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

**SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. SAKUNDIAK EQUIPMENT, a DIVISION OF WGI WESTMAN GROUP, Respondent**

LRB File No. 120-11; August 8, 2011
Chairperson, Kenneth G. Love, Q.C.; Members: Ken Ahl and John McCormick

For the Applicant Union: Mr. Larry Kowalchuk
For the Respondent Employer: Mr. Brian Kenny & Ms. Courtney Keith

**Unfair Labour Practice - Interim Order - Union seeks reinstatement of employees permanently laid off during organizing drive in workplace - Employer argues that lay off unrelated to organizing activities and decision to terminate employee was made prior to Employer's knowledge of organizing drive - Board notes affidavit evidence conflicting and leaves significant questions unanswered - Board concludes potential existed that Employer knew of organizing activity at time decision was being made to lay off employees - Board satisfied that Union demonstrated arguable case of a potential violation of Trade Union Act - Board also satisfied that balance of labour relations harm favoured granting the requested relief - Board orders reinstatement of employee pending hearing of main application.**

**Practice and Procedure - Interim Order - Board discusses the requirement that there be an underlying application to support the granting of interim relief.**

***The Trade Union Act, ss. 5.3 & 11(1)(a) & (e).***

## REASONS FOR DECISION

**Background:**

**[1] KENNETH G. LOVE, Chairperson:** Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") applied to the Saskatchewan Labour Relations Board (the "Board") on June 30, 2011 alleging that Sakundiak Equipment, a Division of WGI Westman Group, (the "Employer) had contravened sections 11(1)(a) and (e) of *The Trade Union Act*, R.S.S. 1878, c.T-17 (the "*Act*"). [1] The Union also applied on that same date for reinstatement of an employee, Dusty Copeland,[2] as well as monetary loss suffered by Mr.

[1] Application bearing LRB File No. 107-11.
[2] Application bearing LRB File No. 108-11.

Copeland resultant from his lay off.[3] On July 18, 2011, the Union applied to the Board for an interim Order pursuant to s. 5.3 of the Act.[4] That application sought the following relief:

> 1. *An order for reinstatement of Dusty Copeland, Ha Phan, and Nat Dunbar within 48 hours of receipt of this order.*
> 2. *An order for monetary loss within 7 calendar days of receipt of this order.*
> 3. *An Order to provide the name, address and phone number of all employees of the Employer in or in connection with its places of business in the City of Regina to Mr. Paul Guillet within forty-eight hours of the receipt of this Order.*
> 4. *An Order requiring the Employer to permit representatives designated by the SJBRWDSU to meet with every employee of the Employer for one hour during their normal work hours without loss of pay at a time and location determined by the SJBRWDSU.*
> 5. *Such further and better Orders as are reasonable and necessary to ensure that the intent of the above Orders can and will be respected.*

**[2]** The Union's application for interim relief was heard by the Board on July 22, 2011. In accordance with the Board's practice in respect of applications for interim relief, the Board reviewed affidavit evidence in the form of the Affidavits of Dusty Copeland, Nat Dunbar and Ha Phan, filed by the Union and the Affidavits of Victor Holodryga and Ashley Outerbridge, filed on behalf of the Employer. Mr. Copeland is the subject of the Union's interim application. Mr. Dunbar and Mr. Phan are also former employees of the Employer who were laid off at or near the same time as Mr. Copeland. Mr. Holodryga is the Vice-President and General Manager for the Employer. Ms. Outerbridge is the Human Resources and Health and Safety Coordinator for the Employer.

**[3]** Following the hearing on July 22, 2011, the Board reserved its decision. For the reasons which follow, the Board denies the Union's application for interim relief.

**Facts:**

**[4]** The Employer is a farm equipment manufacturer. The Employer manufactures various types of farm equipment, including grain bins and grain augers. Mr. Copeland commenced employment with the Employer in February of 2011. When he commenced employment, he deposes that he initially loaded trucks, but was moved to being an operator of a "flight machine", which in his Affidavit he describes as the "main production equipment used to manufacture the [grain] auger".

