SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES UNION , Applicant v. LAC LA RONGE INDIAN AND CHILD SERVICES AGENCY INC., Respondent

LRB File No. 267-14; December 1, 2015
Chairperson, Kenneth G. Love, Q.C.; Members: Maurice Werezak and Laura Somervill

For the Applicant Union: Crystal L. Norbeck
For the Respondent Employer: Peter V. Abrametz

Unfair Labour Practice – Employee terminated without cause during an organizing campaign – Employee was one of the inside organizers for the Union – Union claims that Employee terminated as a result of her union organizing activity – Section 6-62(1)(a), (g) & (i) of *The Saskatchewan Employment Act.*

Unfair Labour Practice – Reverse Onus pursuant to section 6-62(4) & (5) of *The Saskatchewan Employment Act* – Union shows that Employee was engaged in union activity protected by the *Act* and that Employee terminated – Onus shifts to Employer to show good and sufficient reason

Unfair Labour Practice – Good and Sufficient reason for termination – Board reviews explanation given by employer and finds that those reasons do not satisfy the requirements of Section 6-62(5) of the *Act*.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Chairperson: This is an Unfair Labour Practice application brought by the Saskatchewan Government and General Employees Union ("SGEU") against the Lac La Ronge Indian and Child Services Agency Inc. ("ICFS) in respect of the termination by ICFS of Ms. Shelliea Cooper during the course of a campaign by some employees of ICFS to

have SGEU represent them for collective bargaining with ICFS. A similar application[1] in respect of Mr. Jesse McGhee was withdrawn by SGEU at the commencement of the hearing.

Facts:

[2] Sometime in late October of 2014, Don Regel, an organizer with SGEU was contacted by Shelliea Cooper, an employee of ICFS, with respect to the prospect of SGEU representing employees of ICFS for collective bargaining. Mr. Regel arranged to meet with Ms. Cooper and her partner, Jesse McGhee, to discuss the prospective organizational campaign.

[3] Mr. Regel, another SGEU employee, Ms. Cooper and Mr. McGhee met at the La Ronge Motor Inn in Lac La Ronge, SK on November 3, 2014 to discuss the prospect and to determine the chances of success in an organizing campaign. During that meeting, Mr. Regel testified that both Ms. Cooper and Mr. McGhee were somewhat reluctant to be seen with union personnel. There was some discussion about meeting with a tribe elder to sanction the unionization effort, but Ms. Cooper and McGhee did not wish to draw attention to the organizing effort.

[4] Outside of the restaurant, following the meeting, the SGEU employees provided organizing packages and an informational brochure to Ms. Cooper and Mr. McGhee. They also provided Ms. Cooper and Mr. McGhee with support cards which could be signed by employees who wished to show support for the union organizational drive and who wished to be represented by SGEU. The parties agreed to meet the following week to determine progress in obtaining the necessary support for the certification application.

[5] Mr. McGhee, Mr. Regel and the other SGEU employee met again on November 20, 2014. Following a brief meeting, they went to Mr. McGhee's home where Ms. Cooper was. At the home, Mr. Regel received signed support cards from some employees and was provided a phone list of other employees of ICFS. While in Lac La Ronge, during the lunch break, Mr. Regel and Mr. McGhee visited one of the downtown offices where ICFS employees worked, but found noone there, apart from the office receptionist.

[6] Prior to the second meeting in Lac La Ronge, Ms. Cooper had reached out via text message to Ms. Ida Ratt Natomagan, an employee of ICFS in Pinehouse, Saskatchewan. Ms. Ratt Natomagan forwarded that message, in part, to Ms. Teco Bird, her supervisor, who

[1] LRB File No. 266-14

forwarded the text on to Mr. Dexter Kinequon, the Executive Director for ICFS and Ms. Kyla McKenzie, the Assistant Director of ICFS.

