ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 2081-17-U
Unfair Labour Practice

United Food and Commercial Workers International Union (UFCW Canada), Applicant v FGF Brands Inc., Responding Party

OLRB Case No: 2470-17-R
Certification (Industrial)

United Food and Commercial Workers International Union (UFCW Canada), Applicant v FGF Brands Inc., Responding Party

OLRB Case No: 2471-17-U
Unfair Labour Practice

United Food and Commercial Workers International Union (UFCW Canada), Applicant v FGF Brands Inc., Responding Party

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - June 26, 2020

DATED: June 26, 2020

Catherine Gilbert
Registrar

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ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **2081-17-U**

United Food and Commercial Workers International Union (UFCW Canada), Applicant v **FGF Brands Inc.**, Responding Party

OLRB Case No: **2470-17-R**

United Food and Commercial Workers International Union (UFCW Canada), Applicant v **FGF Brands Inc.**, Responding Party

OLRB Case No: **2471-17-U**

United Food and Commercial Workers International Union (UFCW Canada), Applicant v **FGF Brands Inc.**, Responding Party

BEFORE: Paula Turtle, Vice-Chair, and Board Members William Cook and Heino Nielsen

APPEARANCES: Ken Steubing, and others, for the applicant; Phil Wolfenden, and others, for the responding party

DECISION OF THE BOARD: June 26, 2020

Background and overview of the issues

1. Board File No. 2470-17-R is an application for certification for employees of FGF Brands Inc. (sometimes referred to as "the Employer" or "FGF") at its location at 1295 Ormont Drive in Toronto. The application is dated December 22, 2017.

2. United Food and Commercial Workers International Union (UFCW Canada) ("the Union") filed an unfair labour practice application (Board File No. 2081-17-U) on November 15, 2017 alleging that three

employees, Ruel Reyes ("Reyes"), Peluchi Fontanilla ("Fontanilla"), and Marcellino Arconado ("Arconado") were fired on October 31 (Reyes) and November 2 (Fontanilla and Arconado) contrary to the Labour Relations Act, 1995, SO 1995, c 1, Sch A ("the Act"), for engaging in protected activity.

3. Allan Thibodeau ("Thibodeau") was one of the Union's first contacts, and he was fired on October 18, 2017. Because he signed a separation agreement, the Union did not file an application about his termination, although the Union took the position that his termination was also contrary to the Act and is therefore relevant to the Board's consideration of the issues raised in the applications.

4. By application dated November 15, 2017 (Board File 2080-17-IO), the Union sought the interim reinstatement of Reyes, Fontanilla and Arconado. The Employer agreed to reinstate all three on a without prejudice basis. They returned to work on December 4, 2017. Fontanilla and Arconado continue to work at FGF. In explaining the Employer's decision to temporarily reinstate Reyes, Fontanilla and Arconado, Crane testified that the Employer felt it could work with all three. She further confirmed that there were no "issues" with them after their return to work and saw no reason the Employer could not continue to work with them into the future.

5. The Union filed a second unfair labour practice application on December 21, 2017 (Board File No. 2471-17-U) alleging that FGF violated the Act after Reyes, Fontanilla and Arconado were returned to work and the Employer continued to interfere in the Union's efforts to organize FGF's employees.

6. Reyes' employment ended on or about February 9, 2018. In Board File No. 2471-17-U, the Union alleged he was fired then (for a second time) and sought his reinstatement. The Employer took the position he quit and called evidence in support of that position. Reyes did not testify. The Union acknowledged in its closing submissions that the evidence did not support a finding that Reyes was fired in February 2018, although it maintained its position that he was fired contrary to the Act on October 31, 2017 and it sought remedies in connection with that termination.

7. As a result of the terminations, the Employer's interference in the organizing campaign, and the other violations of the Act, the Union says it was unable to obtain enough membership evidence to

demonstrate 40% support. A representation vote was not directed, and the Union seeks to be certified pursuant to section 11 of the Act.

8. The Employer denies knowledge of the organizing campaign or that Thibodeau, Reyes, Fontanilla and Arconado were organizers when it fired them. It takes the position that it had good reasons to fire all of them, and it asks the Board to dismiss the application for certification, the unfair labour practice applications and the section 11 request.

9. These applications were filed in late 2017 but remained outstanding before the Board when the Act was amended on November 20, 2018. Accordingly, in view of the transitional provisions for the amendments, in considering these applications, the Board applies the following version of section 11 of the Act:

> 11 (1) Subsection (2) applies where an employer, an employers' organization or a person acting on behalf of an employer or an employers' organization contravenes this Act and, as a result,
>
> (a) the true wishes of the employees in the bargaining unit were not likely reflected in a representation vote; or
>
> (b) a trade union was not able to demonstrate that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appeared to be members of the union at the time the application was filed. 2005, c. 15, s. 2.
>
> Same
>
> (2) In the circumstances described in subsection (1), on the application of the trade union, the Board may,
>
> (a) order that a representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit;
>
> (b) order that another representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit; or

> (c) certify the trade union as the bargaining agent of the employees in the bargaining unit that the Board determines could be appropriate for collective bargaining if no other remedy would be sufficient to counter the effects of the contravention. 2018, c. 14, Sched. 2, s. 2.
>
> Same
>
> (3) An order under subsection (2) may be made despite section 8.1 or subsection 10 (2). 2018, c. 14, Sched. 2, s. 2.
>
> Considerations
>
> (4) On an application made under this section, the Board may consider,
>
> (a) the results of a previous representation vote; and
>
> (b) whether the trade union appears to have membership support adequate for the purposes of collective bargaining.

10. In considering the Union's section 11 request, the Board must decide:

a) Whether the Union did not obtain the support of 40 per cent or more of the individuals in the bargaining unit because of unfair labour practices committed by the Employer and, if so;

b) Whether the Board should certify the trade union or order a representation vote and direct the Employer to do anything to ensure the vote reflects the wishes of the employees.

11. The burden of proof is on the Employer to prove it did not violate the Act. The burden is on the Union to establish, on a balance of probabilities and on the basis of an objective test, that the Employer's conduct prevented it from reaching the 40 per cent threshold and that the Board should issue a certificate.

12. For the reasons given below, we find that Reyes, Fontanilla and Arconado (sometimes referred to collectively below as "the organizers") were terminated contrary to the Act.

13. We also find that some, but not all, of the Employer's actions after Reyes, Fontanilla and Arconado returned to work violated the Act.

14. However, we do not find the Employer's misconduct after the organizers were returned to work justifies the extraordinary remedy of certification without a vote in this case. We are persuaded that it is appropriate to award significant remedies to counter the effects of the Employer's contraventions of the Act.

Evidentiary considerations

15. The Board heard testimony from 11 witnesses over 21 hearing dates (and the evidence of one witness entirely by written statement, on the agreement of the parties). The evidence in chief of some of the witnesses was given by witness statements affirmed by the declarants. Both parties argued that the Board should find the witnesses called by the other party were not credible.

16. The Union relied heavily on inconsistencies between the evidence of Employer witnesses, and in some cases, relied on internal contradictions in the testimony of individual Employer witnesses to urge us to reject the Employer's version of events. The Employer relied heavily on its argument that the Union did not make out all of the allegations it pleaded in its unfair labour practice applications.

17. The credibility of some of the Employer's evidence was harmed by a lack of consistency. And the Employer is correct that not all of the misconduct alleged by the Union was supported by the evidence. At the same time, some of the Union's evidence had internal contradictions and the Employer did not prove all of its assertions. In other words, many of these issues (lack of consistency and failure to prove everything asserted or alleged) are often the consequences of multiple witnesses and expansive pleadings, and both parties were affected by these factors in this case. In some cases, we have applied these factors in making significant findings of fact.

18. Many documents were produced before and during the hearing in response to production requests made by both parties. In some cases, documents that fell within the scope of earlier production requests were not produced by the Employer until issues arose and undertakings were made during the questioning of witnesses. As a result, (for example) e-mails about Reyes' Performance Improvement Plan ("PIP") extension

were produced during the evidence of Lora Pecora ("Pecora"), FGF Talent and Development Business Partner. Jennifer Crane ("Crane"), FGF's Site Leader had already testified about Reyes' termination, and the Employer did not seek to recall her to testify about the PIP e-mails. Without attributing misconduct to the Employer, we observe that this evidence would have been more complete and coherent had the documents been produced and explained earlier in the hearing.

19. When assessing the credibility of witnesses, we are guided by well-established principles set out in *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.), at page 356 and in making many of the findings in this case, we have applied those principles:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carries conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Work at the bakery and overview of human resources policies

20. FGF is an industrial bakery that produces muffins and loaf cakes for sale to retail stores (including Loblaws and Walmart) and take-out restaurants (including Starbucks), for shipment across Canada and the United States. It has several operations in the area, including two bakeries, one at 1295 Ormont Drive in northwest Toronto (which was the subject of the Union's application for certification) and one at 1235 Ormont Drive, which opened in 2017. The Union estimated there to be 350 employees in the bargaining unit it applied for, and the Employer estimated there to be 392 employees in that unit.

21. Crane is responsible for 1295 Ormont Rd. Before coming to the Ormont Plant in 2016 she worked her way up through management at other FGF plants, starting as a Shift Leader in 2014. Although the operation that is the subject of this decision is a bakery, the parties often described it as a plant, so it will be referred to that way in this decision.

22. Crane emphasized that FGF tries to treat employees fairly in applying its human resource practices and policies, including when it fires them. FGF has a written progressive discipline policy although, according to Crane, progressive discipline is not applied in every termination. Some of the termination letters produced by FGF that were issued to other employees refer to the application of progressive discipline. The letters issued to Reyes, Fontanilla and Arconado do not.

23. The evidence about the number of employees typically fired by FGF was unclear. Crane testified in chief that about 40 employees were terminated every year, consistent with her declaration responding to the Union's interim order application. During Crane's evidence, it became clear that FGF terminates many more than 40 employees every year: more than 40 employees were terminated in October and November of 2017. However, that number is somewhat misleading, because FGF recruits its new employees through employment agencies. At FGF, "terminations" include many short-term agency employees who are deemed unsatisfactory, where the Employer tells the agency it does not want an employee to return and asks the agency to send a new one in their place. Crane agreed that "very few" of the terminated employees have been at FGF for a significant period of time.

24. FGF has detailed practices and policies for training and development. New employees are assessed after about six months and again at one year of work by a Performance Feedback Form ("PFF"). Employees with a favourable PFF at the one-year mark are offered regular employment. Most employees, but not all of them, choose to become regular employees when offered the opportunity.

