

ONTARIO LABOUR RELATIONS BOARD

1831-10-U; 2071-10-U; 0695-11-U Communications, Energy and Paperworkers Union of Canada, Local 87-M Southern Ontario Newsmedia Guild, Applicant v. **Ming Pao Newspapers (Canada) Ltd.**, Responding Party.

BEFORE: Brian McLean, Vice-Chair.

APPEARANCES: James Nyman, Howard Law and K.H. Wong appearing for the applicant; John Illingworth, Jordan Smith and Maureen Tang appearing for the responding party.

DECISION OF THE BOARD: January 30, 2012

1. These are unfair labour practice complaints in which the applicant trade union alleges the employer violated the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (“the Act”), both during its organizing campaign to obtain bargaining rights and after the Board certified it to represent the employees of the employer on October 15, 2010.

2. The hearings of these matters took several days to complete. Virtually all of the evidence was led through witnesses whose first language was not English and thus had to be translated. In addition, many of the documents were translated in Mandarin Chinese whereas Cantonese was required and there are different spellings of names depending on which Chinese language was used. All of these factors resulted in a lengthy process. It also leads to difficulty in evaluating the credibility of witnesses. Nevertheless, these difficulties do not affect the Board’s role which is to determine what occurred and whether unfair labour practices were committed.

3. Ming Pao is a Chinese language newspaper in Toronto which publishes daily. It has approximately 45,000 readers. It is owned by a multinational corporation headquartered in Hong Kong, Media Chinese International, which in turn is owned by a Malaysian multinational. In addition to the daily broadsheet, Ming Pao also publishes various magazines and free newspapers such as the weekly Chinese-Canadian Express. Ming Pao is one of three major Chinese language newspapers in Toronto. The employees of the other two, Sing Tao and World Journal, are unionized.

4. The employer has several different departments. The departments that were central to the issues which arose in this case are:

- Graphics department - 13 or 14 full (11) and part (2) time employees at the time of certification and headed by Henry Tse the Art Director. Employees in the department also deal with Cyril Lai the Regional General Manager and Maureen Tang the Director of Advertising and Sales. Graphics department employees create (or adapt) advertisements and other graphics that appear in the company’s publications.

- The advertising and sales department - at the time of the application for certification it had 24 employees. There were seven senior account managers; five account managers; two account executives all of whom constituted outside sales; five client services representatives/executives (inside sales) and four traffic employees. The senior account managers, account managers and account executives have the task of looking for new business and dealing directly with their existing clients. These employees may go out to the client's place of business and accordingly spend about 50% of their time in the office. Senior account managers, all of whom were quite long service employees, earn \$1600 per month plus commissions payable with reference to a monthly sales target established by the company. Approximately 80% of their income of \$85-100,000 is derived from commissions. The account managers earn \$1300 per month plus commissions and earn \$60-70,000 per year. The account executives are also in outside sales but they are limited to selling advertising to the Canadian Chinese express the company's free weekly newspaper. They earn \$1100 per month plus commissions. Traffic employees are hourly paid and largely handle the paperwork which must be completed when a client wishes to place an ad in the paper. The traffic department employees are led by Pinkie Chan, the traffic co-ordinator.
- Production Department - the newspaper prints the paper at night. At the time of the application for certification 9 employees each shift, including a senior press operator (designated as a co-ordinator) operate the presses. The employer also has a dayshift when various supplements are printed.

5. On September 7, 2010 the Union applied for certification and in a vote held on September 14, 2010, a majority of employees voted in favour of representation by the Union. Bargaining commenced in January 2011 but did not progress well and the employees commenced a legal strike in September 2011. The strike ended when the Board (differently constituted) directed that the parties' first collective agreement be settled by arbitration. The Union's complaints before me can be divided into three categories:

- i. employer activities which took place at the start of the organizing drive. These events would have been relevant to the union prior to the representation vote. In the eyes of the union they retain their given the events which later occurred.
- ii. events that occurred in the sales department both before and while bargaining was going on. I have largely reserved on these sales department issues, including the TNT supermarket dispute, in the hope that they can be resolved after this decision issues. If they cannot be resolved I will make further decisions with respect to these issues. The conduct of the bargaining is not before me.

- iii. lay-offs in May and July which the union asserts are improperly motivated.

I will consider the first and third of these groups of allegations in sequence.

Events around the start of the Organizing Drive

6. On August 23, 2010 a group of employees and a union official attended at the Ming Pao lobby and asked to see Ka Ming Lui, (“Mr. Lui”) the Chief Executive Officer and editor of Ming Pao Newspapers North America. Upon being advised that he was not present (he was out of the country), the employees left a letter addressed to Mr. Lui which stated in part:

Please be advised that an open committee of Toronto Ming Pao employees has authorized CEP to inform you they have begun a legal campaign to organize their co-workers into a union. They are:

Paul Lee, Yuang Chang Lin, Raymond Shiu and Simon Sung.

7. On August 25, 2010 the union wrote Mr. Lui to advise that the organizing committee had expanded to include Patrick Law, Joseph Kwok, Tania Lai and Allen Lam.

8. On August 27, 2010 the union advised Ming Pao that Brenda Chu, Christine Lo, Tony Lu and Winsome Ng were also on the committee. All of these latter employees, and nine of the twelve employees in total, were in the company’s advertising and sales department.

9. Soon after the union announced the organizing drive things began to happen.

10. On August 26, 2010 Mr. Lui issued a lengthy letter to all Ming Pao employees titled “Let’s Work Together in a Free and Pleasant Atmosphere”. In the letter, which largely consisted of statements that are frequently and properly made to employees by employers during organizing campaigns, the employer made certain comparisons between Sing Tao and Ming Pao. There was nothing improper about this in theory, but the Sing Tao comparisons would remain a problematic theme throughout the case before me.

11. On August 29, 2010, Mr. Lui sent another letter, this time titled “The Union Prohibits Me From Speaking or Doing...”. This letter indirectly raises job security issues through a guise, the guise being the prohibition of talking about such issues. The letter states :

Greetings! I believe you have read the letter delivered to your homes on August 26.

Some colleagues asked me after reading the letter:

Would Ming Pao do this or that after a union is formed at Ming Pao?

I told them that I knew about their concerns, but unfortunately, the union quoted applicable laws and regulations that forbid me to express my opinions; even suggestions are prohibited.

On the morning of August 23, a non- Chinese union representative burst into Ming Pao in full fury, followed by a few colleagues who have worked for us for many years.

I was in Vancouver that day. They didn't see me, so they dropped off a letter and left.

From that letter I quote the following:

“The company cannot directly or indirectly suggest that the forming of a union may bring financial consequences to Ming Pao or risks to business and/or job security...It is restated that even suggestions of this nature may result in legal consequences.

After you read this quotation, you understand why I cannot answer your questions!

Doesn't democracy allow different opinions? Doesn't truth become clearer through debates? Why am I prohibited from talking about whether there may be “risks to business and/or job security”

Laws and regulations bind my hands while I am pushed to the arena to counter the union that is self-confident and restraint- free, due to great wealth. You tell me: is it fair?

I am anxious, worried, and concerned that my colleagues at Ming Pao would be pushed to make rash decisions before getting all necessary information.

But I am telling myself to keep calm and affirmative, because what I have on my shoulders is not only my personal honour, but also the right or wrong decisions of all my colleagues at Ming Pao on the union issue.

I believe that “People do what they do; God is there watching.” You support me and help me; although I cannot say anything, you understand in your hearts.