[7] The message that was forwarded was as follows:

> From: Teco Bird
> Sent: Tuesday, November 18, 2014 12:48 PM
> To: Dexter Kinequon; Kyla McKenzie
> Subject: Fwd:
>
> Copy of the text msg Ida had received…
> Sent from my iPhone
>
> Begin forwarded message:
>
> > *From: Ida Ratt Natomagan <inatomagan@idfs.ca*
> > *Date: November 18, 2014 at 12:03:44 PM CST*
> > *To: Teco Bird ,TBird@icfs.ca*
> >
> > *I received this text on Saturday, November 15, 2014 @ 8;30 am: "are you going to be in La Ronge anytime this weekend? Or even next week I was wanting to ask your opinion about something to do about ICFS as I'm just passing through and leaving soon. This is your community forever so your opinion is crucial to what is going on in the agency. I responded with "I'm going to be there on the 21, 22, 23 but I am really curious BTW who is this? Its me Shelliea, It's top secret and about Dexter and Kyla. Jessie is gone now his last day was Friday so more cases will likely come your way. The Metis are planning an uprise are you in? the king and queen of the North have been reigning for a long time. I'm overwhelmed with the power trips and being a servant to onyaka. But I am going to try and set some things up before I go so people can function better when they want to work here. It's your communities people and future plans need to be about the people and not power trippers". I told her that i would grab a coffee with her when I get there but she said it was too long.*

[8] Ms. Kayla McKenzie, the Assistant Director of ICFS, and Mr. Dexter Kinequon, the Executive Director of ICFS, confirmed that they received this text message from Mr. Bird on November 18, 2014. They both testified that the message caused them some concern, insofar as the reference to a metis uprising was concerned. They testified that they discussed the message and determined to terminate Ms. Cooper based upon the Memo. They both testified that they were unaware of any unionization activity or Ms. Cooper's involvement in such activity.

[9] On November 24, 2014, Mr. Kinequon, Ms. McKenzie,and Ms. Gail Roy met with Ms. Cooper. The Board was provided notes of this meeting, along with a letter addressed to Ms. Cooper wherein she was advised that she was being terminated "without cause".

[10] The notes of the meeting disclose that the meeting was called because of a "complaint regarding Shelliea's comments made about the organization". Ms. Ratt Natomagan's text was presented as a complaint against Ms. Cooper that she was going to start a revolution. At this meeting, Mr. Kinequon handed Ms. Cooper her termination letter, terminating her without cause.

[11] After Ms. Cooper's termination, SGEU continued to seek support among the employees of ICFS, but in the final result, could not obtain sufficient support to make application to this Board for certification. They did, however, learn that Mr. Kinequon, at a staff meeting in February of 2015, spoke to the staff to compare the benefits of remaining as a non-union organization versus having SGEU represent the employees. The major disincentives, he claimed, for being unionized was that staff would lose an annual $500.00 Christmas bonus and there would be no staff retreats. Additionally, he said that employees would be required to pay union dues.

[12] Following abandonment of their organizing campaign, SGEU brought this application alleging, *inter* alia, that Ms. Cooper had been terminated as a result of her participation in the organizing effort of SGEU contrary to the provisions of *The Saskatchewan Employment Act* (the *"SEA"*).

Relevant statutory provision:

[13] Relevant statutory provisions are as follows:

> ***Unfair labour practices – employers***
> ***6-62****(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
>
> *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;*
>
> *. . .*
>
> *(g) to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat of termination 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 pursuant to this Part;*
>
> *. . .*
>
> *(4) For the purposes of clause (1)(g), there is a presumption in favour of an*

> *employee that the employee was terminated or suspended contrary to this Part if:*
>
> > *(a) an employer or person acting on behalf of the employer terminates or suspends an employee from employment; and*
> >
> > *(b) it is shown to the satisfaction of the board or the court that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right pursuant to this Part.*

Union's arguments:

[14] Counsel for SGEU filed a written argument which we have reviewed and found helpful.