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[3] Application bearing LRB File No. 109-11.
[4] Application bearing LRB File No. 120-11.

**[5]** In his Affidavit, Mr. Copeland deposes that his move to being an operator of the flight machine was a “substantial promotion” and that he was trained to operate the machine “over the employee who had twenty-five years experience” with the Employer. The Employer disagrees with this characterization of Mr. Copeland’s importance to the organization. In her Affidavit, Ms. Outerbridge denies that Mr. Copeland was trained to operate the flight machine in preference to the long service employee, but rather that that employee had taken training prior to Mr. Copeland’s hiring and was trained further when Mr. Copeland was trained on the machine.

**[6]** Furthermore, the Employer denied that Mr. Copeland had been given a title change when he began as an operator of the flight machine, contrary to his Affidavit, nor was he promoted to be the senior operator of the machine. The former senior employee continued to be the team leader in that area.

**[7]** Mr. Copeland deposed that he met with Union officials on June 15, 2011 “to begin organizing a union at my workplace”. He states that he signed a union support card on that date as well. He further deposes that from June 15, 2011 to June 22, 2011 that he talked to other employees “about unionization”. He deposes that his discussions with employees took place during coffee breaks, lunch breaks and in the parking lot of the Employer prior to and after work in the days immediately prior to June 22, 2011. Mr. Copeland was laid off on June 22, 2011.

**[8]** In her Affidavit, Ms. Outerbridge describes the process by which 4 employees were laid off on June 22, 2011. These employees were, Mr. Copeland, Gord Polsom, Robin Kinequon, and Charlie Racz. In each case, the employees were asked to collect their personal belongings and were escorted out of the building. The lay off letter provided to Mr. Copeland provides as follows:

> “WITHOUT PREJUDICE
> DELIVERED
>
> 22 June 2011

Dusty Copeland
11 Paynter Crescent
Regina, Saskatchewan
S4X 1H3

Dear Dusty,

Due to unfortunate circumstances which have resulted in a shortage of work, it is with regret that we must inform you that you will be laid off effective today, June 22nd 2011. As a result, the lay-off from your employment with Sakundiak Equipment will be permanent, is without cause, and arises out of difficult decisions we have had to make within the recent business slowdown.

In addressing your entitlement to monetary compensation as a result of the lay-off of your employment, we consider our primary obligation is to provide you with reasonable notice. Based upon your months of service and the Labour Standards Act (Saskatchewan) you will receive a total of one (1) weeks' notice and will therefore receive a lump sum amount of $720.00 of pay in lieu of notice. This amount, together with your final salary and any earned but unused vacation entitlement and your Record of Employment will be provided to you within the next few days.

All benefits will cease as of the last date of your employment, today June 22nd 2011. You must return any Company property on your last date of employment.

We again thank you for your months of service with the Company, and wish you all the best in your future endeavours. Dusty, we wish you all the best in your future endeavours.

Sincerely,
Sakundiak Equipment

Per:

Victor Holodryga,
Vice-President and General Manager Sakundiak Equipment”

**[9]** Mr. Copeland deposed that two (2) other employees, including Nat Dunbar and Ha Phan also signed support cards for the Union on June 20 and 21, 20ll. He also deposed that he was in regular contact with Mr. Dunbar and Mr. Phan during that period concerning their progress in organizing the Union.

**[10]** There was also some contested evidence regarding an incident which Mr. Copeland describes as a confrontation with Mr. Holodoyga about his “roaming around”. Mr. Copeland deposes that Mr. Holodoyga was monitoring his activities (his break time for lunch).

Similarly, Mr. Dunbar also deposes that Mr. Holodoyga was “unusually on the floor a lot”. This evidence is denied by Mr. Holodoyga in his affidavit, where he deposes that “[W]hen I am at the plant, I walk through the plant floor at least six times a day on average to observe the employees and the machinery for as long as I have worked at this facility”.