25. Reviews and PFF's also determine if more senior employees will be given a raise.

26. Crane testified that employees who need to improve in areas identified as "serious" are typically placed on a PIP. The PIP form states termination may occur if the employee does not improve, but Crane acknowledged that the objective of a PIP is to provide directions and time for evaluation with the goal of improving employee behaviour and is not disciplinary. Crane could not point to a case (other than Reyes, as discussed further below) where a worker on a PIP was terminated without the PIP being reviewed.

27. Crane and others testified that Reyes, Fontanilla and Arconado were team leaders and in explaining their terminations, said they were

held to a higher standard of conduct than non-leader employees. Fontanilla acknowledged this in her evidence.

28. There are cameras at all entrances and exits of the plant and at strategic locations inside the plant, including in the production area where employees work. The cameras are not hidden.

29. Crane testified the cameras are used infrequently and only for employee security and food safety. She described three cases where they were used: when a customer reported that a foreign object was found in a muffin and the camera footage was used to identify the source of the object; to assist in investigating an employee fight in the plant, and to investigate a theft reported by an employee.

30. Crane described the office area as "open concept" and said if she were reviewing video footage in the normal course, it would have been visible to others. She acknowledged that video footage could have been reviewed without being visible in Vice President of Operations Walter Visentin's office ("Visentin") and the offices of Tejus and Ojus Ajmera, the owners of FGF.

31. Crane testified that the only people with access to video from the cameras were the IT department, Visentin, and the Ajmeras. During her evidence, Susannah Golec-Haughton ("Golec-Haughton"), FGF Talent and Development Health and Safety, confirmed that she could also access the cameras.

32. As discussed further below, former FGF employee Jitendra Bilimoria ("Bilimoria") testified that FGF Operations Leader Harpreet Mangat ("Mangat") told him in October 2017 he was reviewing video footage daily, and Bilimoria reported this to Fontanilla. Mangat denied this, stating he has no access to video footage.

33. There was no evidence of video footage being reviewed, or discussed, after the organizers returned to work in December.

34. Crane acknowledged she had worked in unionized facilities with a previous employer in the same industry before she came to FGF, and that her personal preference is for FGF to remain union-free. She shared this view with Fontanilla.

35. Visentin confirmed that the Ajmeras would prefer FGF to remain union free. Visentin's e mails reporting on his meetings with Fontanilla

and employee Betty Powell ("Powell") show that he told both of them of these views during those meetings.

36. According to Visentin, the Ajmeras took the organizing campaign very personally and were "very emotional" about it.

37. As further described in more detail below at employee meetings, Crane told employees that FGF and its management would prefer to remain union free because a union would make FGF uncompetitive.

The union's organizing campaign

38. In September 2017 an unidentified FGF employee ("Employee A") contacted the UFCW about organizing employees at FGF. After further discussions with UFCW representatives in which he was asked to identify other supportive employees for an organizing campaign, Thibodeau invited Fontanilla to a meeting with a small number of union supporters and Kevin Shimmin ("Shimmin"), a UFCW organizer with about 20 years' organizing experience, at a Tim Horton's on Sunday, October 8, 2017.

39. Attending the meeting were Shimmin, Thibodeau, Reyes, Fontanilla, Arconado (who came with Fontanilla), and Employee A. After talking about why FGF employees wanted a union, all five of the employees present signed cards. Shimmin gave them about 100 cards in total and explained the application process. He urged them to be careful and encouraged them to obtain cards outside the workplace as much as possible.

40. When they were back at work after the October 8 meeting, the employees began organizing. Reyes, Fontanilla, and Arconado spoke with other employees about the benefits of joining the Union and obtained signed membership cards. Employees approached Fontanilla in the parking lot, the lunchroom, the locker room and washrooms to ask about the pros and cons of joining the union and to sign cards. They also approached her away from the workplace (for example, in a Filipino restaurant and at social events like birthday parties). She testified the organizers were approached by employees both in person and by phone.

41. Arconado testified that before he was fired, he spoke to about 10 employees and seven to nine of them wanted to sign cards.

42. We heard no evidence about the details of Thibodeau's organizing activity. Shimmin described him as a lead organizer (because he initiated contact with the Union) but not a key organizer. Shimmin testified he did not expect Thibodeau to collect many cards.

43. Fontanilla testified that she and other inside organizers – including Thibodeau - distributed about 100 cards (with she and Reyes distributing the most) and the response was enthusiastic.

44. The Union obtained signed cards as listed below:

- five were signed (at the Tim Horton's) on October 8, 2017
- five were signed on October 10, 2017
- three were signed on October 11, 2017
- one was signed on October 12, 2017
- seven were signed on October 13, 2017
- one was signed on October 15, 2017
- one was signed on October 17, 2017
- one was signed on October 19, 2017
- one was signed on December 5, 2017
- one was signed on December 6, 2017
- three were signed on December 7, 2017
- two were signed on December 13, 2017
- one was signed on December 16, 2017
- four were signed on December 17, 2017
- three were signed on January 2, 2018
- one was signed on January 4, 2018

- one was signed on January 9, 2018
- one was signed on January 11, 2018

45. Shimmin confirmed that during the approximately 10-day period between October 8, 2017 and October 19, 2017, 24 cards were signed (including the 5 signed by the insiders at the Tim Horton's on October 8).

46. Immediately after Thibodeau was fired on October 18, 2017 two workers approached Fontanilla and told her to be careful. After Reyes was fired on October 31, 2017 workers in the lunchroom asked Fontanilla what she would do if she were next to be fired.

47. Shimmin testified that the momentum of the campaign before Reyes, Fontanilla and Arconado were fired was never restored. He described the terminations as a turning point in the organizing campaign because other employees feared they would lose their jobs.

48. Shimmin explained that early card signers are usually the most committed and enthusiastic union supporters. He and other Union organizers contacted card signers by phone to encourage them to get involved in the campaign. The call backs were usually within days of the card signer having joined the union, although some calls were made to employees who had signed cards during an unsuccessful organizing campaign by a different local of the UFCW about a year earlier. Employees who were called back said they continued to support the Union, but none of them were willing to participate in the campaign, telling the organizers they feared for their jobs.

49. Shimmin identified some e mails from Union staff organizers describing the call backs. All the e mails were dated in November, i.e. after Reyes, Fontanilla and Arconado were terminated and before they were reinstated.

50. Shimmin tried to contact Employee A by phone, but Employee A hung up on Shimmin.

51. From their return to work on December 4, 2017 until January 11, 2018 (including a two-week shutdown in late December when employees were not at work), Reyes, Fontanilla, and Arconado obtained 18 cards.

52. Fontanilla testified that when employees asked her how she got back to work, she told them the Union helped her.

53. Fontanilla also testified that after her return, she tried to continue to sign employees to cards but felt they had a different attitude towards her and they stopped approaching her about the Union. She testified that employees expressed concern that if they talked to her, they would get fired. If she approached someone to discuss the Union, they were afraid to talk to her. Fontanilla also testified that in view of Golec-Haughton's direction to her that she was not to organize at the workplace (discussed in more detail below), she felt nervous about engaging in organizing activity at work and rarely left her work area.

54. Fontanilla also testified that Golec-Haughton questioned her in January 2018 after an employee complained to Golec-Haughton that Fontanilla was campaigning in the lunchroom. In response to Golec-Haughton, Fontanilla said "it's normal for them to ask me and if they are going to give me a card, I am going to take it".

55. As described in greater detail below, and in addition to the efforts by Reyes, Fontanilla and Arconado to sign their fellow employees, organizers from the Union (including Mr. Shimmin) leafleted the plant at shift change on December 4, 5, 14 and 15, 2017.

Response to the Union's November 1 letter

56. Crane testified that she first learned of the Union's campaign when the Union wrote to her on November 1, 2017 asserting that an employee was fired for union activity, contrary to the Act. Crane testified that she did not know who the letter was referring to.

57. The evidence from FGF witnesses about the Employer's immediate response to the November 1, 2017 letter varied considerably among the witnesses, as follows:

- Crane testified she spoke to Procher and Visentin for 10 – 15 minutes the afternoon of November 1, and not to anyone else. The Ajmeras did not participate in that meeting;

- Golec-Haughton testified she attended a meeting on November 1 with Crane, Ash Ratte ("Ratte"),

Procher, Visentin and the Ajmeras, and that Procher spoke. She acknowledged this was an unusual group to be meeting;

- Visentin testified the November 1 meeting included the Ajmeras, site leaders and operations leaders and T&D employees. It lasted approximately one hour and the Ajmeras spoke, making clear their view that they did not want a union at FGF;

- Mangat testified he attended a meeting in early November after the letter was received along with other site leaders and the Ajmeras spoke. The meeting lasted 5 to 10 minutes;

- Pecora testified she attended a meeting with Procher, Crane and other Business Partners to discuss the letter. Tejus Ajmera was at the meeting but not Ojus.

58. This is one of the areas where the credibility of the Employer's evidence was undermined by significant contradictions among all of its witnesses. While some variation in recall among several witnesses recalling a single event is to be expected, it is unusual for the differences to be this significant, especially where witnesses are testifying about an important event, i.e. the Employer's receipt of the Union's official notice of an organizing campaign. The differences in the Employer witnesses' evidence undermine the reliability of their assertions that they first learned about the Union on November 1, 2017, and not before.

Reyes termination

59. Ruel Reyes was terminated on October 30, 2017. He was reinstated on December 4, 2017. His employment ended again on February 9, 2018.

60. Reyes was a team leader in the Sanitation Department, responsible for a crew of five or six employees. In August of 2017 he was suspended for one day, for sleeping in his car during his shift. At that time, Crane recommended that Reyes be fired, but his immediate supervisors Site Sanitation Leader Pedro Echinique ("Echinique") and his immediate supervisor (referred to during the hearing as "Albin") disagreed, and they convinced Crane to give him another chance.

61. Crane admitted that the August suspension had the desired effect, and Reyes did not sleep in his car again.

62. Reyes was put on a PIP and moved to the day shift effective September 25, 2017 because Echinique was concerned about his productivity on the night shift. When the PIP was issued, Reyes was assured by management employee Jessica Gera that the purpose of the PIP was to assist him in reaching his potential and would not lead to his termination.

63. On October 23, 2017 Reyes was working in the Sanitation Cage and a chemical line on a rack in the cage was in the wrong place. As a result, the chemical in the line dripped in Reyes' eye, and he went to hospital to have it checked. Crane testified that workers are required to wear safety glasses when working in the Sanitation Cage.

