**The Labour Relations Board**
**Saskatchewan**

**SEIU WEST, Applicant v. REVERA RETIREMENT GENPAR INC., Respondent**

LRB File Nos. 080-11, 093-11, 095-11 & 100-11; July 8, 2011
Chairperson, Kenneth G. Love, Q.C.; Members: Ken Ahl and John McCormick

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| For the Applicant Union | Ms. Heather Jensen |
| For the Respondent Employer: | Ms. Meghan McCreary |

**Interim Order – Unfair Labour Practice – Three employees terminated following Union organization drive – Board finds Union establishes an arguable case that Employer committed unfair labour practice.**

**Interim Order – Balance of Labour Relations Harm – Board determines that balance of labour relations harm favours Board issuing interim Order. Labour relations harm to Union of risk that employees discouraged from participating in union activities for fear of it affecting their employment outweighs harm to Employer of having extra employees for short period of time.**

**Remedy - Employees reinstated on interim basis, pending expedited hearing.**

## REASONS FOR DECISION

**Background:**

**[1]** SEIU West, (the "Union") was recently certified to be the bargaining agent for a unit of employees of Revera Retirement Genpar Inc., carrying on business as Marian Chateau Retirement Villas (the "Employer") by an Order of the Board dated June 23, 2011.

**[2]** This application is for an interim Order of the Board reinstating certain employees to their positions with the Employer and for incidental relief pursuant to s. 5.3 of *The Trade Union Act* (the "*Act*"). For the reasons which follow, we have determined to grant the application.

**Facts:**

**[3]** The Union filed an unfair labour practice application with the Board on May 26, 2011 (LRB File No. 080-11) alleging various matters including that three housekeepers employed by the Employer had been terminated contrary to s. 11(1)(e) and 11(1)(g) of the *Act*.

**[4]** Subsequently, the Union filed applications for reinstatement of those employees (LRB File No. 094-11) and monetary loss for those employees (LRB File No. 095-11). It then filed the within application for interim relief on June 22, 2011.

**[5]** All of the applications referenced above were filed by the Union prior to the issuance of a certification Order in favour of the Union to represent the employees of the Employer in collective bargaining. The Board's Order certifying the Union as the exclusive bargaining agent of employees was issued on June 23, 2011.

**[6]** The Employer owns seven retirement homes in Saskatchewan, including Marian Chateau in Regina. These residences, including Marian Chateau, have been operated and managed under contract by The Caleb Group/Caleb Management Ltd. ("Caleb"). On December 20, 2010, the Employer gave notice to Caleb that, effective August 1, 2011, it intended to assume responsibility for the operation and management of the retirement residences in Saskatchewan.

**[7]** In early May of 2011, the Employer met with employees to discuss the change in management from Caleb to the Employer. There is some difference in the affidavit evidence regarding the impression left at that meeting as to whether or not there would be any staff layoffs. The employees who provided affidavits, Ronda Poitras and Charlotte Joseph, deposed that they understood that no staffing changes were anticipated. The Employer, through Caleb's Vice-President, Operations, Claude Marcotte, deposed that statements made in a document provided to employees at the meeting "was not intended to be, nor was it a representation or promise that there would be no reductions or layoffs at Marion Chateau."

**[8]** On May 27, 2010, just prior to the conduct of a representation vote by the Board pursuant to s. 6 of the *Act*, the Employer laid off a cook, Anna Van Horne. The reason given for the layoff was "[D]ue to restructuring in the kitchen". In Mr. Marcotte's affidavit, he deposed that the layoff of Ms. Van Horne was based upon seniority and that she "was the most junior person

in the Food Services Department (kitchen)". Subsequently, Ms. Van Horne, following intervention by the Union and because another member of the kitchen staff had resigned, was reinstated into a similar position in the kitchen. At the hearing of this matter, the Union advised that no interim relief was being sought in this application with respect to Ms. Van Horne.

**[9]** On June 8, 2011, the Employer laid off three housekeepers, being Rebecca Arock, Charlotte Joseph and Ronda Poitras. In the Affidavit of Claude Marcotte, he deposed that these employees were laid off because "on or before April 15, 2011, the Employer had determined that it would need to eliminate at least three, and possibly more, positions in Marian Chateau's housekeeping department."