**[11]** There was also a difference of opinion as to the necessity of the layoffs. The Employer deposed that the wet spring in 2011 resulted in less sales than they had anticipated. They began monitoring the sales activity and began to note that they were experiencing both a lack of orders and an increase in inventory levels. The Union’s affidavits stressed the facts that the Employer had just completed a major plant expansion, which the Company had recently celebrated. They also noted that the Employer had recently participated in a major farm equipment show held in Regina, the Farm Progress show.

**[12]** The Employer deposed that the layoffs were solely related to economic events, being shortage of sales and increases in inventory. The Employer also asserts that the layoffs were planned for some time and were scheduled to occur following the conclusion of both the Plant Celebration and the Farm Progress Show.

**[13]** The Union deposed that it was their belief that the layoffs were motivated by the union organizing campaign. They further deposed that as a result of the layoffs, the organizing campaign “has come to a complete halt”.

**[14]** The Affidavit evidence was conflicting as to certain other events relevant to these proceedings. For example, while the parties agreed that there was a meeting of employees held on June 24, 2011. The Union affiants depose that this meeting was to discuss rumours concerning unionization, the Employer asserts that this was a regularly scheduled “focus group” meeting. Ms. Outerbridge deposes that “Unionization was not discussed in any of these meetings”, however, she also notes that a junior employee “raised a question regarding the union drive and Mr. Lepper [the Employer representative chairing the meeting] responded that we were not there to discuss it”.

**[15]** Notwithstanding the conflicts in the evidence, both parties in their submissions to the Board sought to strike out portions of the Affidavits filed by the other as being based on hearsay or on information and belief. Mr. Kowalchuk stated in argument that the “affidavits

leave many questions that are not properly answered and that he wanted to cross-examine on them.

**[16]** Boiled down to the essentials, the Union took the view that the layoffs were motivated by anti-union animus contrary to the Act. The Employer took the view that the layoffs were planned before any organization drive started and were motivated purely by economic pressures faced by the Employer.

**Arguments of the Parties:**

**[17]** Both parties agreed that the Board's decision in *Canadian Hotels Income Properties Real Estate Investment Trust (Regina Inn Hotel)*[5] sets forth the test to be applied by the Board in determining whether to grant interim relief under s. 5.3. That test is:

> *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.*

**[18]** The Union took the position that the evidence was sufficient to demonstrate an arguable case of a potential violation of the *Act*. In this regard, counsel noted that the right of an employee to join a trade union was a fundamental right protected by both the Act and the Charter of Rights and Freedoms. He argued that the denial of that right was difficult to prove, but the Board has been vigilant in its protection of the rights of workers to join a trade union of its choice. In support of his argument, he filed 4 cases.[6]

**[19]** The Union also argued that the balance of labour relations harm favoured ensuring that employees rights to join a trade union of their own choosing, along with the harm to the union caused by the chilling effect resultant from the layoffs, which resulted in the organizing campaign coming to a complete halt, outweighed any potential economic harm to the employer in reinstating the employees.

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[5] [1999] S.L.R.B.D., No. 18.
[6] *Courtyard Inns Operations Ltd. (c.o.b. Regina Inn)* [1996] S.L.R.B.D. No. 46, LRB File Nos. 154-96 to 156-96; *Partner Technologies Inc.* (Re:) [2000] S.LR.B.D. No 71, LRB File Nos. 290-00 to 292-00; *Universal Reel & Recycling Inc.* (Re:) [2001] S.L.R.B.D. No. 80, LRB File Nos. 226-10 to 228-01; *Starbucks Coffee Canada, Inc*. (Re:) [2005] S.L.R.B.D. No. 40, LRB File Nos. 183-05 to 185-05.

**[20]** The Union also argued that the reverse onus provided for in s. 11(1)(e) should come into play in this application and that there was no onus on the Union to prove the elements of its case. Rather, he argued, the employer should be considered to be in breach until it proves otherwise.

**[21]** The Employer argued that the layoffs were not motivated by any anti-union animus and were long planned to occur. They argued that the layoffs were not disciplinary and were not for cause.