[15] SGEU argued that IFCS had violated section 6-62(1)(a) of the *SEA* by interfering with, restraining, intimidating, threatening, or coercing employees in the exercise of their rights conferred under the *SEA.* They argued that the termination of Ms. Cooper would intimidate other employees from pursuit of their rights under the *SEA.* SGEU argued that the termination of Ms. Cooper satisfied the test set out by the Board in *RWDSU v. 101109823 Saskatchewan Ltd. (O/A the Howard Johnson Inn – Yorkton)*.[2]

[16] SGEU also argued that the termination of Ms. Cooper was a violation of section 6-62(1)(g) of the *SEA*. SGEU argued that Ms. Cooper was involved in an organizing drive on behalf of SGEU and the employees of IFCS. As such, SGEU argued that the reverse onus provided for in section 6-62(4) and (5) of the *SEA* would apply and the employer was therefore required to show a coherent and credible reason for the termination of Ms. Cooper. In support, SGEU cited the Board's decision in *Valley Hill Youth Treatment Centre Inc. v. SGEU*[3] and the cases cited therein.

[17] SGEU also argued that the actions of IFCS reasonably interfered with the right of the employees of SGEU to choose a bargaining agent.

Employer's arguments:

[18] Counsel for IFCS filed a written argument which we have reviewed and found helpful.

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[2] [2014] CanLII 64280 (SKLRB), [2104] Carswell Sask 271
[3] [2013] CanLII 98136 (SKLRB), [2013] Carswell Sask 755

[19] ICFS argued that it had no knowledge of the organizing efforts by Ms. Cooper or the Union. It took issue with the description of Ms. Cooper as SGEU's "inside organizer". In support of its position, ICFS cited a decision of the Canada Industrial Relations Board in *Canada Council of Teamsters and FedEx Ground Package System Ltd.*[4] ICFS argued that Ms. Cooper took care to ensure that her involvement was not known and that news of SGEU's organizing drive did not leak out.

[20] ICFS also argued that Ms. Cooper's termination was based upon the contents of the text message sent to Ms. Ratt-Natomagan as outlined in her termination letter. ICFS argued that Ms. Ratt-Natomagan lived in a Metis community (Pinehouse) and that words such as "metis uprising" would cause her concern.

[21] ICFS argued that Ms. Cooper was terminated without cause and with good and sufficient reason and without any knowledge of any organizing campaign by SGEU.

Analysis and Decision:

Section 6-62(1)(a)

[22] This section is usually invoked with respect to communication by an Employer to employees that interferes with, restrains, intimidates, threatens or coerces those employees. Because of its reverse onus provision, terminations during organizing campaigns is normally considered by the Board under section 6-62(1)(g).

[23] In its argument, SGEU did not point to any particular facts that it relied upon with respect to the breach of this provision other than the termination of Ms. Cooper. However, absent a reverse onus, the onus of proof that there has been a violation of this provision rests upon SGEU. They have not satisfied this onus by showing any evidence that any employee has been impacted in the manner set out in section 6-62(1)(a).

[24] In *RWDSU v. 101109823 Saskatchewan Ltd. (O/A the Howard Johnson Inn – Yorkton)*, which was cited by the Union, former Vice-Chairperson Schiefner outlined the objective test utilized by the Board to determine if conduct by an employer would amount to an unfair labour practice under this provision. At paragraph [61] he says:

[4] [2011] CanLII 614 (CIRB)

> *The substantive test for determining whether or not impugned conduct of an employer represents a violation of s. 11(1)(a) involve a contextualized analysis of the probable consequences of impugned conduct on employees of reasonable intelligence and fortitude. In other words, if this Board is satisfied that the probable effect of the employer's conduct would have been to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of protected rights, a violation of the Act will be sustained. This test is an objective one. The Board's approach is to determine the likely or probable effect of impugned conduct upon the affected employees. In doing so, we assume the employees are reasonable; that they are intelligent; and that they are possessed of some resilience and fortitude. See: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Sakundiak Equipment, [2012] 205 C.L.R.B.R. (2nd) 139, 2011 CanLII 72774 (SK LRB), LRB File Nos. 107-11 to 109-11 & 128-11 to 133-11. The kind of prohibited effect which s. 11(1)(a) seeks to avoid is conduct by an employer that would compromise or expropriate the free will of employees in the exercise of their rights under The Trade Union Act. In our words, to sustain a violation in the present case, we must be satisfied that the statements made by Mr. Park and/or Mr. Kim would have been sufficient to strip the subject employees of their ability to make rational decisions about the exercise of their rights under the Act.*