**[10]** Mr. Marcotte also deposed that, in addition to the three housekeepers which are the subject of this application, a fourth housekeeper was laid off on or about June 13, 2011, which he deposed "was part of the planned management transition."

**[11]** Both of the employees who provided affidavits, and Mr. Marcotte deposed that the Employer had offered part time, casual employment to the laid off housekeepers as replacements for other employees taking holidays during the summer months. All of the affected housekeepers declined this offer.

**Relevant statutory provision:**

**[12]** Relevant statutory provisions of the *Act* provide as follows:

> *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.*
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> *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:*
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> *. . .*
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> > *(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 an 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 reasons 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;*
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> *. . .*
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> *(j) To declare or cause a lock-out or to make or threaten any change in wages, hours, conditions or tenure of employment, benefits or privileges while any application is pending before the board or any matter is pending before a board of conciliation or special mediator appointed under this Act;*
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> *. . .*
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> *42. The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.*

**Union's arguments:**

**[13]** Counsel for the Union filed a book of authorities and summary of those authorities which we have reviewed.

**[14]** The Union argued that the Board's jurisprudence establishes a two-part test for the Board to make an interim order[1]. First, an applicant must show that it has an arguable case, and second, if an arguable case is found, the Board must consider the labour relations harm to each of the parties in granting or not granting the requested relief.

[1] See *Hotel Employees and Restaurant Employees, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operation Ltd. o/a Regina Inn Hotel and Convention Centre*, [1999] Sask. L.R.B.R. 190, LRB File No. 131-99.

**[15]** The Union argued that the affidavits filed by the Union clearly showed that there was an arguable case that the Employer had interfered with the employees' rights under the *Act*. They argued that the Employer's actions in laying off employees created a chilling effect when the Union was going through an organizing campaign which, while ultimately successful, was still in its nascent period.

**[16]** The Union cited numerous cases[2] which it argued were similar in fact to the present situation and where the Board had intervened to grant interim relief. The Union argued that these decisions showed that the Board was sympathetic to the vulnerability of a union in the formative stage of its development. It argued that the Board recognized these situations gave rise to a "chill" in the workplace which was intended to dissuade employees from participating in union activities.

**[17]** The Union argued that the Board did not need to subject the evidence to a high level of scrutiny, nor did it need to determine if the Union had presented a strong case. Rather, all that was required was that the Union show that there was an arguable case to present to the Board.

**[18]** The Union argued that at paragraphs 19 and 20 of the *Starbucks*[3] decision, the Board supported its arguments concerning the potential labour relations harm to a nascent union. It argued that the Board recognized the chilling effect of terminations on the right of employees to engage in activities to select a trade union free of fear that their continued employment may be jeopardized.

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[2] See *Investigatve Services Ltd. v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 5917* [2011] CanLII 27648*; Canadian Union of Public Employees, Local 4973 v. Welfare Rights* Centre [2010] CanLII 42668*; S.J.B.R.W.D.S.U. v. Starbucks Coffee Canada Inc.,* [2005] Sask. L.R.B.R. 593*; GSU v. Startek Canada Service Ltd.,* [2004] Sask. L.R.B.R. 128*; CUPE v. Del Enterprises Ltd.*, [2004] Sask. L.R.B.R. 228*; U.F.C.W., Local 1400 v. D & D Taxi Ltd.,* [2004] Sask. L.R.B.R. 347*; C.U.P.E. v. Heinze Institute,* [2003] Sask. L.R.B.R. 374*; U.F.C.W., Local 1400 v. Paul Lalonde Ent. Ltd.*, [2001] Sask. L.R.B.R. 911*; H.E.R.E., Local 206 v. Chelton Inn Suites* Hotel, [2000] Sask. L.R.B.R. 434*; S.J.B.R.W.D.S.U. v. Partner Technologies Inc*., [2000] Sask. L.R.B.R. 737