Regarding the questions that I am prohibited from answering, I can give you a hint:

Ask the union whether withdrawing from the union is as easy as joining it.

If “it is easier in than out”, why bother to make a rash decision?

You need to understand that one false step brings everlasting grief.

I also need to tell you that I am prohibited from doing some normal work for the company. I quote from the letter: “During the organizing process, the company cannot change any employment terms or conditions, including salaries, commission, working hours, shifts, advertising clients, etc....”

Another sentence follows:

“You need to know the laws of Ontario guarantee that employees have the right to discuss the benefits of forming a union...”

How about the right to discuss the disadvantages of a union?

The letter doesn't mention this, and the union didn't say anything about it!

The Canadian laws have this way of “announcing only good news, not bad news”.

The last sentence is ironic enough:

“The union will take immediate legal action against any behaviour that restricts the freedom of speech.”

You tell me who is **“restricting the freedom of speech”**. Who is **implementing “the authoritarianism in the freedom of speech”**? Who is **“covering up one’s misdeeds by shifting the blame onto others”**? Who is **“getting a killing knife before coming to the throne”**?

I hope that you will now understand why I have kept my silence when some people kept giving promises; I was forced to shut up by someone who used laws as tools.

I am a news worker; my duty is to seek truth and facts. I know that the “killing knife” is pointed at me, but I am not afraid.

Right now, I am documenting all communication with the union, even small sentences and words, I will organize the notes and publish them under the title “My Fight with the Union” in *Ming Pao* at an appropriate time, to tell the world exactly what happened. Someone’s forgetting honour at sight of money, making use of others to get rid of an adversary and the sincere solidarity, etc.

You are welcome to phone me if you have any information. My 24-hour telephone number is xxxxxx.

Thank you for your sincere support!
Let’s work together to overcome this obstacle!

Jiaming Lu[Mr. Lui]
August 29, 2010¹

12. Later on August 29, 2010 Mr. Lui authored a front page article for the August 30, 2010 edition of the newspaper dealing with the Union’s organizing drive. The article was titled “Will Ming Pao lay-off its staff like Sing Tao?” A subtitle stated in part: “a member of the Ming Pao Union Organizing Committee, indicated yesterday that once the Toronto ‘Ming Pao’ union is formed, the union hopes that Ming Pao will try its best not to lay off its workers. However, if Toronto’s ‘Ming Pao’ has to reorganize and streamline its structure and so must lay off some staff, the Union has no way to stop that”. The front page also included **in English** a copy of a form extracted from a website published by an organization called labourwatch, titled “Notification of Cancellation of Application for Union Membership or Cancellation of Union Membership in a Union Drive”. The paper then translated verbatim extractions from the labourwatch website including information that advised employees that if they changed their mind and wanted to cancel their union card, they could complete the form and forward it to the Board. Both the content of the articles and the way they were processed is of concern to the union.

13. The text of the article contains references to lay-offs and comparisons to Sing Tao. In fact, consistent with the sub title of the article, it is the first issue discussed. The article states: [bargaining unit employee Paul Lee] accepted a telephone interview yesterday. The reporter asked him: “if A Ming Pao union was established, would it lay off staff in the same way as ‘Sing Tao’ did?” His answer is that the union hopes that Ming Pao will try its best not to lay-off any

¹ In this decision I quote several of Mr. Lui’s letters which have been translated. They may sound unusual to an English speaking ear. However, no party suggested I ought to take special note of the language used.

staff, but that the company can always decide to lay-off staff or not according to its requirements. The story continued:

...

He says that, as far as he is aware, Sing Tao Daily News, which has a union, has a staff of 130. According to the Human Resources records of Ming Pao, the paper now has a staff of 158, but Si Wei Li [Paul Lee] says that, as far as he knows, Ming Pao only now has over 140 staff members and that Sing To Daily News pays higher wages than Ming Pao, and therefore he hopes that once the union is established, Ming Pao's staff can still be paid at about the same level as its counterpart...

...Another member of the Union Organizing Committee approached staff of 'Ming Pao' to try to convince them to sign the union card to support the establishment of the union. While so doing, that member said: upon establishing the union, whether or not there will be layoffs of staff is an issue that will be negotiated between the union and the employer. In addition, whether by that time the staff of Ming Pao will enjoy pay and benefits equivalent to those of 'Sing Tao' will be subject to negotiation between the union and the employer. The same applies to whether part-time staff will enjoy any benefits. All of these issues will have to be negotiated by the union with the employer, and the union cannot make any guarantee at this stage.

14. What is not mentioned in the article is that the reporter conducting the interview was Tak Lam, the Deputy Chief Editor, a member of management (and later a member of the employer's bargaining team). The Board was provided with a partial transcript of the interview Mr. Lam conducted with Mr. Lee. Much of the interview (of the portion transcribed) relates to the possibility of lay offs and the comparison of staffing levels and terms and conditions of employment with Sing Tao.

15. After completing the interview Mr. Lam came back to the Ming Pao newspaper where he saw Mr. Lui, Ming Pao's Chief Editor and Chief Executive Officer. The two agreed that Mr. Lui would write the article that would appear in the next day's paper. However, as is discussed below, I note that Mr. Lui and Mr. Lam did not give consistent testimony in this regard.

16. It is to be noted that in the article Mr. Lui, the author of the article, refers to himself in the third person and reports on interviews with himself. It is also noted that the report on the discussion with bargaining unit employee Shan Fa Shao is a report of a discussion that Mr. Lui had with Shan Fa Shao while the two were having a smoke outside the company's offices. At the time Mr. Fa Shao believed that this was merely a friendly chat between two co-workers and had no idea that his words would be published. When asked in cross examination about the ethics of this Mr. Lui said it's okay to print if it is true.

17. In his testimony Mr. Lui defended the story on the grounds that it is provided as information about unions for the benefit of Chinese language readers. I do not believe him. What possible interest could Chinese language readers have in the labourwatch change of mind card? That was obviously put on the front page for the employees to see. More importantly, where did the issue of layoffs, which is so prominent in the story, come from? There had been no suggestion prior to the story that the company was contemplating lay offs. In fact, to the contrary (as we shall see), the company had recently announced that there were to be wage increases. The issue of lay offs had absolutely no relevance to the situation at Ming Pao at the time except as a threat against union organizing. There were also inconsistencies in the evidence about the way in which the story originated. Mr. Lui's evidence was that the news department had decided that the

story was newsworthy and that he happened to be in the newsroom on the night before the story was to run. He said he saw Mr. Lam there and asked him if he could help out and Mr. Lam asked him to write the story. Mr. Lam's evidence was that he and Mr. Lui had a discussion prior to the interviews with the employees and they agreed that the story should be run. What was left unexplained was why the story was "news" days after the union's announcement was made. It is also unclear how it came to occupy essentially the whole front page of the newspaper.

18. I conclude the story was a transparent attempt to scare employees by suggestions of lay-offs hidden by some freedom of the press defence. Mr. Lui's refusal to acknowledge the obvious, that the story was directed at Ming Pao's staff and was designed to send a threatening message to them, and the discrepancies in his testimony, throws his credibility into doubt.

19. The idea that the union was preventing Mr. Lui from saying what he really wanted to say first raised in the employer's August 29 letter was also present in the newspaper article on the front page of the August 30 edition. In the article, Mr Lui, quoting himself, says:

Even if economic recovery is very slow, apparently there are no signs of further deterioration and the corporation has made new strategic arrangements in every aspect, including staff benefits. The Toronto 'Ming Pao' staff's move to establish a union has now been reported to the head office in Hong Kong and will be a matter of special high concern. But at present he cannot provide a detailed explanation of the term 'special high concern', because the union has indicated that, under labour laws, there are various rules and regulations which forbid the company from announcing benefits policies during the union organizing stage. Hence, the company is now in consultation with lawyers in the hope that the company can explain to staff in detail during this legal period referred to by the union.

