasons for Decision in the workplace. In making that determination the Board stated in *Canadian Union of Public Employees v. Del Enterprises*, [2004] Sask. L.R.B.R. --- (not yet reported), LRB File Nos. 087-04 to 092-04, paragraphs 24 to 26 as follows:

> *[24] In the present case**, the Union has established that the lay-off of each of Ms. Markle and Ms. Ord raises an arguable case that is not frivolous or vexatious.** They are experienced employees who were summarily laid off with no expectation of recall – for the purposes of the Act we find that their employment was terminated. Ostensibly the actions were taken because of a decline in resident numbers – that is for a reduction in work. However, by the Employer's own admission in the replies it filed, employees hired just two or three months earlier in February and March, 2004 continue to work. Also, the replies declare that another employee has commenced working the shifts that had previously been assigned to Ms. Markle and Ms. Ord.*

> *[25]* ***The terminations of Ms. Markle and Ms. Ord are highly suspicious coinciding with the height of activity in their organizing on behalf of the Union. While the Employer may ultimately be able to discharge the reverse onus imposed upon it under s. 11(1)(e) of the Act to establish that the terminations were not motivated in whole or in by because of their activities as key Union organizers, in the period pending the hearing and determination of the application proper, the compelling likelihood is that the actions of the Employer in terminating Ms. Markle and Ms. Ord, will have a chilling effect upon the perception of the employees of the ability to exercise their statutory rights pursuant to s. 3 of the Act free of the fear of prejudice or retribution.***
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> *[26]* ***Balanced against any harm to the Employer if an order is granted for their interim reinstatement, the likelihood that employees will be led to fear for negative consequences of involvement with the Union, far outweighs any alleged potential harm to the Employer.***
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> **[emphasis added]**

Arguments:

[32] Mr. Lenko, on behalf of the Union, maintained that the evidence established that Ms. Markle, while employed by the Employer, was engaged in union activity at the time of her termination and that her termination was related to her involvement with the Union. The Employer is therefore in violation of ss. 11(1)(a) and (e) of the *Act*. In its interim application, the Union asserted that the Employer failed to establish that Ms. Markle was terminated for good and sufficient reason, untainted by any anti-union sentiment. At no time did the Employer advise Ms. Markle of the reasons for her termination and she had no disciplinary record. The Union maintained that reinstating Ms. Markle would neither cause harm nor inconvenience to the Employer.

[33] Ms. Mazden, on behalf of the Employer, asserted that Ms. Markle's termination was for just cause and that it would be unsafe to return Ms. Markle to the workplace as she poses a danger to the residents. The Employer asserted that Ms. Haas is terrified of Ms. Markle and that the Employer found Ms. Haas's and Mr. Shymko's complaints "most horrifying." Of great concern to the Employer is the alleged conduct of Ms. Salyniuk in threatening Ms. Haas, even though Ms. Salyniuk is not an employee of the Employer, has no connection with the Employer as the president of the Canadian Union of Public Employees, Local 4552 representing employees on strike at

Deer Park Villa and is actually a relative of Ms. Haas. The Employer also attempted to argue that it would not cause just inconvenience to the Employer to reinstate Ms. Markle; it would be "horrific" for the residents. In argument, Ms. Mazden stated very clearly that *"we firmly hold we will not reinstate Moira Markle and that her termination is final,"* while denying that the termination had anything to do with union activity in this workplace or at Deer Park Villa.

Statutory Provisions:

[34] Relevant provisions of the *Act* include the following:

> *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;*
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> *(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;*
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> *. . .*
>
> *5.3 With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.*

. . .

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 purpose of bargaining collectively;

Analysis and Decision:

[35] We are of the opinion that the application for interim relief should be granted, that Ms. Markle should be reinstated to her employment as it existed prior to her lay-off on April 19, 2004, pending the hearing and final determination of the unfair labour practice, reinstatement and monetary loss applications proper, and that she should receive compensation for monetary loss. It is necessary that Ms. Markle be reinstated to her employment as it existed prior to the lay-off rather than prior to her

termination on August 23, 2004 because of the allegation by the Union that the Employer did not comply with the Board's June 14, 2004 Order for reinstatement.