[25] This analysis cited the Board's earlier decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Sakundiak Equipment, supra*. In that decision, the Board analyzed its former jurisprudence regarding section 11(1)(a) of *The Trade Union Act.* At paragraphs [124] & [125] the Board said:

> *In order for the Union to succeed in this application, they have the onus to prove that the communications which they cite (the "tool box" meetings) has interfered with, restrained, intimidated, threatened, or coerced an employee of "reasonable fortitude" against the exercise of any right conferred by this Act. The test to be applied by the Board, being an objective test has not changed due to the 2008 amendment. We do not agree with counsel for the Union that the amendment in 2008 converted the test to be utilized to a subjective test.*
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> *The test, therefore, remains whether the Union has satisfied the Board on the evidence presented, that an employee of "reasonable fortitude"would be interfered with, restrained, intimidated, threatened, or coerced from the exercise of any right conferred by this Act.*

[26] The only evidence which was provided to the Board at the hearing was that in February of 2014, Mr. Kinequon addressed the employees and provided them with a comparison of benefits and disbenefits of joining a union, particularly SGEU. There was, however, no evidence presented of the impact, if any, this information had upon the employees to show that anyone of reasonable fortitute "would be interfered with, restrained, intimidated, threatened or coerced" by the provision of this information.

[27] For these reasons, the application under Section 6-62(1)(a) is dismissed.

Section 6-62(1)(g), & Sections 6-62(4) and (5)

[28] SGEU argues that this provision provides protection for workers engaged in organizing drives from being terminated while engaged in the exercise of their rights to seek representation for collective bargaining. ICFS counters that in order for the provision to be effective SGEU must show that it was aware that organizing was ongoing and the Ms. Cooper was an "inside organizer".

[29] In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Sakundiak Equipment*, *supra*, the Board also reviewed its prior jurisprudence with respect to the similar provision within *The Trade Union Act*, section 11(1)(e). At paragraphs [100] – [103], the Board outlines that jurisprudence as follows:

> ***[100]*** *The Board has recently outlined its jurisprudence with respect to the application of s. 11(1)(e) of the Actin Canadian Union of Public Employees v. Del Enterprises Ltd. o/s St. Anne's Christian Centre. That decision referenced the Board's decision in Canadian Union of Public Employees, Local 3990 v. Core Community Group Inc., which decision referenced the Board's decision in Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Moose Jaw Exhibition Co. Ltd.*
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> ***[101]*** *In the Moose Jaw Exhibition case, supra, the Board quoted from para. 123 of its decision in Saskatchewan Government Employees Union v. Regina Native Youth and Community Services Inc. as follows:*
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> > *It is clear from the terms of Section 11(1)(e) of the Act that any decision to dismiss or suspend an employee which is influenced by the presence of trade union activity must be regarded as a very serious matter. If an employer is inclined to discourage activity in support of a trade union, there are few signals which can be sent to employees more powerful than those which suggest that their employment may be in jeopardy. The seriousness with which the legislature regards conduct of this kind is indicated by the fact that the onus rests on the employer to show that trade union activity played no part in the decision to discharge or suspend an employee.*
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> ***[102]*** *In United Steelworkers of America v. Eisbrenner Pontiac Asuna Buick Cadillac GMC Ltd. the Board made this observation about the significance of the reverse onus found in s. 11(1)(e) of the Act. In that decision, the Board outlined two elements that the Board must consider as follows**:***
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> > *When it is alleged that what purports to be a layoff or dismissal of an employee is tainted by anti-union sentiment on the part of an employer, this Board has consistently held, as have tribunals in other jurisdictions, that it is not sufficient for that employer to*