20. On or about August 31, 2010 there was a notice posted on the bulletin board in the staff coffee area titled "We need to Solve Our Own Problems" "Please Help us to Talk Directly to the Management." The notice was signed by four bargaining unit employees. However, other people, including a manager, had hand written statements at the bottom of the notice suggesting issues that needed to be addressed.

21. On September 1, 2010 Mr. Lui held a meeting with the four bargaining unit employees who had posted the notice and all other employees were invited. The meeting was attended by approximately 30 staff. One of the employees in attendance suggested that wages had not been raised high enough and Mr. Lui advised that he had gone to Hong Kong at the end of July and received permission to raise wages higher. He also said that because of the union drive he may not be able to give the wage increase at that time. [I note that, as we shall see, Simon Sung who attended the meeting had received a 3% wage increase by letter dated August 31 2010. Mr. Lui testified that this letter was issued in "error". He received another letter a few days later increasing his wage increase to 8%]. Another employee asked if there was a way for everyone to communicate better. Mr. Lui replied that in Malaysia the employees had formed an employee committee to solve the communication problem and that this might work in Toronto. He suggested the committee could deal directly with management regarding wages and other issues. Mr. Lui was also asked about new staff. Mr. Lui referred to Ming Pao's competitor Sing Tao and how they were able to operate with fewer staff than Ming Pao. He said that if Ming Pao were to operate at Sing Tao's level and pay the kind of wages they paid, Ming Pao would have to lay off 30-50 employees. In this, or another meeting held with production employees (where

similar issues were raised) some production employees complained that they required certain safety equipment.

22. Following the meeting Mr. Lui provided a document to all employees which stated:

Straightforward But with Regrets

We finally had an opportunity to talk; I'd use the word "straightforward" to describe the atmosphere of yesterday's meeting.

As long as no one has a hidden agenda or evil, selfish thoughts, anything can be on the table for discussion and debate.

I once worked under the leadership of Mr. Liangyong Zha, who had a famous remark: "Truth cannot be distorted; be free to express opinions." I think this is an excellent dictum for a news organization.

I believe that the majority of my colleagues, including me, would appreciate [Simon Sung's] straightforwardness and his courage to express his opinions.

The debate was heated, but full of friendliness and reason. This is what I mean by straightforward.

We will immediately do things that can be done immediately. Workers' protection belts and wrist bands are in the process of being bought.

Any 'regret', in spite of the straightforwardness? Yes. Because we didn't see those who'd often claimed that they were willing to communicate with us.

23. On September 4, 2010 the company issued another letter entitled "Plow Ahead Against the Wind and Waves" which referred to the September 1 meeting and announced responses to some of the issues raised at the meeting:

Greetings!

The leaves on the tree in front of the company have turned from green to golden yellow with a hint of red, bright and brilliant. The geese flying south in a perfect arrangement have swept through the blue sky, their honking reminding us of the importance of solidarity.

The beautiful fall in Toronto is crisp and clear; it is a generous gift from heaven, and I hope that you can truly enjoy it over the long weekend.

Gratefulness is a source of happiness. We'd rather be happy being poor than miserable being rich. To a family, things like love, tolerance and harmony are more important than anything else, even if we live a simple life. Of course, there are always people who love to be in a rich family that fights for wealth and enjoys plotting against each other and fighting for power and money.

Everyone has his or her own goal in life; a little difference in goals can make a huge impact on what kind of person one will be.

I spent some time in China in July and developed some new ideas about the content of the newspaper. I wanted to promote the ideas, but due to a little disturbance, I had to slow down.

Ming Pao Toronto has stepped [sic] in its 18th year; there have been all kinds of ups and downs since the inception of the newspaper. Disturbances are reminders to the management, and they are more of a motivation for not being lax.

In the meeting with our colleagues on September 1, some people raised the issue of the reserve fund. When this issue was raised ten years ago, many colleagues thought it was not necessary, but today, it has become very necessary due to changes in the economic structure.

Things change: in the past, we didn't have the HST, and now, everybody is complaining about it.

After Yonghong Zhang, our colleague in the Accounting Department, heard about this, he immediately contacted the bank and other financial institutions. We hope to arrange a seminar shortly, to share information with you.

Regarding the adjustment of salaries, we will soon issue notices after obtaining professional advice from our lawyer. Angie and Celia, in the Human Resources Department, worked until late at night to prepare for the notices; you will receive them on Tuesday, when you are back at work after the long weekend.

After we heard about the feedback from Guiquan Yi in the Binding Group, Ulrica at the Administration immediately bought protection waistbands for colleagues in the Binding Department.

Perry at the Printing Department is speeding up the arrangement of training classes that will allow colleagues who are interested in self-improvement to learn how to operate a planographic press.

The Advertising Department has strengthened the enforcement on the deadline of the advertisement drafts, and the work flow of the Graphics has visibly improved – you don't have to wait until after-hours, so you have more time to spend with your family.

The advertising staff has a little disagreement on this; I have explained to them that between the commercial interests and the employee benefits, the company needs balance. The advertising staff is the highest-paid group; I hope they don't mind it.

Four employees, Dongying Wang, Jaiqiao Li, Shunian Jiang and Guiqun Yi, initiated the meeting on September 1. The meeting was held publicly. They wished to use this as a foundation to form an Employee Committee to talk to the management regularly and get involved in decisions regarding the annual pay increases and benefit adjustments.

The company is in full agreement with forming an Employee Committee. *Sing Chow Daily* in Malaysia, in our group, has an organization like this; it has the right to work with the management in discussing pay and benefit adjustments.

I believe that many colleagues will be willing to participate in the forming of the Committee, just like Simon in the Printing Department: as soon as he heard about this, he wanted to join voluntarily, and he pointed to “We Need to Solve Our Own Problems” on the bulletin board in the lounge and said, “This is the right way of doing things.”

We will take actions to solve and tackle many issues and items. I will not go through all the details here.

How long will this disturbance last? Will the wind get stronger? Will the waves get fiercer? I have no idea. The only thing I know is to plow ahead against the wind waves – it is also the wishes of our colleagues at the company.

I sincerely wish for good health for every colleague; I wish your children to do well in school and grow up healthy, and I wish happiness for your families.....

Ming Pao Toronto

[signature]

24. On August 30, 2012, the Sales and Marketing department held a department meeting. Mr. Lui attended the meeting and indirectly referenced the department in his “Plow Against the Wind” letter. There was some oral testimony from company witness that Mr. Lui had frequently attended these meetings in the past and that that his attendance at this meeting was unrelated to the union organizing drive being significantly supported by the staff in that department. While it is true that Mr. Lui in the past occasionally attended Sales and Marketing department meetings it is also the case that this was a rare occurrence. Given that the union had just signalled its organizing drive, the topics discussed at the meeting and the frequency of his previous attendances, I find it more likely than not that his attendance at the meeting was in response to the union organizing. The parties agree that the minutes of the meeting reflect what occurred at the meeting and, while largely taken up with mundane matters, also included discussion of the following:

2. Departmental date and Discussion:

- Mr. KM [Mr. Lui] has expressed that the internal auditor appointed by Hong Kong head office have suggested different guidelines to all departments, which helps the company to develop in a more efficient and organized way, as well as to prevent corruption and loophole. Mr. Lui also stressed the importance that all staff should abide by the company office guidelines and deadlines.
- An interim memo regarding the advertising deadlines (see attached) is distributed. The existing deadlines with some updates are summarized for easy reference. All staff are requested to follow.
- With reference to Sing Tao Daily News advertising guidelines which protect the rights and interests of the staff, the following arrangement will be take effect:
 - i. In order to improve the sales control, the sales performance will be closely monitored. When any sales staff is unable to meet the sales target in 3 consecutive months, the staff can request assistance from the management, such as sales training, to make improvement. After other 3 months, the

sales performance will be reviewed. If no improvement is seen, the sales staff will receive official warning from the company. If the unqualified sales performance continues for 3 more months, the company will take further action, including dismissal.