[36] There have been numerous decisions over recent years involving applications for interim relief in circumstances where an employee has been terminated while exercising rights under the *Act*. In *Canadian Union of Public Employees v. Del Enterprises*, [2004] Sask. L.R.B.R. ---, LRB File Nos. 087-04 to 092-04 (not yet reported), the interim decision involving these parties dated June 14, 2004, the Board summarized the principles applicable to such a determination as follows, at paragraphs 20 to 23:

> *[20] The test for the granting of interim relief was enunciated by the Board in Regina Inn, supra,* [*Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn)*, [1999] Sask. L.R.B.R. 190, LRB File No. 131-99], *as follows, at 194:*
>
> > *The Board is empowered under ss. 5.3 and 42 of the Act to issue interim orders. The general rules relating to the granting of interim relief have been set down in the cases cited above. Generally, we are concerned with* ***determining (1) whether the main application reflects an arguable case under the Act, and (2) what labour relations harm will result if the interim order is not granted compared to the harm that will result if it is granted.*** *(see Tropical Inn, supra, at 229). This test restates the test set out by the Courts in decisions such as Potash Corporation of Saskatchewan v. Todd et al., [1987] 2 W.W.R. 481 (Sask. C.A.) and by the Board in its subsequent decisions. In our view, the modified test, which we are adopting from the Ontario Labour Relations Board's decision in* Loeb Highland, supra*, focuses the Board's attention on the labour relations impact of granting or not granting an interim order. The Board's power to grant interim relief is discretionary and interim relief can be refused for other practical considerations.*
>
> *[21]* ***On an application for interim relief we are not charged with determining whether the allegations have been proven, but rather with whether the status quo should be maintained pending the final determination of the main application: an interim order is intended to be preservative rather than remedial.*** *As the Board observed in Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suites Hotel (1998) Ltd., [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00,125-00,139-00,144-00 & 145-00, at 444****, an interim order must be consonant with the preservation and fulfillment of the objectives of***

the Act as a whole and of the specific provisions alleged to have been violated*. The Board stated at 443:*

> *Any interim order must first and foremost be directed to ensuring the fulfillment of the objectives of the Act pending the final hearing and determination of the issues in dispute. This includes not only the broad objectives of the Act but also the objectives of those specific provisions alleged to have been violated.*

[22] Accordingly, and as iterated in Chelton Suites Hotel, supra, at 446, each application for interim relief is determined according to its specific facts. Certain types of applications have particular factors that the Board takes into account in assessing the application according to the test. The factors considered are driven by the specific objectives of the particular statutory provisions alleged to have been violated. In applications such as the present one, where it is alleged that employees were terminated for activity in support of the union, or in attempted intimidation of union supporters, ***the Board has considered the potential for a negative effect on the status of the union and the potential for loss of support and confidence, as well as the impact on the individual employees terminated. The fragility of the union's status and strength of support, and the vulnerability of its supporters to pressure exerted by the employer prior to certification, is generally accepted and not seriously disputed.***

[23] In Amalgamated Transit Union, Local 1624 v. Trentway-Wagar Inc., [2000] C.I.R.B.D. No. 10 (February 21, 2000), a case similar to the present one in that the union's key organizers were dismissed at the height of the organizing campaign, the Canada Board approved of an approach to considering applications for interim relief that specifically entailed consideration of the objectives of the statutory provisions in issue. With respect to the discharge of a union organizer, it approved of the following statement by the Ontario Board in Tate Andale Canada Inc., [1993] OLRB Rep. Oct. 1019:

> *52. In the instant case, there is not much doubt that the applicant meets the threshold.* ***Where the union's two key organizers are unexpectedly discharged at the height of the organizing campaign, there is a prima facie case of a breach of the Act, and there is reasonable cause for employees to believe that an unfair labour practice has occurred****; moreover, in cases of this kind,* ***where the employer bears the legal onus of establishing that it has not contravened the Act, it is hardly surprising that the union requests that the pre-discharge status quo be maintained until the employer meets the statutory onus cast upon it****. If the employer is obliged to establish that its removal of employees from the workplace was not unlawful, there is nothing counter-intuitive about keeping them there until it does so. …*

> *53. In other words, whether or not the employer is ultimately successful on the main application**, the sequence of events under review is likely to inhibit the free exercise of employee rights, unless there is some positive and tangible assurance that those statutory rights will be protected. If an outsider regards these discharges as at least suspicious, an employee in the workplace would reasonably fear the consequences of his/her involvement with the union.** … whatever the motive for these discharges may actually have been, there is likely to be an adverse impact in the workplace until the aggrieved employees' rights are resolved through adjudication.*
>
> [emphasis added]

[37] In the present case, the Union has established that the termination of Ms. Markle raises an arguable case that is not frivolous or vexatious. The Board can reasonably infer, given the lack of evidence, that Ms. Markle does not have a disciplinary record. She was also not informed of the nature of the conduct giving rise to her termination, apparently for just cause, either at the time of the termination or at any time prior to these proceedings. While the Employer provided affidavit evidence of problems it had with Ms. Markle's work performance, much of it was hearsay and its reliability questionable, particularly in a hearing such as this, where there is no right of cross-examination. While a determination of the reasons for termination will be made when the main applications are heard, it must be noted that the Employer has failed to file a reply to those applications, which may ultimately prevent it from advancing this position at the hearing of the applications proper.

[38] Ms. Markle was clearly engaged in union activity through her involvement in an organizing drive at the Employer's workplace commencing in April, 2004 and also arguably through her involvement as an employee on strike at Deer Park Villa. It matters not that Ms. Markle was previously reinstated from an earlier lay-off where the union activity was the same as that being relied on in the present case. For the purposes of s. 11(1(e) of the *Act,* what is required is that the employee had exercised or was attempting to exercise her rights under the *Act*. In the circumstances of this case and, in particular, the disclosure of the details of the union activity at the earlier application for interim relief and the resulting Board Order, it is simply not possible for the Employer to state that it had no knowledge that Ms. Markle was engaged in union

activity prior to her termination or its decision to terminate her. Either the Employer does not understand the meaning of "union activity" or it simply refuses to accept the prior interim Order of the Board.

[39] Ms. Markle's initial lay-off coinciding with the height of her organizing activity on behalf of the Union is highly suspicious. It remains so when Ms. Markle is reinstated to her employment by Board Order and there is an allegation that the Employer has failed to comply with the Board Order. Suspicion is further heightened by the fact that the termination of Ms. Markle in August, 2004 followed the expression of a concern by the Union regarding the Employer's non-compliance with that interim Order and the statement made by the Union that it was giving consideration to enforcing the Board's Order through the courts. The Employer's response to this concern includes a suggestion that the most peaceful resolution is resignation before Ms. Markle is terminated for just cause. The evidence on the whole appears to establish a sequence of actions by the Employer to rid itself of Ms. Markle in any way possible, providing justification which escalates in seriousness from the time that Ms. Markle became involved in union organizing to the time of the hearing of this application for interim relief. The Employer's initial reason for Ms. Markle's lay-off was a decline in resident numbers. At the hearing of the first interim application, this reason was supplemented by the suggestion that Ms. Markle had poor work performance although no evidence was led to prove this. Following her reinstatement, the Employer appears to begin to gather evidence of improper work performance and terminates Ms. Markle for just cause, although without specifying the incidents that give rise to a termination for just cause. Then, without filing a reply to the applications proper, the Employer introduces affidavit evidence at this hearing outlining examples of poor work performance which it characterizes as being of the most serious kind and horrific in nature. Therefore, not only is the timing of the Employer's actions in relation to the organizing drive highly suspicious, the escalating nature of the Employer's response to these proceedings and the involvement of the Union is as well.

