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Ontario Labour Relations Board HIGHLIGHTS

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Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in August of this year. Some of these decisions will appear in the July/August issue of the OLRB Reports:

Employment Standards – An executive's position as Vice-President Marketing was eliminated and, after some period of uncertainty, he was promoted to the position of Chief Operating Officer, although at a salary less than his contract had called for as V-P Marketing – The Board considered whether the reduction in salary was a result of a new contract of employment (that stipulated the reduction was to be increased when the company was sold, received new financing or increased revenues), or whether the reduction was simply a nominal one, to be paid back to the claimant at a later date – The Board found there to have been a specific agreement to be re-employed at the reduced salary, and accordingly there was no valid claim for unpaid wages – Application allowed

BECKLES, DALE, A DIRECTOR OF VALADEO TECHNOLOGIES; RE GENE LEWIS AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 2612-02-ES; Dated August 12, 2003; Panel: Patrick Kelly (7 pages)

Employment Standards – Notice of Contravention – The Board rescinded one Notice (failure to keep accurate records) since the Director failed to call any evidence and bore the onus pursuant to subsection 122(4) to establish that the applicant had contravened the Act – The Board reduced penalties in the other Notices to zero, since the applicant established she had complied with the section (agreement in writing to include vacation pay on each pay cheque) prior to the Notices even having been issued and the Director did not oppose the request to reduce the penalty to zero – Application allowed

BINS & BINS, 19966 ONTARIO INC. O/A; RE LORALEE GIBBS AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 3066-02-ES; Dated August 27, 2003; Panel: Mary Anne McKellar (5 pages)

Construction Industry – Construction Industry Grievance – The Board considered whether the painting of the water tower at Napanee was repair (falling within the definition of construction industry) or maintenance – The Board found that the coating, which was twenty years old, and thus the tower, had come to the end of its functional life – Accordingly, a major overhaul and upgrading was required, which was more than maintenance; it was repair work falling within the construction industry definition – Matter continues

BLASTCO CORPORATION; RE ONTARIO COUNCIL OF THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES AND INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 114; File No. 2368-02-G; Dated August 19, 2003; Panel: David A. McKee (15 pages)

Construction Industry – Sector Determination – The Board considered whether the painting of a new elevated water tower in the community of Palmerston in the Town of Minto was within the ICI sector (Painters' position) or the sewer and watermain, heavy construction or a new sector (Blastco's and the intervenors' position) – The Board found that "end-use" was not determinative since it was equally divided between ICI (its

storage function) and sewer and watermain (its pressure maintenance function); work characteristics pointed more consistently to the ICI sector than any other, and bargaining patterns had virtually no weight – Since there was no overwhelming imperative arising from any one factor, the Board weighed the preponderance of evidence and found it favoured the ICI sector

BLASTCO CORPORATION; RE ONTARIO COUNCIL OF THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES AND INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1824; RE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL 128; TOWN OF MINTO; LANDMARK ONTARIO LTD.; File No. 3661-02-M; Dated August 19, 2003; Panel: David A. McKee (16 pages)

Certification – Construction Industry – Practice and Procedure – Unfair Labour Practice – During the cross-examination of the responding parties' central witness, the applicants attempted to explore an unparticularized allegation of impropriety between the respondent and the intervenor, an unaffiliated union – After adjourning the matter the Board considered whether to permit the applicants to amend their pleadings to add these particulars and whether to consolidate the newly filed unfair labour practice applications, which had incorporated these additional particulars – The Board did not permit amendments to the pleadings for three reasons: first, the Board found the applicants could have and should have investigated these matters prior to the witness' testimony (lack of reasonable due diligence); second, although the legal onus is on the applicants in all four applications, the employer is required to lead evidence first in the two representation applications, and accordingly, it would be unfair to allow the applicants to graft the unfair labour practice complaints on to the ongoing representation applications, thereby gaining a procedural advantage; third, the prejudice to the responding parties and the witness could not be remedied – Additionally, the Board exercised its discretion to decline to inquire into the unfair labour practice applications, without prejudice to the applicants filing similar or expanded applications – Motion denied, unfair labour practice complaints dismissed

BRIECAN CONSTRUCTION LIMITED; BRIE CONSTRUCTION INC.; LEVERT INDUSTRIES LIMITED; ALLAIRE MECHANICAL, A DIVISION OF CLARA HOLDINGS (ONTARIO) INC., LEVERT PERSONNEL RESOURCES INC., CLARA HOLDINGS (ONTARIO) INC.; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 786; RE NORTHERN ONTARIO WORKERS' ASSOCIATION; File Nos. 0936-00-R; 1993-99-R; 0552-03-U; 0553-03-U; Dated August 5, 2003; Panel: David A. McKee (7 pages)

Duty of Fair Referral – Unfair Labour Practice – The applicant alleged that the union hiring hall practices were arbitrary, discriminatory or in bad faith since he was not offered work for a period of time and because he went from the top to the bottom of the hiring hall list after quitting a job he had accepted – First, the Board found that he was offered work during the period and that his inability to recall offers of work was insufficient to establish his case in light of the information provided by the union – Second, in response to the applicant's argument that there was plenty of work available and consequently he should have had more offers, the Board found that the union was not obliged to show the correlation between its work referrals and the list unless there is a specific allegation that the union's by-laws or s. 75 had been breached – Since no specific allegations were raised (they were raised for the first time at the consultation), the Board did not require the union to produce details of the referrals [see *Maurice Doyon*] – Finally, the Board considered whether the union's interpretation of the by-law, resulting in the placing of the applicant's name at the bottom of the list for not reporting to work without a valid excuse was unreasonable – The Board did not find the union's interpretation unreasonable; found the onus rests on the union member to inform the union of any restrictions on referral; and given that the applicant did not even follow up the union's offer to review its decision to put him at the bottom of the hiring hall list, found no basis for his allegation that the decision was discriminatory – Application dismissed