**[22]** Counsel for the Employer attacked numerous statements in the Affidavits filed by the Union as being speculation, opinion, hearsay or of no benefit to the Board. The Employer argued that applications for interim relief must be based upon information within the personal knowledge of the deponent.[7]

**[23]** The Employer also argued that the relief sought by the Union was inappropriate since the proper purpose of interim relief is to preserve the status quo until an application on the merits can be heard, not to provide the Union with access to information to assist in their organizing campaign.[8]

**[24]** The Employer argued that the Union did not demonstrate an arguable case. They argued that the Union must show more than a coincidence of timing between the alleged union activity and the layoffs. To do so, would place a reverse onus on the employer in these interim proceedings contrary to the Board's reasons in *Re: International Union of Bricklayers and Allied Craftsmen, Local #1 Sask. and Regal Flooring Ltd.*[9]. The Employer argued that the Union failed to provide evidence to support any link between the layoffs and the alleged union activity.

**[25]** The Employer argued that there was no prejudice to the union which could not await the full hearing of the Unfair Labour Practice application.[10] Furthermore, they argued that

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[7] *Welfare Rights Centre (Re:)* [2010] S.L.R.B.D. No. 13
[8] See *Regina Inn Hotel*, *supra* note 5 at para. 10
[9] [1996] Sask. L.R.B.R. 694 at 700
[10] *SJBRWDU v. Prairie Microtech Inc.* [1994] S.L.R.B.D. No 62, at 5.

the Union had provided no proof of a "chilling effect" on union support.[11] Nor they argued, had the Union showed any evidence of harm which could not be remediated by monetary compensation.[12]

**[26]** The Employer argued that it would face significant reputational harm if the interim order was granted, which it argued mitigated towards the balance of labour relations harm favouring the Employer.

**[27]** At the close of arguments, the Board asked the parties if they were aware of the Board's recent decision in *UFCW v. The Watrous Cooperative Association Limited*[13]. Mr. Kowalchuk advised the Board he was familiar with the decision, Mr. Kenny advised that he was not. In fairness to both parties, the Board provided them with a copy of the decision and adjourned the hearing to allow the parties to review that decision and comment on it.

**[28]** The Board drew this decision to the attention of the parties as it was a recent case and bore some factual similarities to the present case. Unfortunately, that decision had not, as yet, been posted either on CanLII nor on the Board's web site and may, therefore, not have come to the parties attention.

**[29]** Following the adjournment, Mr. Kenny suggested to the Board that bringing the case to the parties attention was in accordance with the Court of Queen's Bench decision in *Canadian Linen and Uniform Supply Ltd. v. RWDSU.*[14] In that case, at para 25 & 26, Mr. Justice Kovack says:

> *The Board owed a duty to both parties to adhere to the principles of fairness and natural justice. Whether a reasonable person test is applied, or whether one simply asks what would have been fair in this situation, or whether one inquires into the opportunity of each party to comment on, distinguish or contradict information before the Board, a breach occurred. The breach was serious in that the Board was engaged in a comprehensive review of the approach taken by labour relation tribunals in various other jurisdictions (and under various other statutory regimes) with a view to establishing or identifying policies in respect of the very issue before it. It is clear from the above case law that the decision cannot stand.*

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[11] *UFCW, Local 1400 v. Arch Transco Ltd. and Buffalo Cabs (1976) Ltd., operating as Regina Cabs* [2004] Sask. L.R.B.R. 327.
[12] *CUPE, Local 600-5 (Re:)* [1997] S.L.R.B.D. No. 14
[13] LRB File No. 037-11
[14] [2005] CanLII SKQB 264, [2006] 7 WWR 492, [2006] 266 Sask. R. 64

> *It is important that application of this judgment be limited specifically to this particular set of facts. The actions of the Board appear clearly to have gone beyond those of a decision-maker whose own research identifies a number of additional legal authorities worthy of consideration and comment, but not necessarily crucial to a decision. In this instance the research, not disclosed to the parties, influenced the Board's decision in a way prejudicial to the Applicant. Given the substantial magnitude of the Board's research into legal and policy issues and the fact that the Board's work product was applied entirely to the disadvantage of the Applicant, fairness and justice required that the Board "take the initiative in inviting the interested parties to submit representations to it" (Halsbury's Laws of England, 4th ed. reissue, 1989, Vol. I(I), para. 96).*

**[30]** For these reasons, the Board did not want to have either party surprised if the Board should rely upon or quote from this decision in its final reasons. Hence, the parties were provided an opportunity to review and comment on the decision.