[40] It is not for the Board to determine on an application for interim relief whether the Employer had cause for the termination of Ms. Markle. It is sufficient at this point that the Board finds that the Union raised an arguable case that Ms. Markle was terminated in whole or in part for union activity, whether or not there was good and

sufficient reason. While it is possible that the Employer might establish at the hearing of the applications proper that Ms. Markle's termination was not motivated in whole or in part by her activity as a union organizer and the Union's potential action to enforce the Board's interim Order of reinstatement and compensation for monetary loss, in the period pending the determination of the applications proper, the labour relations harm of not granting interim relief outweighs that of granting such relief. The actions of the Employer in laying off Ms. Markle, possibly not complying with the prior interim Order and now terminating Ms. Markle, will have a chilling effect on the employees' perception of their ability to exercise their rights under the *Act* without fear of retribution by the Employer, as well as the ability of the Union to protect them for engaging in such action.

[41] The Employer suggests that it will suffer harm if Ms. Markle is reinstated in that it fears that the residents are in danger from Ms. Markle. The Board finds that there is no compelling evidence to establish that Ms. Markle is a threat to patient safety. The only evidence provided that could sustain such an assertion is the allegation that Ms. Salyniuk stated to Ms. Haas that Ms. Haas could be in trouble if she signed the affidavit against Ms. Markle. In addition to the Board not being made aware of the circumstances of this comment, this evidence, which was provided to the Board only in the affidavits of Ms. Mazden and Ms. Karol despite the fact that Ms. Haas filed an affidavit, is irrelevant to this application. Ms. Salyniuk is not an employee of the Employer and there was no suggestion that Ms. Markle had any involvement in that matter. Therefore, in weighing the harm to the Employer if an order is granted for Ms. Markle's reinstatement, there is a strong likelihood that employees' fear of retribution for involvement with the Union far outweighs any potential harm to the Employer. In order to fulfill the objectives of the *Act*, it is necessary to preserve the status quo by ordering Ms. Markle's reinstatement. In addition to providing tangible assurance to the employees that their rights will be protected, the order prevents the potential loss of support for and confidence in the Union.

[42] For these reasons, we have determined that an Order will issue for the immediate reinstatement of Ms. Markle to her employment as it was before her lay-off on April 19, 2004 and for compensation for monetary loss for the shifts she has missed from work, pending the hearing and determination of the applications proper. The Board shall remain seized of the matter in the event that the parties are unable to determine the

appropriate number of hours of work Ms. Markle should be scheduled for and the amount of the monetary loss.

[43] Furthermore, as this is the second interim Order to issue requiring the interim reinstatement of Ms. Markle to her employment within a period of three months, it is critical that the Employer's employees understand that they are entitled to exercise their rights under s. 3 of the *Act* to organize and participate in the activities of the Union without fear of prejudice or retribution. In order to accomplish this objective the Employer is required to post these Reasons for Decision and the Order that will issue herein, for a period of fourteen (14) days in a place in the workplace where the Employer normally posts notices to employees.

[44] The Board was very concerned by the comment made by Ms. Mazden in argument that the Employer "will not reinstate Ms. Markle" and that her "termination is final." The Board sincerely hopes that the Employer will co-operate in the implementation of this Order and abide by both its spirit and intent. In the event that it fails to do so, the Union has available to it the provisions contained in s. 13 of the *Act* which allow it to enforce the Board's Order as an order or judgment of the court in the same manner as any order or judgment of the court.

DATED at Regina, Saskatchewan this **1st** day of **October, 2004.**

LABOUR RELATIONS BOARD

Angela Zborosky, Vice-Chairperson