64. Reyes' PIP was subject to review on October 25, 2017 in accordance with the Employer's practice.

65. Crane testified that the Sanitation Cage incident prompted her to review Reyes' record. She testified that she decided Reyes should be fired because his record showed a lack of commitment to safety (based on a September 2015 incident which she could not describe) and the October 23, 2017 incident in the Sanitation Cage. She also considered the August 2017 suspension for sleeping in his car and the PIP in September 2017.

66. Crane described the decision as "a tough one", given Reyes' length of service, but said his performance was deteriorating and not improving.

67. Both the substance and the process of FGF's decision to fire Reyes do not stand up to scrutiny.

68. Crane could not explain Reyes' deteriorating performance, and in any event, her suggestion that his performance deteriorated was contradicted by an e mail from Echinique dated October 19, 2017 that indicated he was performing very well under the PIP.

69. Crane acknowledged that before the Sanitation Cage incident, Reyes had no safety incidents after the (unparticularized) incident of September of 2015. She agreed that after August of 2017 there were

no further incidents of Reyes sleeping in his car and that the PIP was non disciplinary and that Reyes had been specifically assured of that. Her reliance on these factors is inconsistent with a fair application of progressive discipline.

70. Most importantly, Crane's reliance on the Sanitation Cage incident, which was put forward as the culminating incident that led to her review of Reyes' record, was completely discredited. She testified FGF's PPE policy required Reyes to wear safety glasses when working in the Sanitation Cage. However, in cross-examination, she agreed - eventually - that FGF's PPE policy did not apply to Reyes when he was in the Sanitation Cage, because he was not "dispensing or handling" chemicals, and he was not required to wear PPE. She modified her position and asserted that even if his failure to wear safety glasses did not violate the policy, it was an error in judgment for him not to do so, and the "real reason" for his termination was that he failed to identify a hazard.

71. Golec-Haughton is FGF's senior manager responsible for health and safety. Her evidence followed a similar course: in chief she asserted that Reyes' conduct violated FGF safety policy but in cross-examination she conceded that he had not breached the policy but was "in an area where chemicals are", so should have worn safety glasses.

72. The Joint Health and Safety Committee investigated the incident in the Sanitation Cage and recommended by a report signed by management officials on October 23 and 24, 2017 that Reyes be issued a verbal warning.

73. Crane and Golec-Haughton's evidence that Reyes violated a safety rule, and the intransigence of their commitment to that narrative, revealed that their evidence was unreliable because they were susceptible to skewing their evidence to favour the Employer's position.

74. Although it is not necessary to our findings in this matter, we note that other evidence from the Employer indicated that up until just before his termination, Reyes' PIP was going to be extended. An e mail exchange between October 18 and October 24, 2017 included the following:

a) Gera messages Crane and Echinique saying she assumes Reyes will not get a wage increase when he

is reviewed, because he is on a PIP, and she asks Echinique about Reyes's performance;

b) Echinique responds that Reyes is performing "very well" (copied to Crane);

c) Gera responds to Echinique and saying she thinks "with his recent accident" (referring to the Sanitation Cage incident) they should all discuss (copied to Crane);

d) Crane forwarding the e mail chain to Pecora on October 24, 2017 with the message: "Nothing urgent but this is the guy on the PIP".

75. Following this exchange, Pecora drafted a letter noting that Reyes had improved in the five areas identified in the PIP and extending the PIP for two weeks for a further period of review. Pecora was a new employee and she was trying to be proactive: she drafted the letter based on a precedent she found and she sent it to Ash Ratte, her supervisor in Human Resources, for her approval. She admitted in cross-examination that she likely spoke to Ratte before October 27, 2017 and no one suggested to her that Reyes's PIP would not or should not be extended. Despite her vagueness (not remembering specifically if she spoke to Ratte about the issue but acknowledging she would have spoken with her at this time), the circumstances and the content of the e mail suggest Ratte had approved the extension.

76. Despite being led to believe Reyes' PIP would be extended and creating documents consistent with that as late as 11 am on October 27, 2017 Pecora was copied on an e mail at about 6 pm that day confirming Reyes would be fired.

77. Crane acknowledged she relied on the PIP as part of her justification for terminating Reyes without speaking to his supervisor to determine if the PIP was having the intended effect.

78. Reyes was fired by Crane on October 30. She told him he was not a good fit with FGF.

79. The e mails described above were not provided to the Union until after Crane testified. They showed Crane was included in the email exchange and the Employer did not seek to recall Crane to explain the

sudden shift in the trajectory of Reyes' employment from expected PIP extension (either based on express instructions or based on conversations that pointed in that direction) to termination on questionable grounds within a period of six hours.

Fontanilla's termination

80. Fontanilla, also a team leader, started working at FGF in 2012 and was fired on November 2, 2017. Crane fired Fontanilla after Shift Leader and Operations Leader Mangat reported to her that Fontanilla was rejected for a wage increase based on her PFF dated October 24, 2017. The PFF identified attendance as an area of concern.

81. Fontanilla had received a mixed performance review by a different supervisor in 2016 (although it was better than her 2017 review) and was granted a wage increase at that time.

82. During her evidence, Crane reviewed Fontanilla's history which included counselling for a confrontation with a fellow team leader in April 2016, an allegation of harassing other team leaders in August of 2016 and a negative performance review in 2017. Crane observed that Fontanilla's performance had declined between her 2016 review and her 2017 review, despite being provided with leadership development training. However, Crane also agreed during her testimony that the real reason for Fontanilla's termination was the rejection of her wage increase on October 24, 2017.

83. Fontanilla has a young child and she sometimes had childcare issues that caused her to be late for work or miss work. She agreed she had texted her Shift Leader Parth Vaidya ("Vaidya") several times to tell him she would be late. He never told her it was a problem, and Vaidya's evidence was consistent with this. She was coached on October 6, 2017 and was told to provide two hours' notice if she could not make it to work. At this meeting Fontanilla reassured the Employer that she had recently made more reliable childcare arrangements.

84. An e mail exchange among managers including Crane on October 5 and 6, 2017 discusses two incidents of absenteeism in late September (including one where she provided a medical note). In the exchange, Gera suggested this justified coaching and that, because Fontanilla's wage increase would soon be rejected, discipline could then follow. The e mails include discussion about what is the appropriate response (coaching vs written warning) but importantly, none of the

participants in the exchange suggested termination should be the appropriate response to the rejection of her wage increase.

85. Fontanilla was told at a meeting on October 24, 2017 that her PFF would not lead to termination, but instead would trigger a further review in eight weeks. The PFF expressly states no PIP is required (which suggests the issues identified on the PFF are not seen as significant) and does not warn Fontanilla about possible termination. When Crane was asked why Fontanilla was not put on notice that her job was in jeopardy, she offered that Fontanilla should have understood her job was at risk because her raise was rejected. Crane described this as a "big deal" and a "red flag".

86. Crane's suggestion that rejection of a wage increase is a significant event was not credible because it was inconsistent with many of the Employer's own records and admissions. When presented with evidence of other employees whose raises were rejected (sometimes, more than once) and who were not terminated, Crane acknowledged that Fontanilla was the only employee she could think of who was denied a raise and not given an opportunity to improve. Visentin and Mangat also agreed other employees were rejected for wage increases and not fired.

87. There was no evidence of Fontanilla being absent between her coaching on October 6, 2017 and her termination.

88. The Employer tried to explain why Fontanilla was treated differently than other employees, but that evidence was not credible. Visentin asserted that the other employees who were kept on after a poor performance review did not have the same interpersonal issues Fontanilla did, and he described an incident Crane had told him about. However, when told in cross-examination that the exchange he described did not occur until December 2017, Visentin said Crane had described other incidents where Fontanilla treated employees inappropriately, although she did not say when they occurred.

89. When she was fired, she was told by Crane she was not a good fit. According to Visentin this is the Employer's practice, described as a respectful way of terminating employees. When she returned to work in December she was told she was fired because of her performance.

90. Even after she was reinstated, FGF management did not adequately explain her termination.

91. Fontanilla met with Visentin at her request on December 5, 2017. Fontanilla asked him why she was fired and according to Fontanilla, he shrugged. In describing the same exchange, Visentin denied he shrugged, but testified he told her she was fired for "many reasons" and denied Fontanilla's assertion that it was because of the union. He admitted he did not give Fontanilla any specific reasons why she was fired. Golec-Haughton also shrugged, according to Fontanilla, when Fontanilla asked her why she was fired.

Arconado's termination

92. Arconado was also a team leader. He began working for FGF in 2012 and he was fired immediately after Fontanilla, also on November 2, 2017.

93. Crane testified that she decided to fire Arconado because he was friends with Fontanilla, because of performance issues and because he had not demonstrated a commitment to the Employer by accepting the offer to become a regular employee when he had the opportunity to do so.

94. Employees come to FGF through agencies and they typically become regular employees after about a year. Most of FGF's leadership team started as agency employees. Despite having worked for FGF since 2012 and having the opportunity to become a regular employee, Arconado did not do so. Crane acknowledged in cross-examination that at least two other employees did not choose to become regular employees when offered the opportunity. She also admitted she did not know whether Arconado had been given feedback for his performance. Crane eventually confirmed during cross examination that Arconado's alleged friendship with Fontanilla was the decisive factor in her decision to terminate him and was the basis for her recommendation to Visentin that he be fired. Visentin testified that Crane told him Arconado was fired because they had a child together.

95. Crane told Arconado when she fired him on November 2, immediately after firing Fontanilla, that he was fired because of his relationship with Fontanilla.

96. Fontanilla and Arconado live together and have a child. During her evidence, Crane claimed to be uncertain of the nature of Fontanilla and Arconado's relationship, despite the fact that they had a child together. Fontanilla was on maternity leave for a year, between April

2015 and April 2016. Mangat and Visentin testified that it was known generally at the workplace that they had a child and Fontanilla testified she spoke with Crane before she was fired about balancing work and family responsibilities. Visentin testified Crane told him a day or two after Fontanilla was fired that they had a child together. Despite these things, Crane did not confirm in her evidence that she knew this when she decided to fire Fontanilla.

97. Despite Mangat's testimony that suggested it was a company policy that if an employee is terminated their partner is also fired (and that Visentin is responsible for the policy) Visentin testified that he was not aware of such a scenario occurring at FGF.

Alan Thibodeau

98. The Union did not complain about Thibodeau as he signed a separation agreement but took the position his termination was relevant to this application. He was fired on October 18, 2017. He initiated the Union campaign (along with Employee A) and participated in it after the Tim Horton's meeting on October 8, 2017.