- ii. Mr. Lui encourage all staff to research and get more accurate information about Sing Tao advertising guidelines for further reference.

25. The Union complains that these were measures designed to threaten and punish the sales department, especially the outside sales group, which was known to be the base of the union's support. The union notes that the visit by the auditor referred to in the minutes actually took place several months earlier in the first week of March. In fact, the head of the sales department Ms. Tang testified that she had discussed the auditor's directions at the sales meeting held on March 15, 2010. Her evidence was that Mr. Lui came to her prior to the August 30 2010 meeting and told her he wished to reinforce the auditor's directions. There was no real explanation for why it was necessary to reinforce the guidelines at that time.

26. Allan Lam, a sales employee, testified that the issue of Sing Tao's advertising guidelines had never been raised at a prior meeting and that the guidelines introduced at the meeting contained new elements. Also, there was repeated emphasis that the guidelines need be followed. It is noted that the guidelines on their face say "updated August 30, 2010". The guidelines changed the processes that the sales managers used to get advertising into the paper and made it more difficult to do so on short notice. Also, in practice the guidelines were not always followed in order to give service to a customer that wished to place an advertisement at the last minute, so the strict adherence to the guidelines was something new. The benefit to the company was that it reduced the amount of overtime by graphics employees who might have to stay late to get an advertisement in the paper. Thus the reference in the "Plow" letter to graphics employees spending more time with their families. Moreover, in the past when employees failed to reach sales targets they would be talked to by management, not disciplined.

27. It is apparent that Mr. Lui's attendance at and conduct of the sales department meeting was intended to intimidate sales employees in response to their union activity and I so find. There was no evidence before me that the sales employees had not been following the guidelines which would raise the need to remind employees of the advertising guidelines which the auditor had in March directed must be followed. Moreover, the reference to Sing Tao and the imposition of new harsh measures for failure to reach sales targets was clearly done for improper purposes.

28. A further event about which the union complains is the wage increase provided to almost all employees on or about September 3 2010. This wage increase is relevant both in its own right and in connection with the employer's claims to be losing money in mid 2011 which, in its submission, justified layoffs at that time. The details of the wage increase follow.

29. It was customary for Francis Tiong, the CEO of Ming Pao's parent company, to visit the Toronto office at around the time of the annual summer dinner Ming Pao held for all employees. 2010 was no different and the annual dinner was held on June 14, 2010. Prior to the dinner taking place there was a meeting of Ming Pao's executive committee which Mr. Tiong attended. At the meeting Mr. Tiong advised the executive committee that he had concerns about the economy. He was concerned interest rates, energy prices and paper costs were going to rise and that the economic situation in Europe would not improve, all of which might affect the profitability of the newspaper. Nevertheless he recognized that the Toronto operation was performing acceptably well and was prepared to permit a general wage increase for many of

Ming Pao's employees. However, the wage increase was "not to exceed the rate of inflation". In addition, a bonus might be provided to not more than 10% of employees.

30. At the annual employee dinner Mr. Tiong told all of the employees that he was pleased with the performance of the company and advised that they would get a wage increase. There was no amount specified.

31. On June 30, 2010 there was another executive committee meeting. The Company's Chief Financial Officer, Eddie Chong, who reported directly to the head office in Hong Kong, advised that instructions had been issued from Hong Kong regarding the wage increase. The average wage increase would be 2% as opposed to the inflation rate of 1.8%. The best performing 10% of employees would get 2%. Good performers would get 1.8%, average performers would get 1.5% and it was suggested that poor performers could be let go. It was also stated that commissioned sales employees and part time employees would not get an increase. Mr. Chong did not testify before me.

32. Finally, on August 5 there was another executive meeting. Mr. Lui reported back on his recent trip to Hong Kong. There is no suggestion in the minutes that there had been any change to the decision to keep wage increases to the inflation rate even though, as we shall see, the company asserts that on August 3 it had received permission to provide a substantial wage increase. Moreover, the CFO Mr. Chong indicated that there had been an unexpected increase in the cost of paper. The executive committee also discussed the importance of watching costs and, towards this end, there was a discussion about contracting out the entire production department. However, this idea was shelved. There was one money saving decision made at the meeting. The company's benefits provider had advised that in order to maintain the same level of benefits the company would see a sizable increase in its premiums. Accordingly, the company decided to reduce the benefits provided to employees so that the premiums would remain at the same level.

33. As noted, on August 31, 2010 a letter was sent to a number (the number was not put in evidence) of employees advising them of a wage increase. In the case of Simon Sung the letter indicated that he would receive a 3% salary increase retroactive to July 1, 2010. The increase would be reflected in his September 15, 2010 pay. He was advised that the increase was based on his overall performance for the year, added responsibilities "if any" and the market rate. Mr. Lui, who signed the letter, testified that he had signed the letter in mid August and that a mistake had been made. Accordingly, on September 3, 2010 the employer sent Mr. Sung a further letter providing for a stunning 8% wage increase. This was consistent with the raises of 5-10% given to virtually all employees at that time. Despite the initial directions provided by Mr. Chong part time employees also got an increase. Indeed, part time employees in the pressroom (among whom union support appears on the evidence not to have been high) received a 10% wage increase. Sales and traffic employees, excluding the outside sales employees who received no increase, were given an 8% raise.

34. The wage increase letter was provided to employees on September 7, 2010 (the Tuesday after labour day) and the day the application for certification was filed by the union. In order to get the letter typed out for all employees by that date the employer had two human resources employees working late into the night. Why the rush? Why the sudden urgency for something that had allegedly been in the works for weeks?" There was no explanation.

35. Although the employer claims that the union organizing campaign had no impact on the wage increase that evidence defies credibility. In fact, the employer's apparent change in policy from June, under which wage increases were to be provided which equal the rate of inflation (up to 2% for high performers), to August, when wage increases of up to 10% demand

an explanation, and the employer provided one. Mr. Lui testified that after June he was concerned that the wage increases approved by the company were not generous enough so, on a trip to Hong Kong in July, he asked for approval for greater increases. Prior to the trip he claims he had sent a proposal to Hong Kong. However, tellingly this proposal was not put into evidence. An email dated August 3, 2010 was, however, put into evidence. The email was from “ysfan”, the assistant to Mr. Tiong and attached to it was the following letter in English:

August 3, 2010

Re : Salary Adjustment for 2010-Ming Pao Toronto Office

Regarding the salary adjustment we discussed on July 31, 2010 during our meeting, your proposal of increasing the salary for 2010 by more than 2% but not exceeding 7% in average is feasible after consideration. I hope such salary raise would give the staff a significant impetus for better performance in the coming year. Please proceed.