[3] *Supra* note 1

**Employer's arguments:**

**[19]** Counsel for the Employer filed a Book of Authorities and written argument which we have reviewed.

**[20]** Counsel for the Employer concurred with counsel for the Union regarding the test to be applied by the Board for granting interim relief. However, counsel did not agree that the threshold for an arguable case had been met. The Employer argued that the granting of interim relief is a discretionary remedy and that the right to claim such relief must be clearly established.[4] Furthermore, it argued, the burden of proof in such an application falls upon the Applicant and the reverse onus set out in s. 11(1)(e) of the *Act* does not apply at this stage.[5]

**[21]** The Employer argued that the Union had provided no evidence to establish an arguable case in that all it had shown was coincidental timing between the lay off of the housekeepers and the Union's certification activity. They pointed to the Affidavit of Mr. Marcott as full answer to the concerns about the lay offs being tied to exercise of the employees rights under the *Act*. They argued that the decision to reduce staff was taken well before the certification process began.

**[22]** The Employer argued that by advertising for replacement housekeepers, it was only trying to fill in for vacation periods and that it had tried to provide work to the laid off employees by first offering them this work.

**[23]** In respect of labour relations harm, the Employer argued that the Union had not shown "some prejudice to them [the Union] which cannot be fairly addressed if they are required to await the full hearing and determination of the main application."[6]

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[4] *Re: Athabasca Catering Lmited Partnership v. United Steelworkers of America, Local 8914*, [1999] Sask. L.R.B.R. 430, LRB File No. 116-99
[5] *Re: International Union of Bricklayers and Allied Craftsmen, Local #1 Sask. v Regal Flooring Ltd.*, [1996] Sask. L.R.B.R. 694, LRB File No. 175-96 at 701
[6] *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, [1994] 4th Quarter Sask. Labour Rep. 197, LRB File No. 238-94

**[24]** Furthermore, it argued that the Union had failed to put forward any evidence or even a "reasonable factual basis" to support the allegation that the actions of the Employer had resulted in a chilling effect in the workplace.[7]

**[25]** The Employer argued that this Union was not so fragile that it needed to be protected from a possible breach by the Employer by having the Board issue an interim Oder. [8]

**[26]** The Employer argued that the primary remedy sought by the Union was financial, that is, loss of pay. This, it argued, mitigated against interference by the Board at this stage because a financial award could be made by the Board in its final determination without any necessity of an interim Order.[9]

**[27]** The Employer argued that the dismissal of the housekeepers was part of a planned management transition requiring a reduction in staff. The purpose of the reductions was cost savings, not anti-union animus. The Employer argued that any labour relations harm would favour not granting the Order since the Employer did not require those employees to perform work which does not need to be done. Reinstatement of the employees, the Employer argued, would result in a monetary loss to the Employer.

**Analysis & Decision:**

**[28]** It is the Board's decision that the application for interim relief should be granted and that Ms. Arock, Ms. Joseph and Ms. Poitras shall be reinstated to their employment as a housekeeper at Marian Chateau on the same terms and conditions and with all of the rights and benefits enjoyed by each of them prior to their termination until the hearing and final determination of the applications proper effective as of the date of the Order accompanying these reasons.

**[29]** The test to be met on applications for interim relief has been well established by the Board and need not be repeated here. As noted above, the Board must determine (1)

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[7] *United Food and Commercial Workers, Local 1400 v. Arch Transco Ltd. and Buffalo Cabs (1976) Ltd., o/a Regina Cabs*, [2004] Sask. L.R.B.R. 327, LRB File Nos. 241-04, 242-04 & 245-04

[8] Retail, Wholesale and Department Store Union, Local 455 v. Tai Wan Pork Inc., [2000] Sask. L.R.B.R. 219, LRB File No. 076-00

[9] See *Arch Transco, supra* note 7 *and Canadian Union of Public Employees, Local 600-5 (Re*), [1977] S.L.R.B.R. No. 14.