99. Crane testified that Thibodeau was suspended in September for yelling at employees and was fired after he returned to work because his attitude did not improve: he was unhappy with his shift assignment and this led to a bad attitude and complaining. Golec-Haughton testified there was an "incident" in the first week of October that caused his termination, when Thibodeau was shouting on the radio.

100. Golec-Haughton agreed it was unusual for her to attend a termination meeting at this time in her employment at FGF and it was also highly unusual for Visentin to have attended.

101. The timing of Thibodeau's termination was suspect, coming as it did ten days after the October 8, 2017 meeting which he and other organizers attended with Shimmin. As well, the circumstances of his termination, including Golec-Haughton's attendance, were unusual.

Employer knowledge

102. The Employer's witnesses denied knowing Thibodeau, Reyes, Fontanilla and Arconado were Union organizers when it decided to fire them.

103. Crane testified that she did not know the identity of the organizers until early December, when the Union distributed a flyer containing their picture after they were returned to work. She then corrected herself and acknowledged she knew they were organizers before early December, based on the Union's interim application dated November 15, 2017.

104. There was some evidence of unusual activity by management in the workplace just before the terminations. Fontanilla testified that the Ajmeras were not in the plant more than three or four times a year (at year end, at a summer gathering and at townhall meetings). One week before she was fired, Tejus Ajmera was in the plant and he greeted her by name and asked how she was doing. He had not spoken to her by name before. She saw him speak to other workers on her crew at the same time. Arconado confirmed that he too saw the Ajmeras in the plant twice in October during the night shift, and he had not seen them in the plant on the night shift before.

105. Crane asserted that FGF's owners are "routinely" and "frequently" on the plant floor. Crane's evidence was contradicted by Mangat, who said they were on the floor once or twice a month in the fall of 2017, and by similar evidence from Golec-Haughton.

106. Fontanilla testified she saw Mangat at work on the night shift – not his usual shift - in October of 2017. The Employer's explanation for Mangat being on the night shift was unclear and contradictory, i.e. Crane said he was there to train management employee Rafael Sotomayer, while Mangat said he moved to night shift to replace Sotomayer and Sotomayer's training had ended.

107. Bilimoria is friendly with Mangat and Vaidya and they share a common heritage and language. Bilimoria testified that Mangat told him in October 2017 that he and Crane were reviewing camera footage "regularly", and Fontanilla testified that Bilimoria reported this to her in October 2017. Both Mangat and Vaidya denied telling Bilimoria this and denied reviewing video footage.

Communication with Employees after Reyes, Fontanilla and Arcondado return to work

Reyes, Fontanilla and Arconado are told they cannot organize at work on their return

108. Crane testified that FGF wanted to explain to Reyes, Fontanilla and Arconado why they were fired, and provided all three with letters that purported to explain their terminations when they came back to work. The explanations provided to Reyes, Fontanilla and Arconado in the letters differed from what they were told when they were fired.

109. Crane testified she, Golec-Haughton and Ratte met with Reyes first thing in the morning on December 4, 2017 when he returned to work. The letter explaining his termination does not refer to the alleged safety infraction in the Sanitation Cage.

110. Crane testified Reyes asked about permissible union activity at that meeting, and Golec-Haughton said she wasn't sure and she got back to him later in the day. Golec-Haughton denied being at the early morning meeting altogether. She testified she told Reyes later that day he could engage in union activity on his own time, as long as it did not interfere with production.

111. Reyes did not testify, so Golec-Haughton's evidence about what she told him was uncontradicted. However, we are persuaded by the *viva voce* evidence of Fontanilla and Arconado, discussed below, that Golec-Haughton told them not to organize at the workplace, including during non-working time.

112. Fontanilla and Arconado returned to work for the 7:00 pm shift on December 4, 2017. Crane testified they each had separate meetings with herself and Golec-Haughton before they started back to work where they were given letters alleging performance-based reasons for their terminations.

113. Both Fontanilla and Arconado testified with certainty and convincingly that Golec-Haughton was at their meetings, and that she told them not to campaign at all at the workplace, even during their breaks. Fontanilla remembered that Golec-Haughton asked her at the meeting why she was so emotional, and she gave detailed evidence about both Crane and Golec-Haughton telling her she was not to organize at work, even in the lunchroom. Crane denied Golec-Haughton told them they could not campaign during their lunch and breaks, and Golec-Haughton denied being at the meetings altogether.

114. Documents produced by FGF that summarized the meetings with Fontanilla and Arconado indicate that Golec-Haughton attended the

meetings with them (and Crane), consistent with Crane's, Fontanilla's and Arconado's evidence.

115. Crane and Golec-Haughton disagree about whether Golec-Haughton was at the return to work meetings. Fontanilla's evidence was clear and detailed about both what was said at the meeting, and both Fontanilla and Arconado were firm that Golec-Haughton was present. We find that Golec-Haughton was present at the meetings, and that she told Fontanilla and Arconado they were not entitled to campaign at the workplace at any time, even in the lunchroom on their breaks. The finding that they were told not to organize anywhere at the work is consistent with Golec-Haughton questioning Fontanilla about her organizing activity after an employee reported to Golec-Haughton that Fontanilla approached her in the cafeteria.

Meeting with employees on Reyes' team and the sanitation crew

116. Crane testified that on the morning of December 4, 2017 she and Golec-Haughton met with the employees on Reyes' team - without Reyes present - to explain his return to work. Crane did not explain why Reyes was excluded from the meeting and did not remember any discussion about why he should be excluded (although she remembered discussions about what should be said to his team, i.e. that Reyes was returning to work and work should resume as normal).

117. Crane's selective recall about this event is troubling: she remembers other aspects of the meeting from which Reyes was excluded but did not remember the reasons for his exclusion. The Employer has not explained why, despite its expressed intention to treat the returned employees like others, it excluded Reyes from the meeting of his shift.

December 4 – meeting of employees on Fontanilla's line

118. A video was introduced that showed Mildred Lao, FGF Shift Leader, leading employees from the line where Fontanilla worked - except Fontanilla – and out of the production area at about 7:25 pm on December 4, 2017 and returning at about 7:38 pm. Lao testified that the employees were needed to work on another line. Lao acknowledged in cross examination that when help is needed on another line it is usually needed for longer than 10 minutes. When asked if she was told to get employees to attend a meeting, Lao said she could not recall.

119. Fontanilla testified that Lao told her to stop the line so employees could attend a meeting in the office. Lao directed her to stay back and clean the line. On their return, the employees told Fontanilla they had attended a meeting with Crane and Visentin. One employee told her Visentin told the employees Fontanilla had been returned to work on a temporary basis. Fontanilla did not recall anything else she was told about the meeting. Crane and Visentin denied being at such a meeting altogether.

120. Fontanilla testified the other workers were welcoming and friendly to her when she first returned to work on December 4, 2017 but after the employees left her line for about 15 minutes that evening, they were distant and reluctant to speak with her. Fontanilla and Lao were friends before she was fired – Lao was Fontanilla's daughter's godmother – but after her return to work, even Lao was distant.

121. Lao's evidence on this issue was incoherent and inconsistent and selective. We do not accept her explanation that the rest of Fontanilla's shift was needed on another line. As with the meeting from which Reyes was excluded, there is no cogent explanation for excluding Fontanilla. We heard no evidence of what was said at this meeting. The fact that employees were cold to her afterwards suggests they were warned away from her.

122. We find that Fontanilla was excluded from a meeting of other employees on her line and that after that meeting, according to Fontanilla's evidence, the employees' attitudes towards her changed. Because the Employer denied the meeting occurred, we heard no evidence about the meeting itself.

Line leader meetings – December 4

123. Crane testified meetings with line leaders were held on December 4 and she identified a document called "Communications Strategy" that was followed when management informed line leaders about Reyes, Fontanilla and Arconado returning to work. One point in the strategy was to inform leaders that "[t]he union did not get their jobs back". She confirmed that the communication strategy was followed.

December 4 and 5 meetings

124. Several employee meetings were held on December 5, 2017 at which attendance was mandatory. Crane testified that she and Visentin

explained to employees what FGF's views were about the Union. A total of 14 to 18 meetings were held with about 20 employees attending each meeting. At each meeting, Crane read from a letter dated December 5 which included the following opening paragraph:

> FGF, 1295 Ormont has recently learned that a union is tyring to get our Team Members to sign union cards. We think this would be a bad thing for you and for FGF, why? because in Canada unions don't work with the company, and this would make us uncompetitive. We want to be a team of people who work together for a common goal, to become the world's greatest baker. While we hope you will decide not to sign a card, we want to be clear that we will not interfere improperly with your right to make that choice.

125. The letter was then distributed (personalized with each employee's name) to the employees in attendance.

126. Fontanilla attended one of the meetings on December 5, 2017 where she spoke for about 10 minutes. About 25 employees were there. Fontanilla testified she asked Visentin why she had been fired and he shrugged. Visentin denied this. She described the benefits of having a Union. An employee spoke up and described a unionized plant (Campbells' or Toyota), where despite the presence of a union, the plant still closed.

127. The meetings were a forum where the Employer expressed its opposition to the Union and its hope that the employees would not unionize. They coincided with Reyes, Fontanilla and Arconado returning to work.

Private Fontanilla/Visentin meetings

128. After one of the meetings on December 5, 2017, Visentin met privately with Fontanilla at her request. Fontanilla asked why she was fired, and he told her there were many reasons, although he did not provide any. Visentin denied Fontanilla's evidence that he apologized for what happened. Instead, he said he told Fontanilla he was sorry she was upset. He told her he wished she would change her view about the Union. At the end of the meeting Fontanilla asked for a meeting with the owners.

129. On December 22, 2017 a second meeting occurred with Fontanilla, Visentin and Tejus Ajmera. Fontanilla asserted that she was

fired for being a union organizer and they repeatedly denied it. They asked why the employees wanted a Union and Fontanilla explained some of the employees' concerns. Fontanilla testified that Visentin told her he wanted her to stop signing cards, and Tejus Ajmera told Visentin not to say that. Visentin denied this exchange occurred.

130. Both these meetings occurred at Fontanilla's request.

Leafleting and police

131. The Union (through Shimmin and three or four other Union employees) distributed a leaflet that contained a picture of Reyes, Fontanilla and Arconado and the phrase "We are Back to Work!". It explained that the Employer was not entitled to fire workers for signing a card. The leaflet also included a union card with a postage paid envelope. It was distributed to employees at shift changes on December 4, 2017 (approximately 6:30 to 9:00 pm) and December 5, 2017 (approximately 6:30 am to 9:00 am) and December 14, 2017 (approximately 6:30 pm to 9:30 pm) and December 15, 2017 (approximately 6:30 am to 9:30 am).