36. The union is sceptical of the employer’s evidence on this issue and on balance I share that scepticism. I come to that conclusion on a number of grounds.

37. First, it is useful to start with the employer’s response to these allegations which are contained in its response to the application in Board file No.2071-10-U. The response states:

- The wage increases were approved by Head Office in June and July, 2010, prior to any organizing campaign. No announcements of wage increases were made as a result of any organizing campaign.
- In reply to paragraph 7 [of the application], announcements with respect to the wage increases were made after approval in June and July, 2010 by Head Office. No announcement was made on any percentage increase. Any increase was finalized only after consultation with department heads and approval by Head Office.

38. It is apparent from the employer’s response that the employer recognized that the timing of the making of the decision regarding the wage increase was a critical issue. In light of that it is curious that the August 3 email from Mr. Tiong was not produced to the union until December 2011 when the hearing was near its end. It is also curious that the email was not put before the Board during the hearing of the application in Board File No.2233-1-FC which was an application to determine whether the Board should order the parties’ first collective agreement settled by arbitration. That decision was issued on December 2, 2011 and the wage increase was an issue in the case referred to by the Board. It was only after that decision issued that the email turned up.

39. Curious too is the discussion regarding the wage increase in the newspaper article on the front page of the August 30, 2010 issue. In that article, the author Mr. Lui, quotes himself as follows:

In 2009, thanks to the lower cost of plain newsprint, and thanks also to the hard work of the staff, there were some gains in the company’s profit-but if one takes into account the unsuccessful business in San Francisco and the accumulated losses in New York, the company’s books were still far from being balanced. However, [Mr. Tiong], CEO of the Ming Pao group, felt that the efforts of the staff should be recognized, and decided that as of July 2010, staff pay should be increased at a rate which could offset inflation, and

that various department heads could decide on recommending staff with outstanding achievements to receive other additional awards. (emphasis added)

40. Mr. Lui did not explain how it could be that on August 30 he would report wage increases in line with inflation (consistent with the June executive committee minutes) when, according to the company's evidence, just a few weeks earlier he had gone to Hong Kong, requested permission for far greater increases and in a letter dated August 3, 2010 been given permission to proceed with wage increases far in excess of inflation.

41. In addition, there is no explanation regarding why the new wage increase approval was not the subject of discussion at the August 5 executive committee meeting. One would have expected such a discussion since the letter of Mr. Tiong (who did not testify) had arrived only two days before. In fact there is no record of there being an executive committee meeting where wage increase of 5-10% were discussed.

42. Furthermore, even accepting that the letter is legitimate, it was also not explained how Mr. Tiong's letter authorizing salary increases of 2-7% resulted in wage increases to some employees of 10% and to no employees, save those in outside sales, of less than 5%. Nor was there any explanation of how the company went from a merit based increase to a wage adjustment in which it appears all employees in the same job got the same increase. Finally, there was no explanation for how it can be that Mr. Lui and Mr. Lai made the wage increase decisions even without the input of department heads even though Ms. Tang, at least, was a department head on the executive committee.

43. Finally, there is no explanation for how it came to be that part time employees received a significant wage increase when it had been decided that they would receive no wage increase. Although, on this point, I think the explanation is clear. Many of the company's part time employees are employed in the company's binding department. In late August or early September Mr. Lui had a special meeting with the department and its manager in order to understand their concerns. One of the concerns was safety equipment and new safety equipment was almost immediately provided to these employees. It is also clear on the evidence that wages were also a concern raised by the manager and the wage increases of 10% addressed this concern too. No binding department employee was laid-off during the round of lay-offs in 2011.

44. The way that the wage increase were announced to the pressroom employees is also instructive. Mr. Lui called the pressroom operators to come to the employer's conference room. Each employee was provided with a letter indicating the amount of their wage increase. On a board in the conference room Mr. Lui had written a table comparing the different jobs and wage levels at Ming Pao and Sing Tao. Mr. Lui also compared the number of workers it took for Ming Pao to print the newspaper versus the number of press operators Sing Tao employed to do the same, noting that Sing Tao used fewer workers.

45. I can come to no other conclusion than the wage increases provided to employees were a violation of the Act designed to interfere with the organizing drive. While it is true that wage increases had been promised to employees in June, Mr. Tiong was concerned about the economy and gave instructions to keep the increases modest. These instructions were consistent with the cost concern atmosphere in management as exhibited in the executive committee meetings. The salary increases provided by the employer in September were completed in a hasty manner, were inconsistent with the instructions given as late as June 30 (and not contradicted in any other executive committee meeting) and inconsistent with the conservative economic atmosphere then prevailing. Telling is the fact that Simon Sung's initial raise was only 3% and,

according to Mr. Lui was determined in mid August after the employer alleges it had received permission for higher wage increases. Also telling is the fact that in the August 30 newspaper article Mr. Lui quotes himself as saying wage increases had been approved at the rate of inflation.

46. In addition to these allegations there were also a number of allegations made and evidence led with respect to attacks against members of the sales department in this period and later. I reserve on these issues in the hopes that following the release of this decision the parties can resolve them. However, if they are unable to do so, I remain seized to make findings of fact and, where necessary, direct appropriate remedies.

47. There are also allegations regarding a meeting that Mr. Lui had with the traffic department in the Fall of 2010. Mr. Lui made the suggestion that if the company was forced to spend a lot of money on legal fees it may have to reduce the number of employees. Mr. Lui advised also that in Vancouver Ming Pao there were only 2 traffic employees and in Sing Tao only one. As we shall see one traffic employee was laid off in May 2011. Following the lay off, the traffic department chair, Pinkie Chan, complained to management that there was too much work to do.

48. I am satisfied that the employer engaged in a number of very serious breaches of the Act in its conduct around the commencement of the organizing campaign and leading up to the filing of the application for certification. I will make specific findings at the end of this decision. Nevertheless once the union applied for certification, a representation vote was held and a majority of employees voted in favour of representation by the union. A certificate was issued by decision dated October 15, 2010. Bargaining for a first collective agreement commenced in or around January 2011 but did not proceed well leading to a strike in September.

The Lay-offs

49. On May 12, 2011 seven employees were laid off. On July 7, 2010 another three employees were laid off. The union challenges all of these lay offs as being influenced in whole or in part by a desire to punish the employees for exercising their right to choose to be represented by a trade union. The employer argues that the lay offs were occasioned by economic circumstances facing the employer and that neither the decision to lay off employees nor the choice of which employees would be laid off was influenced by improper motives.

50. The union has both a broad theory for the employer's conduct and more narrow theories for why particular employees were laid off. The union's broad theory is that since the commencement of the organizing drive the employer has been warning Ming Pao's employees that if they chose unionization, like Sing Tao's employees did, the negative aspects of Sing Tao's employment situation, particularly fewer employees, would be applied by the company in return. There are numerous examples of these kind of direct or indirect threats and comparisons set out above including the news paper article, meetings with employees, and the minutes of the sales department meeting.