> *show that there is a plausible reason for the decision. Even if the employer is able to establish a coherent and credible reason for dismissing or laying off the employee…those reasons will only be acceptable as a defence to an unfair labour practice charge under Section 11(1)(e) if it can be shown that they are not accompanied by anything that indicates that anti-union feeling was a factor in the decision.*
>
> ***[103]*** *Also, in The Newspaper Guild v. The Leader-Post, a Division of Armadale Co. Ltd., the Board noted that in making its analysis of the decision, it would not enter directly into an evaluation of the merits of the decision.*
>
> > *For our purposes, however, the motivation of the Employer is the central issue and in this connection the credibility and coherence of the explanation for the dismissal put forward by the Employer is, of course, a relevant consideration. We are not required, as an arbitrator is, to decide whether a particular cause for dismissal has been established. … Our task is to consider whether the explanation given by an employer holds up when the dismissal of an employee and some steps taken in exercise of rights under The Trade Union Act coincide. The strength or weakness of the case an employer offers in defence of the termination is one indicator of whether union activity may also have entered into the mind of the Employer.*

[30] In this case, we have uncontested evidence of an organizing campaign by SGEU in respect to the employees of ICFS. Additionally, we have uncontested evidence that Ms. Cooper was the "inside organizer" for SGEU in respect to this campaign. ICFS counters that they were unaware of any organizing campaign and that Ms. Cooper took steps to ensure that the whole campaign was kept quiet from the employer.

[31] In *Service Employees' International, Local 336 v. Chinook School Division No. 211*[5], the Board dealt with a case involving an Educational Assistant who was terminated during the currency of an organizing campaign and in respect of which, the evidence showed she had a part in that campaign. In that case, the employer denied any knowledge of the part played in the organizing campaign by the dismissed employee. Similarly, in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Sakundiak Equipment*, the evidence showed that the termination was decided on prior to the Employer having any knowledge of the organizing campaign.

[32] Most organizing campaigns will be conducted *sub rosa* so as to avoid the possibility of any retaliatory action by the employer. We do not however, accept as credible, the evidence from Mr. Kinequon and Ms. McKenzie that they were unaware of any organizing

activity until well after Ms. Cooper was terminated. We draw this conclusion from several factors. Firstly, if the decision to terminate was based upon an apprehension that a "metis uprising" would impact on Ms. Ratt-Natomagan or the Pinehouse community, it is not borne out by the actions taken by Mr. Kinequon and Ms. McKenzie in their termination meeting with Ms. Cooper. Rather than conducting an investigation of the statements in the email, they had already concluded that they would terminate Ms. Cooper and came to the meeting prepared to do so. They testified that they determined to terminate Ms. Cooper, without cause, prior to the meeting without having given Ms. Cooper any chance to defend herself. Secondly, the decision to terminate is based solely upon the text message sent by Ms. Cooper to Ms. Ratt-Natomagan. There is nothing in the text that, given the good employment record of Ms. Cooper, would require a without cause termination.

[33] Ms. Cooper had a good employment history. The evidence established that she had moved to Lac La Ronge from British Columbia when she had been awarded a position with ICFS. She successfully passed her probationary period and became a permanent employee of IFCS on April 16, 2014. Following her first year of service, she received a "Degree Incentive Bonus". She also received a "Retention Bonus Gift" at that time. After her first year, she also was the subject of a performance evaluation and review that she successfully passed on September 17, 2014. This review was conducted by Ms. McKenzie and noted only one (1) area (completion of paperwork) where improvement was needed. Given that Ms. Cooper was a good employee, and there was no need for staff layoffs or other reasons to terminate someone without cause, the explanation does not seem credible.

[34] Furthermore, there is evidence in the text message of prior discussions between Mr. Bird and Mr. Kinequon and/or Ms. McKenzie. In forwarding the text message, Mr. Bird says, "[C]opy of the test msg Ida had received…". This statement suggests that there had been prior communication between Mr. Bird and Mr. Kinequon and/or Ms. McKenzie regarding the message.

[35] There was also the incident where Mr. Regel and the other SGEU staff member attempted to meet with employees at one of the ICFS offices in La Ronge during the lunch hours. While they testified that they had been told employees would be there to meet with them,

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[5] [2008] CanLII 47045 (SKLRB)

no-one was there other than a receptionist who advised that all union matters where to be referred to Ms. McKenzie.

[36] Finally, while not direct evidence that ICFS had knowledge of the organizational campaign, Ms. Cooper did send a text to Mr. Regel on November 21, 2014 which said, "[T]hey must have caught wind of it because Vicky asked Lena about union stuff".