Outside surveillance

132. Shimmin testified that during the leafleting on December 4, 2017 Crane and two or three other managers stood outside at 15 to 30 minute intervals. In cross examination, he testified they were present for the duration of the leafleting activity, and that fewer employees were interested in talking with organizers when management was present. Fontanilla and Arconado returned to work that night at about 6:40 pm, and they did not see any management when they entered the plant.

133. Crane denied she was outside the employee entrance that evening. She said she was smoking near the office entrance while the leafleting was taking place for no more than 10 minutes with members of FGF's Human Resources Team Parveer Sandher and Ratte. Shimmin agreed with Crane's evidence that she was smoking "at the corporate end" of the plant, although he testified there was just one person with her and not two. In cross-examination, he agreed there were two management employees near the employee entrance and not four as stated in his witness statement.

134. The Employer's surveillance videos show many employees carrying leaflets as they come to work through the employee entrance.

135. There were internal differences about leafleting between the evidence of witnesses called by both the Union and Employer about the degree of management presence on the night of December 4, 2017. Shimmin's evidence about how long management was standing outside varied between chief and cross examination.

136. Based on the fact that his evidence was not consistent, we find that although Shimmin may have overstated the management presence, FGF management did periodically conduct surveillance of the leafleting activity outside the plant on December 4, 2017 and many if not most of FGF employees would have been aware of it.

137. Golec-Haughton testified that she called the police on December 4, 2017 after Mangat reported some of the organizers were trespassing. Golec-Haughton testified she saw an organizer aggressively confront Visentin on December 4, 2017. She was concerned and called the police, although the police did not come that night. Visentin confirmed that night he told an organizer to get on the sidewalk or he would have to call the police. The organizer responded by yelling and swearing and holding a leaflet up to his face. Visentin walked into the plant so as not to exacerbate the situation. Visentin did not say he felt threatened.

138. Golec-Haughton also called the police on December 14 and 15, 2017 and they did come to the plant. Golec-Haughton denied the Union's evidence that the police were there for 45 minutes on the 14th and an hour on the 15th. Shimmin denied organizers trespassed or were disrespectful although he admitted he did not see what the organizers were doing at all times. He testified that while the police were present, employees were reluctant to speak with organizers.

139. Golec-Haughton explained that she called the police on December 14, 2017 because organizers were trespassing. She did not witness any aggressive action. She called the police on December 15 after an employee reported to her that he felt an organizer forced him to take a leaflet.

140. It was evident from the videos that many employees walked into the employee entrance carrying envelopes with union information. This is consistent with Shimmin's candid acknowledgement that the management presence that night did not interfere with the leafleting and it undermines his suggestion that employees were reluctant to

engage with the Union when management was around, or that management was there continuously.

Taking of leaflets

141. The Employer's surveillance video from December 5, 2017 shows Golec-Haughton and Mangat inside the employee entrance while employees are coming to work. After he comes through the employee entrance, Employee N gives his leaflet to Golec-Haughton after a brief exchange with her while Mangat looks on. Golec-Haughton testified that N told her he didn't want the leaflet. A Union cell phone video of what appears to be the same exchange was taken from outside the employee entrance. Both before and after that exchange, employees walk into the plant through the employee entrance and some are carrying the leaflets in plain view.

142. Both Golec-Haughton and Mangat denied Golec-Haughton directed N (or any other employee) to hand over a leaflet. Their evidence is consistent with the videos which show employees coming through the entrance with envelopes which they carry in plain view, and which they do not hand over to anyone.

143. Fontanilla testified she was working between 8 and 9 o'clock in the evening on December 14, 2017 when an employee told her Lao was taking leaflets from employees. She left the line and saw Lao and Mangat putting leaflets into a garbage can which was moved to be near a door going into the employees' locker room, where Lao was standing.

144. Lao denied taking leaflets from employees. She admitted it was unusual for her to be standing at the employee entrance and she has not done it before or since. She said she was asked to stay there to ensure workers were not trespassing or intimidated by the Union representatives who were leafleting.

145. Mangat testified he and Lao were there to ensure employees were not intimidated by the leafleters and that the leafleters do not trespass. In cross-examination he conceded he could not see the leafleters outside from where he stood.

Management at employee entrances (inside surveillance)

146. Fontanilla testified that on December 14 or 15, 2017 at about 7:00 am, Mangat, Vaidya and Golec-Haughton were standing inside the

employee entrance at shift change times. The video evidence shows FGF management there on December 5, as well. Mangat testified they were there because an organizer had aggressively yelled at Visentin.

147. This management presence near the employee entrances was significant and unprecedented. It was an unusual event that followed closely on the reinstatement of the three fired organizers.

148. The Employer's witnesses testified that managers were near the employee entrances to ensure organizers did not become aggressive or trespass. The employee entrances – especially where the managers were standing – did not provide a direct and clear view of the organizers' activity outside. It was put to Golec-Haughton that management could not see misconduct from where they were located, and she agreed, saying that management could move closer to the door to see what was happening outside, if necessary.

Monitoring and Surveillance

149. We find the Employer was looking at camera footage in October, 2017 but the evidence did not suggest this continued after the organizers were returned to work.

150. However, the evidence established that a different type of surveillance (including communication with employees and the reinstated organizers) after the organizers returned to work, based on evidence of Employer witnesses and the content of emails exchanged among management. The Employer witnesses asserted their communication with employees about the Union was to find out why they were dissatisfied and wanted a union, but the evidence established the Employer was also interested in identifying supporters. Crane testified the discussions about the Union by management became more "heightened" after the organizers returned to work in December.

151. For example, Golec-Haughton emailed other managers, saying that during employee meetings on December 5, 2017, the Filipino employees did not "show any emotion", and therefore seemed aware of the organizing campaign. She also reported in her e mail that the Union had obtained a lot of cards. The e mail did not report on why employees may have been dissatisfied.

152. Crane e mailed other managers under the re line "Intel from Nightshift" to tell them that Mangat reported to her that a named

supervisor was encouraging employees to organize on the night shift. Mangat firmly denied giving this information to Crane.

153. Visentin met with the supervisor (Powell) and he asked her if she was part of the organizing campaign, which she denied. Visentin's e mail says he assured her he believed her, and she should not worry.

154. Crane advised other managers on December 18, 2017 that an employee told her employees were induced to join the Union by promises of better benefits. After initially denying he responded to any reports of union activity, Visentin agreed in cross-examination that he asked two other managers to follow up with the employee.

155. Bilimoria testified that in December 2017, Mangat and Vaidya asked him to keep his eyes and ears open for union activity. They asked him to attend a yearly employee Christmas party to find out what he could about the Union.

156. Mangat and Vaidya agreed they spoke with Bilimoria every day, but they said it was only about production and denied ever speaking with him about the Union. Vaidya admitted he looked for Union activity on the plant floor during working hours because he was told he needed to make sure cards were not signed during production time.

157. Bilimoria testified that in February or March of 2018, he gave Mangat the names of some card signers and other employees who were interested in the Union. Mangat denied Bilimoria told him anything about the Union including who were supporters.

158. Fontanilla testified that Golec-Haughton approached her around December 19, 2017 to ask her if Filipino employees were signing cards. Golec-Haughton denied this.

159. Fontanilla testified that Golec-Haughton told her in January 2018 that an employee complained she was campaigning in the lunchroom and at the same time, Golec-Haughton also told Fontanilla that the application for certification had been filed. Fontanilla told Golec-Haughton it was "normal" for employees to approach her about a card. Golec-Haughton acknowledged she questioned Fontanilla about the employee complaint.

160. Golec-Haughton agreed she spoke with Fontanilla "every once in awhile" in January 2018, including about the organizing campaign.

Golec-Haughton denied she asked if Fontanilla was getting people to sign cards. Fontanilla told Golec-Haughton to stop speaking to her and Golec-Haughton agreed, although she subsequently sent Fontanilla a text message asking to meet which Fontanilla ignored.

161. Golec-Haughton agreed she offered a severance package to Reyes, Fontanilla and Arconado in January 2018.

Lao's discussions with employees

162. Lao acknowledged in cross-examination that two employees asked her about the Union's leaflet and job security after the organizers returned to work and she responded by telling them she did not think the Union would be good for the company, and that only employees (by doing good work) could secure their jobs.

163. Fontanilla testified that a mixer on the ML3 line told her on a Friday in December that Lao told the mixer the plant would close if the Union came in. When it was put to Lao that the Union would call this evidence, Lao denied this and acknowledged she knew it was improper to tell employees this. The mixer who Lao spoke to was not called to testify by the Union, and no explanation was provided.

164. Fontanilla also testified that employees told her Lao asked them if they signed a card. When this expected evidence was put to Lao, she alternatively denied that this conversation with Fontanilla happened, or said she did not recall it. The employees who reported this to Fontanilla were not called to testify by the Union, and no explanation was provided.

165. Lao testified she listened to what employees under her supervision were saying about the Union because she was interested in knowing why they wanted to unionize but she did not ask them questions. She also denied anyone from FGF directed or told her to find out why employees wanted to unionize.

166. The Board is entitled to receive hearsay evidence and the Board is sympathetic to a union's interest in not calling employees to testify in a contentious proceeding where the Employer may perceive them to be union supporters (although steps may be taken to protect employees, like making it clear they are testifying under subpoena). But these allegations are significant, and they were denied by Lao, and we cannot find that they occurred in the absence of direct evidence.

Our findings about violations of the Act

Terminations

167. The Employer argues there was no direct evidence management knew of the organizers' role in the Union when FGF decided to fire them. This is not unusual, and the Board often infers knowledge based on the timing and circumstances of terminations that the employer was aware. We are satisfied based on the circumstances of their terminations, including the timing of the terminations and the process followed and the grounds alleged that Reyes, Fontanilla and Arconado were fired because management believed them to be organizing the Union.

168. We would make this finding based on the factors identified above alone, but the evidence of management being in the workplace on different shifts and the Ajmeras' unusual presence in the plant in October also supports conclusion that management made efforts to find out who was involved in the Union in October of 2017, and did find out, or had suspicions.

169. Many other employees were terminated in the month when the organizers were fired, including a team leader. The evidence also established that one other Union supporter (Employee A) was not fired and continues to work at FGF. Furthermore, the Union's witnesses acknowledged the Employer holds team leaders to a higher standard.