51. The union's theory is significantly buttressed by the minutes of the executive meeting for November 19, 2010 which follows the union's certification and the union giving notice to bargain on October 22, 2010. Mr. Tiong attended the meeting, and apart from observations he had that the formation of the union will increase costs and impact the profits of the company and about the state of the economy, the following points were recorded under the heading "Labor Union":

1. Mr. Tiong noted that the company will handle the union issues. A collective agreement will be subject to if those suggested by the union are reasonable, for that the company has a bottom line.
2. Sing Tao Daily's no. of pages is more than that of Ming Pao's; however, they have less manpower than Ming Pao. **Such scenario needs to be reviewed and manpower needs to be streamlined.**

(emphasis added)

52. In my view Mr. Tiong's message, as recorded in the minutes of the executive committee meeting, is clear: because, like the Sing Tao employees, the employees of Ming Pao had chosen to join a union, the Company was intent on making the employment levels of Ming Pao more consistent with those of Sing Tao. The statement is made under the heading "labor union" and there is no independent business justification for streamlining employees. Lest there be any doubt that this was the intention, it is consistent with the message given by the company over and over again during the organizing drive: yes the Sing Tao employees have a union but they have fewer employees. Of course there is nothing wrong with a company wishing to match the employment levels and efficiency of a competitor. However, when an employer does so as a response to the union's certification, as is made clear by the minutes, that is a violation of the Act. Mr. Tiong was not called as a witness to give any other meaning to his statement.

53. As noted, collective bargaining commenced in early January. The union's bargaining committee included Simon Sung as chair and Allen Lam as vice chair. Both employees were to be laid off in May.

54. Near the start of bargaining the employer filed applications under s.114(2) of the Act asserting that four individuals who the employer had, in its response to the application for certification, declared were employees in the bargaining unit, were actually individuals excluded by the Act because they exercised managerial functions. The Board in Board File Nos. 3965-10-M and 4163-10-M held that the employer was bound to the agreement it had made during the certification process. In addition the employer had since the filing of its response to the application for certification maintained that Bruce Au and Zhang Zhi Ming, two senior press operators, were excluded from the bargaining unit by virtue of s. 1 (3)(b) of the Act. The union had throughout that period taken the position that they were employees in the bargaining unit. The dispute was settled in March (check) with the parties agreeing that the Au and Ming were employees in the bargaining unit. Both Au and Ming were laid off.

55. On May 13, 2011 the employer issued notices of "temporary lay-off" to seven employees including Alan Lam the vice chair of the union's bargaining committee and Simon Sung the chair of the union's bargaining committee. The other employee's laid off were: Agnes Leung, Billy Chan, Zhang Zhi Ming, Tracy Chan, and Brian Liu.

56. On July 7, 2011 the Employer laid off three more employees, Tania Lai, Bruce Au and Tony Lu. In each set of lay-offs the employer advised the employees that the measure was temporary. However, there is no suggestion any laid off employee has been recalled at the conclusion of the hearing of the matter.

57. The employer had to make a decision with respect to the clients of those four laid off individuals who were commissioned sales employees. Consistent with the company's actions when an account manager, Christine Lo, resigned in December 2010 (and was not replaced) the company decided to move clients who were represented by advertising agencies to inside sales

staff and then to distribute the clients who were not represented by advertising agencies to the remaining outside sales staff. As a practical matter the clients represented by advertising agencies were far more valuable to the sales employee than clients not represented by an agency. Therefore, the effect was to partially shift the company's sales business from outside sales staff to inside sales staff. The clients of the laid off employees were sent an email which read in relevant part:

Please be advised that Mr. Brian Liu is on temporary lay-off due to an interim restructuring of Ming Pao's business. In the meantime, to ensure the clients continue to receive high quality service from Ming Pao, Mr. Liu's accounts will be handled by other staff and the corresponding staff will follow up with you immediately.

58. During this period Mr. Liu also sent somewhat inflammatory letters to employees in which he appeared to equate unionization with "rotten Communist egalitarian ideology" and implicitly criticized sales employees for declining sales (apparently without considering the fact that laying off and not replacing experienced outside sales staff might cause a reduction in sales). He, however, praised an inside sales staff employee who emailed him at midnight.

59. Pursuant to s. 96(5) of the Act the onus of demonstrating that the layoffs were not motivated in whole or in part by anti-union animus rests with the employer. In my view, as discussed above, there is ample evidence that the employer had the intention of reducing the employee complement to Sing Tao levels as a result of the employees' choice. In other words, I accept that the employer had a demonstrated intention to lay-off employees in violation of the Act. The question becomes: did the employer act on that intention in May and/or July?

60. In this regard I note that the employer's intentions do not by necessity invalidate its actions in May and July. It was open for the employer to present cogent evidence that the decisions to lay off were not motivated by anti union animus, including a decision to reduce employment to Sing Tao levels as reprisal for unionization, but were necessitated solely by business considerations free of improper motivation. There are two parts to the exercise. First that the decision to lay-off altogether was not improperly motivated and second that the selection of those individuals to be laid-off was not improperly motivated.

61. On the first point the employer's argument is tenuous both with respect to the financial facts and on whether the company's decision was not based in part on reducing employee complement to Sing Tao levels (which goal I have already found to be motivated in part by anti union animus). On this latter point the employer asserts that the newspaper was performing very badly, having lost advertising pages and therefore revenues from advertising, the newspaper's main source of revenue, and therefore lay-offs were necessary. However, when company counsel asked Mr. Lui, who made the decision to lay-off employees in May, Mr. Lui's response referenced the Sing Tao issue: "Well for a long time the company thought we were employing too many people compared to Sing Tao. So for a long time we were trying to reduce the number of employees." Mr. Lui then referenced the November executive committee meeting. I note that the statement that the company had been reducing the number of employees for a long time appears false. According to the company's records, in May 2009 the company had 152 employees which was the same number it had in April 2011. Moreover, as we shall see, the company was advertising for employees to fill new/existing positions throughout the first half of 2011 and after the July lay-offs.

62. The company did produce financial documentation. That documentation showed that the company made a quite substantial pre tax profit in the fiscal year 2010-2011. In fact, it made

its greatest profit since 2006-2007. Having said that, much of the profit was as a result of a reduction in printing and paper costs. Advertising revenue remained stagnant for the previous three years at a level well below that in 2006-2008 before the world wide recession. But there was nothing in the overall 2010-2011 financial numbers which suggest that lay-offs were necessary or imminent.

63. So that leaves a claim that there was a precipitous drop in advertising revenue which led to the crisis necessitating lay-offs. In examination in chief Mr. Lui put it this way when asked by counsel for the company the reason for the lay-offs: It was “mainly due to a pretty big drop in our profits with a reduction in income [from advertising] and a rise of costs. While the market was still doing pretty good we still had a drop in profit and rising costs. That is a dangerous signal to the company that we need to control our expenditures. Otherwise the danger to the company would be so severe that we may need to close down”. Mr. Lui then pointed out that the lay-offs were only temporary and that once business conditions improved the company was committed to recalling the employees.

64. Mr. Lui also explained that the company had lay-offs in the past, specifically in April 2009 when the North American economy was in crisis. At that time the employer laid off 9 employees: two editors, one graphics employee, one advertising account executive, two production employees, and one in each of accounting, administration and circulation. In 2009 the company still made a profit despite the lay-offs. However, it was acknowledged that the financial crisis was far worse in 2009 than in 2011.

65. Mr. Lui testified that he was particularly affected by the period November 2010 to April 2011. Advertising revenue for that period was \$360,000 less than the year before in that period and costs were rising. Mr. Lui relied on the executive department meeting minutes of November 19, 2010 in support of the fact that he had received direction from Hong Kong. Again, and surprisingly there was no other documentary evidence other than that and in particular none from around May when the layoffs were implemented. Henry Tse, the art director and graphics department head, confirmed that there had been a decline in ads coming through the graphics department. However, he also testified that the decline in 2008-2009 had been more significant and at that time the company had only laid off one graphics employee (as opposed to three, including Mr. Sung, in 2011). The company also put in documents which purported to reveal a drop in ad pages in the relevant period. However, Mr. Lui and Mr. Lui gave conflicting evidence about what the documents showed and this conflict was never really resolved.