MCKENNY, SEAN; RE THE UNITED BROTHERHOOD OF CARPENTERS ANDS JOINERS OF AMERICA – LOCAL 93; File No. 0716-02-U; Dated August 6, 2003; Panel: Christopher J. Albertyn (6 pages)

Duty of Fair Representation – Trade Union – Unfair Labour Practice – The applicant, a ten year employee of a nursing home, was

discharged for violation of policy (not reporting that a resident had fallen) – The Board found that the union's unexplained, sixteen-month delay in dealing with the applicant's discharge grievance was arbitrary conduct (lack of ongoing, timely communication) and accordingly a violation of section 74 of the Act – Application granted – The Board requested submissions from the parties as to remedy

MILES, JOYCE; RE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 204; File No. 3889-02-U; Dated August 8, 2003; Panel: Brian McLean (8 pages)

Duty of Fair Representation – Trade Union – Unfair Labour Practice – The applicant, a registered nursing assistant, was discharged from her employment for alleged patient abuse – The Union was unable to explain why, six days after it had decided to proceed with the grievance, it chose to withdraw it – Further, it did not explain why it never responded to the applicant's appeal through the union's internal process – Finally, the College of Nurses review of the conduct resulted in a non-disciplinary caution letter – The Board found that the Respondent did not put sufficient consideration, especially in light of the seriousness and complexity of the matter, into its decision – The Board found the union acted arbitrarily, in breach of section 74, and ordered the union to take the applicant's grievance to arbitration while relieving against any time limits which might prevent the grievance proceeding to arbitration – Application granted

PARKER, SHARON; RE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 183; RE CARESSANT CARE NURSING & RETIREMENT HOMES LTD.; File No. 3689-01-U; Dated August 14, 2003; Panel: Brian McLean (6 pages)

Construction Industry – In Schedule "A" the Board defined, with precision, the boundaries of Board Area 8 (including the lakes and beds of Lake Ontario and Lake Simcoe which come within the boundaries of the City of Toronto and the Township of Georgina) – Although the Board will continue to refer to Board Area 8 in its traditional manner, the Board will rely upon the definition in Schedule "A" in the future, should an issue arise as to whether a particular project is within Board Area 8 or not

TORONTO CONSTRUCTION ASSOCIATION; RE PARTIES LISTED IN SCHEDULE "B"; RE TORONTO-CENTRAL ONTARIO BUILDING AND CONSTRUCTION TRADES COUNCIL; File No. 1633-02-M; Dated August 14, 2003; Panel: David A. McKee, G. Pickell, A. Haward (7 pages)

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Some of the decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Library, now located on the 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Missisauga of Scugog Island First Nation v. CAW-Canada & its Local 444, Great Blue Heron Gaming Co. Court File No. 585/03	1271-03-U; 1336-03-M; 1414-03-M	Motion dismissed Oct. 9/03
Rol-Land Farms Ltd. v. UFCW Court File 33013/03 – LONDON	1025-03-R	Dismissed Sept. 18/03
Director of Employment Standards v. William Brown**, North York Chevrolet Oldsmobile Ltd**.	2235-02-ES	Pending
Thyssen Elevator Ltd. cob as Thyssenkrupp Elevator v. National Elevator & Escalator Assoc., Int'l Union of Elevator Constructors Divisional Court File No. 410/03	2087-01-U	Pending
Girotti St. Catharines Ltd. v. Millwrights Union Local 1007 Divisional Court File No. 368/03	3060-02-G	Pending
Teamsters, Chemical, Energy and Allied Workers, Local Union 1880 v. **Dominion Colour Corp**. Divisional Court File No. 391/03	0425-02-U	Pending – Jan/Feb. 2004
CAW-Canada v. **National Grocers Co. Ltd**. and UFCW, Locals 1000A, and 175/633 Divisional Court File No. 382/03	0137-02-R; 0139-02-R; 0179-02-R; 0450-02-U	Pending
Greater Essex County District School Board Divisional Court File No. 276/03	3398-00-R	Pending
Windsor-Essex Catholic District School Board Divisional Court File No. 277/03	3426-00-R	Pending
OPSEU v. **Ontario Hospital Association** Divisional Court File No. 83/03	3631-02-U	Pending
Canadian Health Care Workers v. CAW-Canada, **Central Park Lodges** et al Divisional Court No. 646/02	1951-01-R; 2179-01-R; et al	Pending
CAW-Canada & its Local 385 v. **Coca-Cola** et al Divisional Court No. 751/02	0179-01-R; et al	Dismissed October 10/03
Marc A. Crockford et al v. UFCW et al Divisional Court No. DV-543/02	1350-99-U; 2809-99-U	Dismissed Sept.30/03
Ottawa-Carleton Public Employees Union Local 503 – CUPE v. **Ottawa Transition Board**, et al Divisional Court No. 02-DV-723	2353-00-PS	Pending – Nov. 27/03
Rosalina Papa v. HERE Local 75, et al Divisional Court No. 283/01	0426-00-U	Pending

Case name & Court File No.	Board File No.	Status
Rocco Tassone v ATU Local 113, et al Divisional Court No. 84/02	3527-96-U	Pending – Nov. 18/03
William McNaught v. TTC, et al Divisional Court No. 254/02	3616-99-U; 3297-99-OH	Heard Dec. 12/02; reserved
Dundas Realities Ltd. v. MOL, et al Divisional Court No. 01-5359	3256-99-ES	Abandoned Sept. 23/03
Tender Choice Foods Inc. v. Mirjana Jazvin Divisional Court No. 454/02	3058-01-ES	Adjourned