[37] Based upon this analysis, the Union has satisfied the onus on it to show that Ms. Cooper was engaged in protected activity and to shift the onus on to the Employer as noted in sections 6-62(4) and (5).

[38] As noted by the Board in *SGEU v. Saskatoon Food Bank*[6] the onus on the employer to show that an employee was not terminated as a result of their participation in protected activity, "while extremely heavy – the employer must satisfy the Board that trade union activity played no part in the decision to terminate the employee – is not impossible to satisfy".

[39] Furthermore, the explanation given by the employer need not demonstrate the kind of justification that an arbitrator would expect (i.e.: "*just cause*"), the onus is on the employer to demonstrate at least "*coherent*" and "*credible*" or "*plausible*" and "*believable*" reasons for the actions it took to rebut the statutory presumption.[7]

[40] The only reason given for the termination was that there was a complaint by Ms. Ratt-Natomagan regarding the text message sent to her by Ms. Cooper. Ms. Ratt-Natomagan testified, and her testimony did not support this rationale. That text contained a comment regarding a "metis uprising" which was the phrase that ICFS relied upon as their justification for the termination.

[41] The reasons given do not provide a coherent, credible, plausible or believable reason for the termination. One might have expected, as noted above, that ICFS would have sought to conduct an investigation as to what the text meant and why it was being sent. That did not occur. Rather, a pre-determination was made to terminate Ms. Cooper without asking her for any explanation.

[42] The reasons stated also lack credibility for the reasons outlined above with respect to the suggestion that ICFS had no knowledge of the organizing campaign. Ms. Cooper

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[6] [1999] Sask. L.R.B.R. 497

was a good employee. There was no other reason to terminate her without cause. There was no shortage of work, no budgetary reductions required, in short, no plausible, credible or believable reason for her to have been terminated. The Employer has failed to satisfy us that there were good and sufficient reasons for the termination of Ms. Cooper.

[43] There is also, in our opinion, a logical disconnect between the alleged reason for the termination, i.e.: a complaint by Ms. Ratt-Natomagan, and the punishment imposed. If there was a complaint (which, if having been found to be well founded following an investigation), the more appropriate remedy would have been possibly a mediation between the parties or a lesser form of discipline. This complaint did not justify a decision to terminate a good employee.

[44] For these reasons, ICFS is in breach of Section 6-62(1)(g) of the *SEA.*

Section 6-62(1)(i)

[45] SGEU also alleges that ICFS breached this provision of the *SEA* that prohibits interference by an employer in the choice by its employees of a trade union. Again, the onus falls upon SGEU in this case, and they have failed to provide evidence to support any finding with respect to this provision.

[46] The Union correctly points out in its arguments that the test is an objective one which requires that there be evidence that conduct or actions of the employer would affect a reasonable employee in respect to his or her choice of a union. There is no such evidence.

[47] We do have evidence of a meeting in February 2015 wherein the employer provided its views regarding joining a union vs. not joining a union. While we have evidence of this meeting having been held and some of the elements discussed, there is no causative link between the matters discussed at the meeting and a choice by an employee regarding a trade union. At the time that this meeting was held, SGEU had pretty much abandoned its organizing efforts.

[48] For these reasons, the application by SGEU under Section 6-62(1)(i) is dismissed.

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[7] See *SGEU v. Valley Hill Youth Treatment Centre Inc. supra Note 3*

Order and Remedy:

[49] At the outset of the hearing, SGEU also withdrew its request for re-instatement for Ms. Cooper as she had found alternate employment in British Columbia. She is, however, to be compensated from the time of her termination to the date of her re-employment with appropriate deductions made for statutory deductions as applicable. In addition, she will be required to mitigate any losses suffered and offset any employment insurance of other benefits received as well as the pay in lieu of notice which she received on termination. If the parties are unable to agree as to the quantum of compensation for Ms. Cooper, this panel of the Board will remain seized as to the issue of compensation.

DATED at Regina, Saskatchewan, this **1st** day of **December, 2015.**

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.
Chairperson