66. In examination in chief Mr. Lui was also asked who had participated in the decision to lay off employees. Mr. Lui's answer was that for a long time the company had been employing too many people compared to Sing Tao. Mr. Lui and Mr. Lai decided something needed to be done and contacted Hong Kong. There were no documents to support this claim. There had been discussion for more than five years about reducing the number of staff as compared to Sing Tao. Both he and Mr. Lai also said that they had discussions with all of the heads of the departments affected at least to provide data. This last claim was not backed up through the evidence. Both Mr. Tse and Ms Tang, the two department heads that testified, said they were not part of the decision that lay-offs were necessary and did not participate in the decision about who was to be laid-off.

67. Mr. Lui testified that he was also concerned about costs which led in part to selecting higher paid (and more senior) employees for lay-off. The concern about costs is problematic since part of the costs issue must have been that employees were provided overly generous and illegal wage increases as part of the effort to keep the union at bay in the Fall of 2009. In my view it hardly lies in the mouth of the employer and is contrary to the Act to lay-off employees as

a result of the company's own improper actions. This conclusion seems particularly appropriate since the outside sales group was, so far as I can tell, the only group of employees not to receive any wage increase at all yet suffered the brunt of the layoffs.

68. While the employer's position regarding the company's financial position was at least somewhat supported by financial records there was none of the type of evidence one might expect- evidence of meetings where the figures were pored over; evidence of financial calculations to determine how many employees were required to be let go; evidence of discussions about which types of employees the company could do without; evidence of discussions about which specific employees would be laid off; emails to Hong Kong laying out the plans. For a company of this size and sophistication this was surprising. I get the impression that these decisions were made by Mr. Lui and Mr. Lai getting together and making these decisions off the top of their heads.

69. Part of assessing the employer's argument is understanding how the newspaper earns revenue. As noted, the vast bulk of the employer's revenue is derived from advertising. Other revenue is generated through third party printing, circulation etc. but this revenue stream was quite consistent through the period in question. So it comes down to advertising.

70. The company's sales department was a prime focus in this case. As noted it consists of three groups of employees: Outside sales staff (Account executives/managers and senior account executives/managers) whose job is to sell the paper to potential advertisers. These employees' income is primarily commissions on sales but they have a small base salary. There are inside sales employees whose job, prior to the organizing campaign at least, was to take orders made by telephone and to make cold calls.

71. Mr. Lui gave what I thought was strange evidence regarding the outside sales force. He said that a reduction in the number of outside sales employees would not affect the amount of advertising the newspaper sold. This is counterintuitive and not credible. The reason the company employs outside sales employees is to secure new clients and new advertising from existing clients. It must be the case that a reduction in the number of outside sales employees would reduce advertising sales. Were it otherwise, it would make no sense for the company to employ outside sales employees in the first place.

72. As noted in December an outside sales employee, Christine Lo, left her employment with the newspaper. She was not replaced. Most of her clients were moved to inside sales employees. The union alleges that this was the start of a deliberate strategy on the part of the employer to shift sales work from outside sales to inside sales. The union alleges that this strategy was both a violation of s. 76 of the Act, because it was punishment for the outside sales employees overwhelming support for the union, and was a violation of s.86 of the Act- the statutory freeze provision.

73. On the whole there is no doubt that the company has made a plausible argument for economic justification for the layoffs. Advertising revenue was decreasing. However, the period of decrease was a relative short one and looking over the company's sales record one can see other periods of similar duration where there had been sales decline and the company had not acted by laying-off employees. The 2009 lay-offs which were of similar magnitude (9 employees let go) came about in a time where the company's advertising revenue had suffered a massive decline, far worse than in 2011.

74. In the end I cannot help but conclude that the decision to lay-off was in part motivated by the idea of "right sizing" *vis a vis* Sing Tao an idea which only came to fruition as a result of

the union organizing drive. That this was at least part of the motivation is clear from Mr. Lui's evidence about the company's desire to get in line with Sing Tao and the directions given by Mr. Tiong at the November 19th executive committee meeting. Moreover, I have already noted that in at least a few respects Mr. Lui did not provide credible evidence. I therefore find that the decision to layoff was tainted and must be overturned.

75. My decision in this regard is buttressed by the second aspect of the argument, that being the decision of who was to be laid off.

76. Mr. Lui gave evidence that he and Mr. Lai applied three general principles in deciding who was going to be laid off. These principles were saving the most money, seniority and performance. In this regard:

77. Brian Liu was laid off because he was the most junior sales executive working for Canadian Chinese Express.

78. Alan Lam was laid-off because he was the most junior senior account manager. He has been with the company since October 2002. Although he was vice chair of the union's bargaining committee the employer did not notify the union that he was to be laid-off. He was not offered a sales executive position or inside sales position even though he had more seniority than employees in those positions and the company was in the process of hiring inside sales employees.

79. Tracy Chan was an employee in traffic who was laid-off because when advertising revenue is reduced you have less need for employees in the traffic department. She was the most junior traffic employee.

80. Simon Sung, Billy Chan and Agnes Leung were all employed in the company's graphics department. Mr. Chan and Ms Leung were the most junior members of that department (with an exception which is noted below) and Mr. Sung was the next most junior having being employed since March 2007. Although Mr. Sung was chair of the union's bargaining committee the employer did not notify the union that he was to be laid-off.

81. Zhang Zhi Ming was one of the most senior employees at the newspaper having worked there for many years. He was a senior operator in charge of production. Mr. Lui testified that he was laid off because he had concerns about his performance, he was highly paid and he was the most junior of the (two) senior operators.

82. On July 7, 2011 the employer laid off Bruce Au the most senior employee in the employer's press department. Like Mr. Ming, Mr. Au's duties included scheduling and leadership on the night shift during which the daily newspaper is printed. He was laid off, according to the employer, because he was the most junior (in fact the sole remaining) senior operator.

83. On the same date the employer also laid off Tania Lai a senior account manager and Tony Lu an account executive dedicated to selling advertising in the Canadian Chinese Express. Ms. Lai was laid off because she was the most junior senior account manager. Mr. Lu was the most junior account executive.

84. I start my assessment with Zang Zhi Ming. Mr. Ming's status as an employee was in dispute for a considerable period of time. The company took the position that he was a member of management and the union took the position that he was an employee under the Act. The

almost certain consequence of the union's position is that the company realized that Mr. Ming was a union supporter. The parties settled their dispute on April 18, 2011. Less than one month later Mr. Ming, one of the longest serving employees in the company, was laid-off.

85. The explanation was that he was the most junior senior operator. There were plenty of much more junior operators than him that could have been selected for lay-off. But he was the most junior in the narrow classification of senior operator. Another more junior employee, Mr. Yip, was also a coordinator but was retained in his employment taking over Mr. Ming's duties. The company's explanation is difficult to accept.

86. The company's position can be compared to the position it took in the graphics department. There the company laid off the three most junior employees in the graphics department. However, there was a more junior employee. She was a recently hired senior graphics employee. Unlike the senior operator, Mr. Ming, she was not laid off. She was retained according to Mr. Lui because she had skills the other did not have. The same consideration was not given to Mr. Ming.

87. I can think of no reason why the company would not have retained Mr. Ming in his employment were it really basing its decisions on the criteria Mr. Lui testified were being applied. I find the alleged concerns about his performance after so many years of service without any apparent issue is just a weak attempt to hide the employer's true motivation. It is plain that anti union animus was at play.