**[31]** Mr. Kenny argued that the decision was relevant to the present case. While he acknowledged that there may be factual differences, the case supported the Employers arguments.

**[32]** Mr. Kowalchuk, on the other hand argued that the case was wrongly decided and should not be relied upon. He argued that the Board, in that decision had rewritten s. 11(1)(e) and had misinterpreted the *Act*. He argued that it should have no bearing on the current case.

**Relevant Statutory Provisions:**

**[33]** Sections 5.3 and 11(1)(a) and (e) 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.*
>
> . . .
>
> *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; but nothing in this Act precludes an employer from communicating facts and its opinions to its employees;*
> >
> > *. . .*
> >
> > *(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;*

**Analysis and Decision:**

**[34]** The Board's practice and jurisprudence on interim applications was summarized by the Board in *Saskatchewan Government and General Employees' Union v. Government of Saskatchewan*[15]:

> ***[30]*** *Interim applications are utilized in exigent circumstances where intervention by the Board is thought to be necessary to prevent harm from occurring before an application pending before the Board can be heard. Because of time constraints, interim applications are typically determined on the basis of evidence filed by way of certified declarations and sworn affidavits without the benefit of oral evidence or cross-examination. As such, the Board is not in a position to make determinations based on disputed facts; nor is the Board able to assess the credibility of witnesses or weigh conflicting evidence. Because of these and other limitations inherent in the kind of expedited procedures used to consider interim applications, the Board utilizes a two-part test to guide in its analysis: (1) whether the main application raises an arguable case of a potential violation under the Act; and (2) whether the balance of convenience favours the granting of interim injunctive relief pending a hearing on the merits of the main application. See: Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Property Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn), [1999] Sask. L.R.B.R. 190, LRB File No. 131-99. See also: Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre, 2010 CanLII 42668, LRB File No. 083-10. As with any discretionary authority under the Act, the exercise of the Board's authority to grant interim or injunctive relief must be based on a sound labour relations footing in light of both the broad objectives of the Act and the specific objectives of the section allegedly offended.*

[15] [2010] CanLII 81339, LRB File No. 150-10

> ***[31]*** *In the first part of the test, the Board is called upon to give consideration to the merits of the main application but, because of the nature of an interim application, we do not place too fine a distinction on the relative strength or weakness of the applicant's case. Rather, the Board seeks only to assure itself that the main application raises, at least, an "arguable case". See: Re: Regina Inn, supra. See also: Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre, 2010 CanLII 42668, LRB File No. 083-10. The Board has also used terms like whether or not the applicant is able to demonstrate that a "fair and reasonable" question exists (which should be determined after a full hearing on the merits) to describe this portion of the two-part test. See: Re: Macdonalds Consolidated, supra. Simply put, an applicant seeking interim relief need not demonstrate a probable violation or contravention of the Act as long as the main application reasonably demonstrates more than a remote or tenuous possibility.*
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> ***[32]*** *The second part of the test – balance of convenience - is an adaptation of the civil irreparable harm criteria to the labour relations arena. See: Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suite 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. In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy. See: Grain Services Union, Local 1450 v. Bear Hills Pork Producers Ltd. Partnership, [2000] Sask. L.R.B.R. 223, LRB File No. 079-00. The Board will also balance the relative labour relations harm that is anticipated to occur prior to the hearing of the main application without intervention by the Board compared to the harm that could result should a remedy be granted. See: Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Regina Exhibition Association Limited, et. al., [1997] Sask. L.R.B.R. 667, LRB File No. 266-97; United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Con-Force Structures Limited, [1999] Sask. L.R.B.R. 599, LRB File No. 248-99; and International Association of Fire Fighters, Local 1318 v. South Saskatchewan 911, [2001] Sask. L.R.B.R. 97, LRB File No. 037-01. In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm. See: 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.*

**Jurisdiction of the Board to deal with Employees other than Dusty Copeland:**

**[35]** Six employees, in total, were laid off by the Employer. The Union has brought an application in respect of only one of them, Dusty Copeland. While the Union's interim application purported to deal with three employees, Dusty Copeland, Nat Dunbar and Ha Phan, no applications were made to the Board with respect to the latter two.