170. However, this evidence does not outweigh the effect of the Employer's failure to adequately explain the substance and the procedure of its decisions to fire the organizers. In this respect, the decision of the Board in *Cotton Inc. v. LIUNA, Local 837*, 2015 CarswellOnt 10869, is relevant. The Board described the employer's explanation for its decision to terminate the organizer's employment as "cogent" and even indicated the employer's story may be "compelling at first" but it found the explanations given by the employer did not stand up to scrutiny. The same could be said of the Employer's evidence in this case.

171. Crane testified the Employer tries to be fair in terminating employees, and the termination of an established employee (as opposed to an agency employee) is unusual. Reyes was an established employee. Reyes did not testify. I accept Crane's evidence that she wanted to fire him in August. However, all the evidence around Reyes' termination – in particular, Crane's attempt to establish multiple justifications for why

he was fired - establishes that he did not violate the Employer's PPE policy; his performance was not deteriorating (and in fact it was improving in response to earlier discipline); and until some time on October 27 the plan was to extend his PIP and not to terminate him.

172. Similarly, the Employer's evidence that Fontanilla's performance was deteriorating and that she was fired because she was denied a wage increase was not persuasive. Other employees were not fired when their wage increases were denied. Finally, Arconado's termination was similarly unsupported by the alleged grounds for cause. If he was fired for being Fontanilla's partner, having found she was fired for her role in the Union, Arconado's termination is tainted by extension.

173. Although this is a non union operation and therefore not required by a collective agreement to observe progressive discipline or prove just cause, it was evident that FGF is a sophisticated employer: it has skilled management staff who are responsible for applying detailed employment policies and managing a large and diverse workforce. FGF itself claims that it uses a standard of fairness in its employee relations. Although the terminations of the organizers are not held to a just cause standard, the timing, manner of termination and substantive reasons for termination must stand up to some scrutiny. In this case, they do not.

174. As the employer did in *Cotton*, FGF marshalled some evidence (certainly for Reyes and Fontanilla) to suggest they had some reason to terminate them. However, as the Board said in *Cotton*:

> 60. The principles applied by the Board to cases of this nature are well-established. Section 96(5) of the Act places the burden of proof on the responding party to establish on the balance of probabilities that it did not act contrary to the Act. The effect of the reverse onus of proof was discussed by the Board in *Barrier Examiner*, [1975] OLRB Rep. Oct. 745:
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> > The effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

> 61. On numerous occasions the Board has dealt with situations where the central aspect of the employer's response to the application is that it was unaware that the employee in question was involved with the union or, indeed, unaware, that there was union organizing going on at all. Of course such claims can be plausible given the fact that it is often the case that employees try to keep their organizing activity a secret for as long as possible. That being said, where there is a direct correlation of time between union activity and the organizer's termination, the Board must look at the employer's evidence with a keen eye. As the Board said in Pop Shoppe, [1976] OLRB Rep. June 299, at para. 5:
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> > 5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other "peculiarities". (See National Automatic Vending Co. Ltd. case 63 CLLC 16,278). ...
>
> 62. I reiterate that the anti-union motivation need not be the sole reason, or even the predominant reason, for the activity complained of to violate the Act, so long as it is part of the reason. Further, it is not the Board's place to determine whether there was "just cause" for the employee's discharge from employment. However, the reasonableness or unreasonableness of the employer's termination decision may be suggestive of the employer's true motivations.

175. As stated in *Cotton* (and repeated in many other cases) the Board will examine the circumstances around the termination of a union organizer, especially where the termination coincides with the organizing activity. Even if the employer appears to have "cogent reasons" for its decision to terminate, if those reasons do not stand up when examined in detail, the employer's decision will be found to be tainted by anti-union animus, and to have violated the Act.

176. While the timing and circumstances of Thibodeau's termination were suspicious, we do not have enough evidence of his role in the

Union's campaign to find his termination was tainted by anti union animus. This is particularly so, given Shimmin's evidence that he was not expecting Thibodeau to continue to have an active role in the campaign.

Exclusion of Reyes and Fontanilla from meetings

177. Crane testified the Employer promised to treat the organizers as other employees were treated when they returned to work. But she did not credibly explain why Reyes was excluded from his shift meeting where his return was discussed. This is significant, given Crane's insistence that all that was discussed at the ten-minute meeting was that Reyes was returning to work and work should resume as normal.

178. Similarly, the Employer did not explain Fontanilla's exclusion from a meeting of her line the day she returned to work. Lao's evidence on reviewing the video of herself shutting down the line and taking all the employees away was not credible. We find the meeting was to discuss Fontanilla's return to work, similar to Reyes' meeting. This is consistent with what an employee on Fontanilla's line told her.

179. This evidence is troubling. The Employer did not adequately explain why Reyes was excluded from the meeting of his team and did not explain at all why Fontanilla was excluded from the meeting of employees on her line.

180. The Board heard no direct evidence of what was discussed at either meeting, other than Crane's admission that Reyes' return to work was discussed at the meeting of his shift, and the report from an employee to Fontanilla that her return to work was discussed at the meeting of her shift

181. Accordingly, the Board is unable to find that the Employer said anything during those meetings that violated the Act. However, the Board finds that the unexplained exclusion of Reyes and Fontanilla from those meetings of their crews and where their returns to work were discussed – to be contrary to the Act. Their exclusion was both differential treatment (prohibited by section 72) and, in the absence of a credible explanation for why they were excluded, was for the purpose of interfering with the Union's campaign (contrary to section 70).

Direction not to organize in the workplace

182. The Board also finds Fontanilla and Arconado were told not to conduct union activity anywhere inside the plant after they returned to work, even on their own time. We prefer their evidence that Golec-Haughton told them this at their return to work meetings in preference to Golec-Haughton's assertion that she was not even at the meetings. The prohibition on conducting union activity was consistent with Golec-Haughton questioning Fontanilla in December and January about organizing activity at work.

183. Fontanilla testified that Visentin told her during the December 22 meeting that he wanted her to stop signing cards, and Tejus Ajmera intervened and told him he should not say that. We find, despite Visentin's denial, that he said this. Fontanilla's evidence was clear and unshaken. We do not find that Tejus Ajmera's admonishment of Visentin, especially in response to Visentin's brief and general direction (to "stop signing cards") was sufficient to counteract the effect of the clear and specific direction issued by Golec-Haughton to not organize on FGF premises.

184. The direction to organizers that they were not permitted to organize at the plant, even on their own time, constitutes interference in the Union's organizing campaign and is contrary to the Act (see for example *Ontario Bus Industries* 1989 CarswellOnt 1212).

Questioning of employees and organizers

185. FGF management communicated among themselves about possible supporters. And some management employees admitted to asking employees if they were involved in the Union (Visentin for example). These types of inquiries are contrary to section 70 of the Act (see for example *Ontario Bus Industries*).

186. We accept Fontanilla's evidence that Golec-Haughton questioned her about her organizing efforts after her return to work. While Golec-Haughton disputed some of the details, she did not disagree that she questioned Fontanilla about the Union and her activities. We find that these repetitive questions were designed to limit, and had the effect of limiting, her organizing activity, also contrary to section 70 of the Act.

187. We accept Bilimoria's evidence about his discussions with Mangat and Vaidya to look for union activity. He has no stake in the litigation, having been fired by FGF. We reject the employer's invitation

to find he has an axe to grind against the Employer and this could have influenced his evidence. In the course of his testimony (for the Union) he admitted he had disclosed highly sensitive information about Union supporters to the Employer. This in and of itself is a reason to find his evidence was credible.

188. Furthermore, the credibility of Mangat and Vaidya is undermined by their insistence that, although they spoke to Bilimoria every day, the subject of the Union never came up. It defies reason that during an organizing campaign which clearly occupied the interest and attention of management, especially in the aftermath of the organizers' reinstatements, that Mangat and Vaidya never raised or discussed the Union with Bilimoria, and we reject their evidence on this point.

189. Mangat and Vaidya tried to learn about the Union and its supporters through Bilimoria, although they were largely unsuccessful, aside from Bilimoria providing them with the names of some supporters in February and March 2018. We find that these efforts were for the purpose of interfering with the Union's campaign and were therefore contrary to the Act.

190. Bilimoria's evidence was consistent with many of the e-mail communications which made it clear the Employer was attempting to identify Union supporters.

Surveillance of leafleting and calling police

191. The Union argued that the Employer interfered with its leafleting, which was an important part of its efforts to revive the organizing campaign, by watching the organizers as they leafleted the workplace on December 4, 5, 14 and 15, 2017; by taking leaflets from employees; and by calling the police.

192. The presence of management at employee entrances during shift change on December 4, 5, 14 and 15, 2017 was unprecedented, as was management's presence outside during the leafleting on December 4, 2017.

193. The videos disclose that there were times when no managers were at the employee entrance (consistent with Fontanilla's and Arconado's evidence) and that when managers were there, employees walked past them and did not give their leaflets to management.

194. The Employer called the police on December 4, 14 and 15, 2017. Golec-Haughton's evidence that she called the police because she was concerned about trespassing and aggressive actions was undermined by the fact that her evidence did not establish a reasonable basis for concluding that any one was in fact trespassing or causing harm. Golec-Haughton's evidence does not persuade us that any serious misconduct was taking place, however, the circumstances were unusual for FGF, an employer is entitled to take reasonable steps to protect its property and ensure employees are safe, and we do not find the monitoring of the leafleting activity outside the plant or the decision to call the police to violate the Act.

195. The inside surveillance at the employee entrances is a different story. We find that the presence of management employees of FGF – often more than one at a time - inside the employee entrances as employees reported for work and left work to be unusual and unprecedented. As noted above the leafleting activity by the Union was unusual for FGF, and FGF was entitled to respond to that in accordance with the law. However, in this case, the justification presented for management's presence inside the employee entrances was not made out. Notably, the conduct they were allegedly monitoring (trespassing and aggression by organizers) was not established beyond at most, a de minimis level. But more importantly, the conduct of the organizers was not visible from where the management employees were located inside the employee entrances. Accordingly, we find the management presence inside the employee entrances was designed to intimidate employees for the purpose of interfering with the Union's leafleting activity and as such it violates the Act.

Other alleged violations of the Act were not made out

196. The Union alleged several other violations of the Act. Those allegations are not supported by the evidence, for the reasons given below.

Allegations that Employer took leaflets from employees

197. On December 4, 2017 just inside the employee entrance, N gave his leaflet to Golec-Haughton. We accept Golec-Haughton's evidence that N offered the leaflet and she took it from him. The video evidence is consistent with an exchange and not a direction or demand.

198. Fontanilla testified that while she was working on December 14, 2017 an employee told her Mangat and Lao were taking leaflets from employees and putting them in the garbage. Fontanilla left her line and looked through the window in the plant door and testified she saw them putting papers in a garbage bin. Mangat and Lao denied taking leaflets from employees.