88. It is convenient to remark that in July Mr. Au was also let go. He was the other senior operator and had been with the company for even longer than Mr. Ming, having been one of the first employees hired by the company when the newspaper was established. Like Mr. Ming his status as an employee was also at issue and he was part of the settlement in which the parties agreed that he and Mr. Ming were employees in the bargaining unit. For the same reasons that I have found the decision to lay off Mr. Ming was tainted by anti union animus I also find that the decision to lay off Mr. Au was also tainted. It is simply inexplicable that a properly motivated employer would not have retained the most senior operator it had.

89. As noted, at the time of the application for certification there were nine employees in the pressroom on any given night shift. After Mr. Au was laid off there were eight employees on the night shift. However, the company found it difficult to get the paper out with only eight employees so it hired an employee to come in at 3am to work for the last four hours of the shift. This decision is also indicative of improper motive because after the layoffs the company could not actually produce the paper.

90. Simon Sung was also on the union's bargaining committee. In early September 2010, when it was believed that the company would pay bonuses to some employees in addition to the wage increase granted Mr. Sung had a discussion with Mr. Tse. Mr. Tse said that the employees in the department would have vote over who should get the bonus. One of the two employees whom the employees voted for was Mr. Sung. I note however, that it is possible the reason they voted for him was because of his work with the union and not because of his skills in his job. Nevertheless, Mr. Sung's value to the company can be seen by the fact that he received an 8% wage increase in September, near the top of the scale.

91. Mr. Sung testified that Josephie Ken, the senior graphics designer had only one year's seniority. He testified that he can do anything she can do on the job. However, as noted previously, she was not laid off. The company also retained the two part time graphics employees. The company explained that the part timers worked nights and it figured that Mr.

Sung or the other laid off graphics designer would not want the part time jobs at night. In fact one of the part time employees resigned shortly after Mr. Sung was laid off and was replaced. Mr. Tse testified that the employees had been offered the part time positions in the past but they did not want to work nights. However, it is clear that there might be a different answer when refusing the position meant being out of work altogether.

92. Four of the ten employees laid off in May and July, Mr. Lam, Ms. Lai, Mr. Brian Lui and Mr. Lu were employed in the company's sales department. It is to be recalled that the union's organizing drive was centered in the sales department and that Mr. Lam, Ms. Lai and Mr. Lu had from near the beginning allowed themselves to be identified as being on the union's organizing committee. Mr. Lam was the chair of the union's bargaining committee and was present for collective bargaining.

93. Ms. Lai's case appears to me a straight forward case of punishing an employee for her support of the union. While it is true that at the time of her lay-off she was the most junior senior account manager she had more than seventeen years service with the company. She had more seniority than any of the remaining account managers. Her support for the union was well known as she had appeared in a youtube video posted by the union in which she spoke at a meeting of union members about her experiences. That video was seen by the employer. It is inexplicable why the employer would not have laid-off a more junior (non senior) account manager than Ms. Lai. But for the union organizing campaign I am sure she would not have been laid-off at all, but had there been a need for lay-offs the employer would have looked to the account managers first rather than lay off an employee with seventeen years service.

94. It is also notable that when the company laid-off employees in 2009 only one sales employee had been laid-off and that in 2011 the company was already down one outside sales executive since the commencement of the organizing drive because Ms. Lo had resigned and had not been replaced.

95. Part of the context too is that the company was actively engaged in hiring in this department from the start of 2011 on. On July 7, 2011 there was a classified advertisement in the newspaper seeking a sales manager who would "coach, lead and motivate the sales team" and report directly to Ms Tang. The company also has hired inside sales employees since the union has been certified increasing the complement of inside sales employees by two. Given that the company is pleading poverty in this precise period as justification for the lay-off four sales employees it is difficult to understand why it would be hiring another layer of management in the department.

96. Meantime, from the start of the year the company also placed frequent classified ads for inside sales employees (client service executives). The company also advertised in this period for a Circulation Manager, an iphone Developer, a Mobile Specialist, a contract Mobile Development Manager and Journalists.

97. It is also curious that Mr. Lui and Mr. Lai made the decision about who to lay-off without consulting with the managers of the departments affected. Even Ms. Tang, the manager of the sales department and who was also on the executive meeting did not give input. Mr. Lai testified that he had asked the managers for data or information on which to make their decisions but this was not confirmed by Ms. Tang and Mr. Tse in their evidence. Moreover, whatever data or information which was provided was not put into evidence before me. They denied any role in the decision at all. I conclude that Mr. Lai was not truthful in those aspects of his evidence.

98. In my view the employer has failed to discharge its onus that the decision to lay-off employees in the sales department was not motivated at least in part by anti union animus. Given that the lifeblood of the newspaper is selling advertising the lay-off of four employees in that department whose job is to sell advertising seems a disproportionate and irrational response to whatever economic issues were facing the company. On balance, it appears to be an attack on the source of the union's base of support.

99. While there is some evidence of an economic need for lay-offs I must ask myself whether the decision to lay-off was completely free of anti union animus. In the situation before me the company indicated an intention, as part of its response to the union certification, to downsize the company in order to make it more comparable with Sing Tao. That intention was voiced repeatedly to the employees and on November 19 in an executive meeting it was made explicit. I am particularly struck by the lack of evidence of any strategic discussion around the departments in which employees were to be laid-off and the effect of those lay-offs on the company's business going forward. There are no emails or documents or evidence of discussions where management expresses concern about a decline in business and then makes a decision to lay-off as a response. Instead, Mr. Lui in his testimony, referenced the November 19th meeting as being the source for his authority to take action. Not only was that meeting really before the sales decrease it was also, as noted, blatantly connected to the union success at Ming Pao. Finally, the choices made of who was to be laid-off was largely tainted by anti-union animus and difficult to justify on rational grounds.

100. I am also satisfied that part of the company's plan was to replace the sales executives with inside sales employees and this had anti union animus and was otherwise a violation of the statutory freeze imposed by s. 86 of the Act.

101. The Board finds the responding party has among other things:

- 1) threatened the employment security of employees contrary to s.70, 72 and 76 of the Act.
- 2) laid-off employees as reprisal for organizing a union contrary to s. 70, 72 and 76 of the Act.
- 3) attempted to initiate the creation of an employee committee during an organizing campaign contrary to s.70 of the Act (see *Burlington Golf and Country Club* [1996] OLRB Rep. 505 July/August).
- 4) granted wage increases for the purpose of urging the employees to oppose the union contrary to s. 70 of the Act (see *Knob Hill Farms Limited* [1987] OLRB Rep. Dec. 153).
- 5) solicited grievances during the organizing campaign and provided safety equipment and altered sales department guidelines contrary to s. 70 of the Act.
- 6) altered the way it conducted its sales business by moving sales from outside sales to inside sales employees contrary to s. 70, 72 and 86 of the Act.

102. Having regard to the foregoing, the Board:

- i. declares that the employer has violated s. 70, 72, 76 and 86 of the Act;
- ii. orders the employer to forthwith reinstate the ten laid off employees with full back pay and, in the case of commissioned sales employees, pay damages for future inability to earn full commissions;
- iii. orders the employer to make all efforts to ensure the clients of the laid off consumer sales persons are returned to them; and
- iv. orders the employer to post the attached “Notice to Employees” where it will come to the attention of employees and to keep it posted for 30 days.

103. I remain seized to deal with issues not determined by this decision, the quantification of damages and other issues with regards to implementation of this decision.

“Brian McLean”
for the Board