**[36]** At the hearing of this matter, the Union's counsel was asked about the three other employees (Robin Kinequon, Gord Polsom, and Charlie Racz) on whose behalf the Union was not seeking relief. Counsel refused to advise the Board as to the reasons behind the interim application purportedly having been made only by the three employees named above.

**[37]** In the application on LRB File No. 107-11, the underlying Unfair Labour Practice application, the Union seeks relief which is the "immediate reinstatement of Mr. Copeland and all employees laid off since June 21, 2011 with full compensation for loss of income and benefits. However, no applications for reinstatement and monetary relief for any employee, other than Dusty Copeland, have been filed with the Board.

**[38]** The Board has determined that, absent an underlying application, it is without jurisdiction to grant interim relief. In *CUPE, Local 4802 v. Board of Education of the Sun West School Division No. 207*[16] at paragraphs 14 -16, the Board says:

> **[14]** *The Board, for the reasons which follow, agrees with the arguments of the Union that it has no jurisdiction to grant the requested relief. In order to do so, there must be some underlying application before the Board, which will be the foundation for its interim order. In addition, in order for the Board to examine the criteria for interim relief, as argued by the Union, it must do so based on the facts alleged in the application made which is the underlying application to the application for interim relief.*
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> **[15]** *Interim relief cannot be granted in a vacuum, that is that the Board does not have original jurisdiction to grant a stay of its orders absent a review of that order, or the underlying basis for that order, or absent another application to the Board which clothes the Board with jurisdiction under s. 5.3 of the Act.*
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> **[16]** *Section 5.3 contemplates that the Board may "make an interim order pending the making of a final order or decision." In the Board's view, this means that there must be an underlying application for a "final order or decision" which is the basis upon which the application for and the making of an interim order is founded. There is no original jurisdiction in s. 5.3 to make an interim order outside of those parameters. Nor is there jurisdiction in the situation contemplated here, to make an interim order in support of an application to the Court of Queen's Bench for judicial review.*

**[39]** In this case, since the Board has no underlying applications for any employee other than Mr. Copeland, the Board has no jurisdiction to make any interim order concerning any other employee who may have been laid off by the Employer.

**[40]** While the Board's jurisdiction in the case of interim relief may be limited, that may not be the case with respect to the hearing on the merits where the Union has clearly requested relief for employees other than Mr. Copeland. However, the Union should also file with the Board prior to the hearing to be held on August 18 and 19, 2011, proper applications for

[16] [2009] CanLII 7785 SKLRB, LRB File Nos. 113-06 & 061-07

reinstatement and monetary loss in the form provided in the regulations to the Act (forms 3 & 4). Such applications, for those employees for whom the Union claims to act, should be filed with the Board no later than August 12, 2011 in order to allow time for the Employer to file a reply on or before the commencement date of the hearing.

**Mr. Copeland's Application for Interim Relief**

**[41]** In this case, there was considerable argument between the parties as to whether certain provisions of the Affidavits filed by both parties should be admitted and relied upon by the Board. In particular, the parties differed with respect to what constituted hearsay and what provisions of the Affidavits should be struck as being hearsay. As noted above in the quote from *Saskatchewan Government and General Employees' Union v. Government of Saskatchewan*[17], applications for summary relief are made in exigent circumstances where there is a necessity to preserve the *status quo* pending the final hearing of the matter. For that reason, Practice Directive No. 1 requires that affidavit evidence filed be based upon personal knowledge[18].