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. However, it must also be noted that the Board's power to grant interim relief is discretionary and interim relief can be refused for other practical considerations.[10]

**[30]** In applying the first part of the test, that is, whether the main unfair labour practice application reflects an arguable case under s. 11(1)(a), (e) and/or (g) of the *Act*, the Board finds at a minimum that there is an arguable case under s. 11(1)(e). While the evidence does not clearly establish that the employees were terminated by reason of an anti-union animus for exercising their rights under the *Act*, there is sufficient evidence to support an arguable case that the terminations were more than mere co-incidence. The Board does not assess the strength of the case at this stage of the proceedings, and the evidence that comes before the Board on the final application will undoubtedly be much clearer with respect to these issues. The evidence of the parties has not been tested by cross-examination and, as a result, no absolute conclusions can be drawn. Similarly, we have not had the opportunity to see and observe the witnesses or make any assessment of their credibility in respect of the issues before us. The timing of the terminations may be co-incidental, as argued by the Employer, but that timing, nevertheless raises the suspicion that the terminations may have another motivation. Also, while the conflict in testimony concerning the communication referenced in paragraph 3 hereof, cannot be resolved on this interim application, there remains the question raised by that communication and the interpretation placed upon it by the employees. There is therefore an arguable case that the Employer committed an unfair labour practice as defined by s. 11(1)(e) of the *Act.*

**[31]** The labour relations harm to the Union is that the remaining members of the bargaining unit could fear that their support of the Union with respect to the application for certification would result in the same or a similar adverse impact on their employment. Employees should always be free to support or not support a union as their bargaining agent without an implicit threat from their employer or their union concerning that support. Section 3 of the *Act* clearly places the choice to join or not to join a union in the hands of the employees. Recent amendments to the *Act* to require representation votes on certification and rescission

[10] See *Loeb Highland*, [1993] OLRB Rep. March 1/97.

have enhanced the right of employees to vote their conscience with respect to whether to seek union representation

**[32]** The labour relations harm to the Employer resulting from the issuance of the interim Order if no unfair labour practice has been committed is that the termination of the housekeepers will be delayed for three weeks until the scheduled hearing of the Union's applications proper and for a short period thereafter until the Board renders its decision on the applications proper. This may mean that the Employer has employees who are less than productive on staff for several weeks. This harm is minor in light of the potential harm to the employees and the Union should the unfair labour practice application be found to be well founded. Furthermore, the Employer will have the benefit of their services during the holiday periods for which it tried to engage them as casual employees during this interim period. Furthermore, any harm is diminished by virtue of the fact that we will leave the issue of monetary loss to be dealt with at the final hearing.

**[33]** The Board therefore concludes that the labour relations harm if Ms. Arock, Ms. Joseph and Ms. Poitras are not reinstated is greater than the labour relations harm if they are reinstated. The Board will, therefore, order their reinstatement effective as of the date of the order which accompanies these written reasons.

**[34]** The members should also receive first hand information of the Board's Order and Reasons for Decision to prevent any misinformation.

**[35]** Therefore, the Board makes the following interim Order:

**(1)** That within forty-eight (48) hours of its receipt of the Board's Order the Employer shall reinstate Ms. Arock, Ms. Joseph, and Ms. Poitras to their positions as housekeepers at Marian Chateau on the same terms and conditions and with all of the rights and benefits enjoyed by these employees prior to their termination, pending final hearing and decision of the applications or until further order of the Board;

**(2)** That within twenty-four (24) hours of its receipt of the Board's Order and these Reasons for Decision, the Employer shall post a copy of the Board's Order and these Reasons for Decision in the workplace in a location where

the documents are visible to and may be read by as many employees as possible, such posting to remain until the final determination of the applications;

**(3)** That the Board's Order shall remain in effect until such time as the Board disposes of the Applications filed by the Union, depending upon whether the final application for reinstatement is determined in favour of the Union or the Employer, there may be no further obligation to employ Ms. Arock, Ms. Joseph, and Ms. Poitras from that time; and

**(4)** That this panel of the Board shall remain seized of this matter.

**DATED** at Regina, Saskatchewan, this **15th** day of **July, 2011.**

**LABOUR RELATIONS BOARD**

Kenneth G. Love, Q.C.
Chairperson