199. It makes no sense that the Employer, having not interfered with employees' bringing leaflets into the plant on several occasions before December 14, would have suddenly started doing so on that date. Accordingly, we find that, whatever Fontanilla saw, it was not Lao taking leaflets from employees and putting them in the garbage. Furthermore, Fontanilla did not say she saw Lao physically taking leaflets from employees. Finally, there was no corroboration of Fontanilla's evidence, either by way of cell phone picture or video or by an eye witness or an employee who saw the leaflets in the garbage.

200. Lao's evidence about this incident was much more credible than her evidence about the line meeting that excluded Fontanilla, because she did admit some things that were against the Employer's interest, including that it was unusual for her to be standing near the employee entrance as employees report for work.

Captive audience meetings

201. The Employer's evidence and notes of the captive audience meetings showed it urged the employees to reject the Union and indicated it believed the workplace was better off without a Union. Fontanilla testified that, at the meeting she attended, she spoke about the Union including telling employees that the Union helped the organizers get back to work.

202. Based on the Employer's evidence and the documents filed, there were no threats to job security at the meetings.

203. Employers are entitled to try to persuade employees to remain non-union as long as their communication is not threatening, intimidating or coercive. We find the statements made at the meetings and the reading of the December 5, 2017 letter do not cross the line into coercion. If an employer's comments allude to job loss and suggest collective bargaining will undermine job security, the communications will be found to violate the Act: *LIUNA, Ontario Provincial District Council v. Kieswetter* 2019 CarswellOnt 10904. The Board will consider the

context of an employer's remarks in assessing whether they are coercive. While FGF's letter connected the company being "uncompetitive" with unions "fighting" with employers and repeated the company's goal of becoming "the world's greatest baker", it did not suggest employees' job security was at stake. Particularly in the context of what we heard generally about the discussions in those meetings we do not find the meetings to have been coercive or otherwise contrary to the Act.

204. The overall tone of the letter (and the message at the meetings) made it clear that while FGF would prefer to remain non union, the Employer also stated it would not "improperly" interfere with employees' choices. Furthermore, Fontanilla spoke up about the benefits of unionization at the meeting she attended and acknowledged in her evidence that she spoke for as long as she wanted to.

Lao's discussions with employees

205. Lao's adamant denial that she ever spoke with employees about the Union at all was undermined by her own admission that she had at least one such discussion. However, on the important allegations that she questioned employees about whether they signed a card and told employees the plant would shut down if the Union got in, the Union did not call first-hand evidence of Lao's alleged statements.

206. The Board is entitled to receive hearsay evidence and the Board is sympathetic to a union's interest in not calling employees to testify in a contentious proceeding where the Employer may perceive them to be union supporters (although steps may be taken to protect employees). But these allegations are significant, and they were denied by Lao, and we are not prepared to make a material finding that they occurred in the absence of direct evidence.

Other alleged harassment

207. The Union argued that Fontanilla's meeting with Visentin and Ajmera was harassment. However, she requested this meeting. Visentin violated the Act in telling Fontanilla he wanted her to stop signing cards. Ajmera recognized the impropriety of this direction and told him he should not say that.

208. Having found violations of the Act, the next question is whether the Union has proven that those violations led to the Union's inability to

reach 40% support for the application. If we are satisfied that the Union did not reach 40% because of the Employer's unfair labour practices, we must then consider what remedy is appropriate.

The Union was unable to obtain the support of 40 percent of the employees due to the Employer's violations of the Act

209. The Union argued the severity and speed of the Employer's response to the organizing campaign deprived it of its ability to obtain 40% support. Within ten days of the Tim Horton's meeting Thibodeau was fired, and this was quickly followed by the terminations of the next three organizers within 10 to 12 days.

210. Especially when terminations happen early in a campaign, and where three of the five organizers are fired for organizing, the terminations will have the effect of stopping the campaign in its tracks. The Union's evidence, including that Employee A the fifth unidentified key organizer would not return Shimmin's calls, is consistent with this.

211. The Union relied heavily on *343315 Ontario Ltd. o/a LaRo Construction* 2016 CarswellOnt 11127, which discussed at length the effect of the termination of the union's key organizer (a salt). In *LaRo*, the campaign was in its cautious early stages and the organizer was approaching individual employees during non-working hours about the union. The organizer described the response of a handful of employees as positive. He was fired three days after his first contact. After a short break for personal reasons he returned to the jobsite and was told to leave the area by the company president. He attempted to contact employees by phone but was unsuccessful.

212. In *LaRo*, the Board found that the organizer was treated much differently by employees before and after he was fired. Employees previously supportive refused to speak with him or expressed fear of being seen with him.

213. The Union also relied on *Cotton* and *CJA Local 93 v 1443760 Ontario Inc. o/a Swing Stage* 2007 CarswellOnt 4527 to argue that the decisive impact of termination has long been held by the Board to be a significant impediment to continuation of an organizing campaign. The Board has long recognized – as stated in these cases and many others – that where an organizer has been terminated for union activity, it has a direct and immediate impact on employees.

214. The Employer argued the Union did not prove the Employer's misconduct caused it to obtain less than 40% support among employees. It noted the Union signed the same number of cards before and after the terminations, and that the Union (as it was entitled to do) took credit for the organizers' return to work (both in the "We are back at work!" leaflet and in Fontanilla's response to questions from employees). The Employer also pointed out that the Union had in the past unsuccessfully tried to organize FGF.

215. The Board has occasionally found employer misconduct did not cause a union to obtain insufficient support, but the cases where this finding is made are exceptional and factually different than this one. For example either the union did not know about many employees in the bargaining unit, and had no contact with them (*Lecompte Electric Inc. v IBEW Local 586*, 150 CLRBR(2d) 163), the union had not obtained sufficient support in more than two years of organizing efforts (*Barne Building and Construction Inc v UBCJA Local 2486* (2013) 2013 CarswellOnt 7628 or could not show the employees were aware of the termination of the union supporter (*CJA v KD Clair Construction Ltd.* 2008 CarswellOnt 2904).

216. The fact that the Union was able to sign employees after the reinstatement of the organizers does not necessarily mean the Employer's action did not have a chilling effect on its organizing campaign. In *United Brotherhood of Retail, Food, Industrial & Service Trades International Union v. Quest Window Systems Inc* 2013 CarswellOnt 11549, where the union signed up more members after the organizer was fired than before, the Board relied on the organizer's evidence that after he was fired, employees did not want to have anything to do with the union. In this case, we accept Fontanilla's evidence that the employees were reluctant to speak with her and their responses to her organizing efforts were quite different after she returned to work.

217. Despite the reinstatement of the organizers at FGF, the Employer's post reinstatement conduct included Golec-Haughton telling the organizers they could not organize on site. We note that it appeared from the evidence that Fontanilla may have done some limited organizing after she returned to work, inside the workplace. But her evidence established that most of the cards were collected offsite and the level of in-plant organizing activity she described before the organizers were fired did not return. Furthermore, she testified clearly that Golec-Haughton's warning inhibited and limited her activity and

that she rarely left her work area. Therefore, we find the direction not to organize on site had the desired effect of weakening the organizing campaign. In addition, the Employer monitored employees for the purpose of interfering with the Union's campaign (both generally by its presence inside the employee entrances at shift change and specifically by talking to employees about the Union) and improperly excluded Reyes and Fontanilla from shift meetings on their return to work.

218. Despite the reinstatement of the organizers and the Union's efforts to take credit for their reinstatement, we find the pattern of misconduct that persisted after their reinstatement extended the effect of the terminations, making it impossible for the Union to obtain the support of 40% of the employees.

219. The first two elements of section 11 are made out: we find the Employer committed unfair labour practices both before and after the organizers were reinstated and the Employer's actions prevented the Union from obtaining 40% support.

We are satisfied that the true wishes of the employees can be ascertained by a representation vote, with the proper remedial orders

220. The Employer argued, correctly, that granting remedial certification is an exceptional remedy. The Union argued, correctly, that the Board frequently grants remedial certification where key organizers are fired during an organizing campaign because the true wishes of the employees cannot otherwise be ascertained and cited many authorities in response. The Employer relied on *Bronnenco Construction Ltd. v. LIUNA Local 1059* 2013 CarswellOnt 2869 which found, despite threats to job security by a member of management and the removal from site and quick return of an organizer, that remedial certification was not justified.

221. As set out in *Eagle Plumbing Contractors Inc*., 2012 CanLII 47363 (ON LRB), the Board will grant remedial certification "when an employer has either made threats to job security or has engaged in a series of unlawful acts that cumulatively has the effect of irreparably harming the ability of employees to freely choose whether or not they wish to be represented by a trade union, and no other remedy would be sufficient to counter the effects of the employer's misconduct" (para 236).

222. Many of the authorities relied on by the parties consider the effect of termination on whether a vote should be ordered. Furthermore, while the cases universally refer to the harmful effects of termination of organizers, most of them do not consider the effects of reinstatement as occurred here.

223. Although we have found the reinstatement of the organizers in this case did not cure the harm to the organizing campaign, the issue of whether the reinstatement of the organizers affects the remedy is a separate question.

224. In *Pietro Electric Ltd.* [1997] OLRB Rep May/June 527, the Board said the following about terminations of organizers:

> 55. Threats to the job security of employees or, as here, actual discharges, linked to support for the union have long been considered by the Board to be unfair labour practices which have such a strong and deep rooted impact that even a representation vote in which ballots were confidentially cast would not reflect the true wishes of employees. Indeed, as the Board recently stated in *Wal-Mart Canada Inc.*, [1997] OLRB Rep. January/February 141, at paragraph 49 therein:
>
> … This case is a classic example of a situation in which the conduct of the employer changes the question in the minds of the employees at the vote … from one of union representation to one of "do you want to retain your employment"

225. Subsequently, at paragraph 57 of its decision, the Board assessed the situation in a similar fashion:

> 57. … A vote for the union might well be perceived by employees as a vote that they would be the next to be laid off. In these circumstances, employees would not be voting in an atmosphere and in an environment that would enable them to freely express their true wishes.

226. Some of the authorities provided to the panel consider the effect of reinstatement on remedy and they are relevant to this aspect of the case.

227. In *Cotton* the employee organizer was reinstated by interim order of the Board. However, the employer in that case did not meaningfully comply with the order: it flouted the order and further

violated the Act by not assigning the reinstated employee to shifts he was entitled to. The Board also found that discipline issued by the employer to the reinstated employee for alleged misconduct after he returned to work was not completely unjustified, but was an overreaction tainted by anti union animus.