**[42]** While it is entirely possible that the Employer had good and sufficient reason for terminating Mr. Copeland (reasons wholly unrelated to Mr. Siddiqui's efforts to organize the workplace), the Board is left with an either/or situation. Mr. Copeland and his supporters, Mr. Dunbar and Mr. Phan say they believe their layoffs were motivated by anti-union animus while the Employers affiants say the opposite. In applications of this nature, where the Board does not have the opportunity to see the witnesses or to have their testimony subjected to cross examination, we are required to determine if the materials presented, being the applications filed and the Affidavit evidence presented gives rise to an arguable case. We are not required to determine the veracity of the evidence at this stage of the proceedings, but merely if, as a whole, the evidence provided can give rise to an arguable case.

**[43]** As this Board has noted on many occasions, these are not the kind of factual determination that can be easily made on an interim application, where the Board does not have

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[17] [2010] CanLII 81339, LRB File No. 150-10

[18] *The application will generally be determined on the basis of written materials filed by the parties, and oral argument, but not the testimony of witnesses. The application should therefore be accompanied by a statutory declaration or affidavit, in which the deponent sets out those facts* ***lying within his or her personal knowledge*** *which will be relied upon to support the application.*

the benefits of *viva voce* evidence and the parties do not have the right to cross-examine witnesses. However, it is clear from the Affidavit of Ms. Outerbridge that the Employer has some knowledge that there was union activity in the workplace. In paragraph 22 of her Affidavit, she deposes that on June 21, 2011, she "proactively and deliberately impressed upon the [sic] those present that everyone involved in management need to remain neutral in the face of any unionization rumours". Furthermore, she deposes that Mr. Holodryga "specifically asked everyone present not to discuss any unionization rumours with other employees". Mr. Holodryga confirms this statement in paragraph 12 of his Affidavit.

**[44]** Based upon those statements, it is clear that the Employer had some information concerning unionization efforts at the workplace. This knowledge predated the date of termination of Mr. Copeland on June 22, 2011. As such, it gives rise to an arguable case that there may have been some connection between the organizing efforts and the layoffs.

**[45]** With respect to the second branch of the test, the Board has acknowledged in numerous cases that firing an employee closely associated with a trade union's organizing campaign can have a chilling or dampening effect on a trade union's organizing drive. See: *Chelton Suites Hotel, supra*, and *Startek Canada Services, supra*. See also: *Hotel Employees and Restaurant Employees Union, Local 206 v. Regina Inn Hotel and Convention Centre*, [1999] Sask. L.R.B.R. 190, LRB File No.131-99; *United Steelworkers of America, Local 5917, v. Superior Hard Chrome Inc.*, [1999] Sask. L.R.B.R. 721, LRB File Nos. 321-99 to 323-99; and *United Food and Commercial Workers Union, Local 1400 v. Heritage Inn*, [2001] Sask. L.R.B.R. 125, LRB File No. 056-01, 057-01 & 058-01. The Board is particular sensitive to this concern in the period prior to the conduct of a representative vote as now required by the *Act*. Prior to the conduct of the representative vote, the Union's support within the workplace is vulnerable to influence and, if the allegations are founded, the damage to the Union's reputation and the potential coercive effect on the Union's support prior to the vote could result in irreparable harm to the Union by the time a full hearing on the merits could be conducted by the Board.

**[46]** While the Employer argued that it would be unfair to it, if Mr. Copeland was reinstated and if the Union's allegations were later determined to be unfounded (as the Employer alleged), with all due respect, the balance of labour relations harm favours reinstating Mr. Copeland pending the hearing on the main application. In our opinion, the potential harm to

the Union of not reinstating Mr. Copeland is greater than the potential harm to the Employer's business resulting from having to reinstate Mr. Copeland on an interim basis.

**Conclusion and Order:**

**[47]** For the foregoing reasons, the Board orders that Mr. Copeland be reinstated to his position with the Employer within 48 hours of receipt of this decision by the Employer, pending the final determination of the Union's application.

**[48]** The Board further orders that a copy of this decision be posted in the workplace in a place where it may be viewed by all employees within 48 hours of its receipt by the Employer.

**DATED** at Regina, Saskatchewan, this **8th** day of **August, 2011.**

**LABOUR RELATIONS BOARD**

Kenneth G. Love, Q.C.,
Chairperson