228. This conduct, said the Board, served as a constant reminder to other employees, even after the organizer was reinstated, of the consequences of organizing activity. The Board found it was highly unlikely a representation vote would reflect the true wishes of the employees.

229. In *Eagle Plumbing*, when the employer discovered an employee was organizing, he was sent home immediately. He returned to work the next day and was effectively placed on probation, with his employer making it clear that if he stopped organizing his co workers, his employment would continue. The Board concluded that despite reinstating the employee, the employer exploited his economic vulnerability to defeat the organizing campaign. Shortly after his reinstatement, and in the presence of bargaining unit employees, a close relative of the owner suggested the company might shut down if the company were unionized. The owner who was there at the time did nothing to correct the statement.

230. In *Eagle Plumbing,* the Board held that the employer's actions after the organizer was reinstated made it clear to other employees that the employer maintained control: the treatment of the reinstated employee made it clear he was no longer trusted (paragraph 266) and he was treated differently (paragraph 267). In addition to pressuring the employee to discontinue his organizing, the employer did not dispute or distance itself from a comment that expressly threatened job security. The reinstatement of the organizer was insufficient to ameliorate the effects of the employer's conduct.

231. Likewise, in *Zest Furniture Industries Limited*, [1987] OLRB Rep. February 299 the Board held that reinstatement of a union organizer did not restore the ability of employees to freely express their wishes. In *Zest*, the two-month gap between termination and reinstatement was significant, as was the fact that only one of three terminated organizers was returned to work.

232. *Zest* refers to *Elbertsen Industries Limited* (1984 CanLII 1081), where it found that, despite the reinstatement of a terminated organizer

and robust remedial actions by the employer, the union should be certified. After firing and reinstating an organizer, the employer in *Elbertsen* made express written promises to employees to assure them their rights under the Act were protected and provided employees with time and space to meet during working hours without management present. However, it did so in the context of entering into an agreement with an employee committee to resolve issues of concern to employees before the organizer returned to work.

233. The Board found that the "curative steps" taken by the employer in *Elbertson* occurred too long after its misconduct and were insufficient to address its illegal conduct, particularly its overt support for the employee association.

234. In all these cases, despite reinstatement of organizers, the Board found the true wishes of the employees were not likely to be determined. However, the cases also make clear that this is not an automatic finding, and the effect of the employer's actions, including reinstatement, must be assessed on a case-by-case basis.

235. Where inside organizers have been fired and reinstated, the employer's conduct must be examined through an objective lens after the employees are returned to work to determine the appropriate remedy *(Zest).*

236. The question raised by these authorities is whether (in applying an objective test) the Employer's conduct at FGF after the employees returned to work cured the effect of the terminations such that the true wishes of the employees in this case can be reflected in a representation vote. In *Bronnenco*, the Board found that the representation vote taken in that case did not likely reflect the employees' true wishes, but that a second vote with appropriate remedies could occur despite the employer's violations of the Act, which included "… comments pertaining to employees' job security by a junior member of the Employer's managerial team; extensive anti-union activities by a bargaining unit employee condoned by, and in some instances abetted by, a junior member of the Employer's management team; and some negative consequences for bargaining unit employees."

237. FGF argued that in a large plant, the effect of three terminations was not significant, and may not have even been known to many employees. This argument ignores the fact that the day they returned to work the Union publicized the organizers' reinstatement and the

Employer held multiple meetings covering all employees at which the issue of unions and more specifically, unionizing FGF, was discussed.

238. There was no evidence of threats to job security at the meetings FGF convened. At the meeting attended by Fontanilla, she spoke in favour of the Union and credited the Union with helping her to return to work. Fontanilla herself testified that she told employees who asked that the Union had helped her get back to work and the Union publicized its role in getting the organizers back to work with the "We are Back to Work" leaflet.

239. The Employer also argued that many of the post termination events alleged by the Union were between FGF management representatives and individual employees and therefore would not have an effect of undermining a vote. The Employer argued its conduct was not comparable to the employer's conduct in *Cotton*.

240. We agree that the Employer's conduct in this case was less serious than in the authorities provided where organizers were reinstated, i.e. in *Cotton* where the employer did not comply with the Board's reinstatement order; in *Eagle Plumbing* where the employer's post reinstatement conduct included a job security threat and a direct message to the organizer that his continued employment was tenuous if he did not stop organizing; and in *Elbertsen*, where among other things the employer entered into an agreement with an employee association.

241. The Union submitted that the Employer's scrutiny of the organizers and other employees after their return to work means a fair vote could not take place. Although not all of the Union's allegations were made out, we have found the organizers were told not to organize in the plant; Fontanilla and Reyes were excluded from meetings with employees on their lines when they returned to work; some members of management questioned employees about their support for the Union and encouraged surveillance of Union activity; and Golec-Haughton questioned Fontanilla directly about her organizing activity. Finally, the conduct of some managers in monitoring employees as they came into work delivered the message to employees that they were being watched, and would have had the effect of intimidating them by their presence.

242. Much of the activity, especially the investigations of individual actions, was one-on-one and would not likely have had a broad effect.

Similarly, the directions to the organizers not to organize and the regular questioning of Fontanilla by Golec-Haughton would not have had a broad effect (other than suppressing organizing activity which is not material to the question of remedy). But the presence of management employees in the employee entrances on December 5, 14 and 15 was designed to, and had, an intimidating effect.

243. In considering whether remedial certification is appropriate, the question is whether the Employer's actions reinforced its authority in the workplace such that the curative effect of the reinstatement of the organizers is eliminated. We find that the Union has not demonstrated that in this case. The Employer engaged in surveillance, asked employees whether they had signed cards, questioned Fontanilla about her organizing efforts, and excluded Fontanilla and Reyes from shift meetings, all contrary to the Act. These actions were intended to and had the effect of interfering with the organizing campaign. But they were not so significant, pervasive or connected to job security that they delivered the message to employees generally that support for the Union would jeopardize their job security or threaten employees' confidence in the rule of law.

What remedial orders are appropriate?

244. We find and declare that the Employer violated sections 70, 72 and/or 76 of the Act by:

a) Terminating the employment of Reyes, Fontanilla, and Arconado;

b) Interfering with the employees' and the Union's lawful exercise of rights under the Act by:

i) Conducting surveillance of employees as they reported for work;

ii) Excluding Reyes and Fontanilla from meetings of their shifts;

iii) Directing Reyes, Fontanilla and Arconado not to organize at the plant; and

iv) Asking employees (including Fontanilla) about their support for and involvement in the Union.

245. The Employer is directed to compensate and make whole all of Reyes, Fontanilla and Arconado for lost wages and benefits and other amenities of employment during the period between their terminations and their interim reinstatements. For clarity, we confirm that their interim reinstatements are retroactively amended, as of the date they were returned to work, to be unconditional reinstatements.

246. Although we do not find the possibility of a fair vote to have been irreparably harmed by the Employer's actions, we are of the view that robust remedial orders are appropriate in view of the effect of the Employer's conduct on the Union's organizing campaign.

247. In light of the foregoing reasons, the Board hereby disposes of these matters by issuing the following remedial relief:

a) The Board finds and declares that the Employer has violated sections 70, 72 and 76 of the Act as described more fully above;

b) The Employer is directed to provide the Union with the names, e mail addresses and telephone numbers in its possession or in the possession of any agency it deals with, of all of its employees including agency workers, beginning on the date of this order and updated bi-weekly to add new employees and delete employees no longer working for it;

c) The Employer is directed to make available to the Union, and at the Union's request, a meeting room at the workplace for representatives of the Union and/or employee supporters to meet with employees not more than once per month, per shift, during the six-month period following the date of this order;

d) The Employer is directed to ensure any communications with its employees (in any form) fall within the limits of permissible employer free speech during an organizing campaign; and

e) The Employer is directed to post and to keep posted this decision and the attached Notice to Employees at the workplace for at least 60 days, and to deliver

a copy of this decision and the attached notice to all of its employees within five days of the date of this decision.

248. At any time during the six-month period beginning with the date of this decision, the Union may request that the Board conduct a representation vote among the employees at FGF in the bargaining unit applied for by the Union in Board File No. 2470-17-R.

249. This panel shall remain seized to deal with any issues arising from the implementation of this decision, including any alleged non-compliance with the directions above.

250. Finally, we note that this was a long proceeding that included contentious evidence. We thank both counsel for their professionalism and courtesy throughout.

"Paula Turtle"
for the Board

Appendix "A"
The Labour Relations Act, 1995
NOTICE TO EMPLOYEES
Posted by order of the Ontario Labour Relations Board

Following a hearing, the Ontario Labour Relations Board found that FGF Brands Inc. violated the *Labour Relations Act, 1995* when it terminated the employment of Ruel Reyes, Peluchi Fontanilla and Marcelino Arconado, and when it did other things to interfere with the organizing campaign by the United Food and Commercial Workers International Union. The Board found that the overall effect of FGF's actions was to ensure that the Union was not able to obtain enough support to file an application for certification.

The Labour Relations Board has found that FGF violated certain sections of the Act. It has required FGF to pay damages to the employees who were fired. In addition, the Labour Relations Board has directed FGF to provide the Union with certain information and to do other things in response to the findings of the Labour Relations Board that FGF's actions prevented the Union from obtaining more membership support.

The full reasons for these determinations are set out in a decision dated June 26, 2020, which FGF was directed to post, along with copies of this Notice.

Employees in Ontario have these rights which are protected by law:

An employee has the right to join a trade union of his or her own choice and to participate in its lawful activities.

An employee has the right to oppose a trade union, or subject to the union security clause in the collective

agreement with his or her employer, refuse to join a trade union.

An employee has the right to cast a secret ballot in favour of, or in opposition to, a trade union if the Ontario Labour Relations Board directs a representation vote.

An employee has the right not to be discriminated against or penalized by an employer or by a trade union because he or she is exercising rights under the *Labour Relations Act, 1995*, as amended.

An employee has the right not to be penalized because he or she participated in a proceeding under the *Labour Relations Act, 1995*, as amended.

An employee has the right to remain neutral, to refuse to sign documents opposing the union or to refuse to sign a union membership card.

It is unlawful for employees to be fired or in any way penalized for the exercise of these rights. If this happens, a complaint may be filed with the Ontario Labour Relations Board.

It is unlawful for anyone to use intimidation to compel someone else to become or refrain from becoming a member of a trade union, or to compel someone to refrain from exercising rights under the *Labour Relations Act, 1995*, as amended.

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive days.

DATED this 26th day of June, 2020.

APPENDIX A

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Attention: Wayne Hanley
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