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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 June of this year. Some of these decisions will appear in the May/June issue of the OLRB Reports:

Dismissal – Employment Standards – In this employer review of an order to pay the Board finds that a failure to leave a vehicle in park (thereby causing damage to other company vehicles) was not "wilful misconduct, disobedience or wilful neglect of duty" – The Board found that although such conduct was neglect of duty, it lacked the requisite element of conscious, deliberate or reckless neglect to be considered "wilful" – Application dismissed

ABOUTOWN TRANSPORTATION LIMITED; RE AGNES LEMPRIERE AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 1467-02-ES; Dated June 11, 2003; Panel Christopher J. Albertyn (3 pages)

Certification – Construction Industry – Practice and Procedure – Status – The Board considers and applies the analysis in *Quadracon* [*1206468 Ontario Ltd. (c.o.b. Quadracon)* [2000] OLRB Rep. Sept/Oct 989] to this case, namely, those eligible to vote would be all those who performed bargaining unit work on the date of application, with voter eligibility not being restricted to those possessing a certificate of qualification – The Board comments that the policy change in *Quadracon* continues to apply: for the purposes of a certification application, it is not up to the Board to ascertain that individuals have certificates of qualification – the *Act* contemplates that if they are trades people who exercise a craft they will be part of a craft bargaining unit

ACTIVE MECHANICAL INC.; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATON, LOCAL 473; File No. 0585-02-R; Panel: Laura Trachuk (10 pages)

Employment Standards – In these employee appeals, the Board considered whether the three applicants, aged 11, 13, and 13 were entitled to minimum hourly wages and vacation pay under sections 23 and 35 of the Act for their door-to-door chocolate sales – The Employment Standards Officer concluded that the applicants were entitled only to outstanding commissions on sales, not hourly wages and vacation pay, as the children were "salespersons" (exempted by Section 2(h) of Regulation 285/01) and not "route salespersons" – The Board canvassed the legislative purpose behind the differential treatment of commissioned salespeople and route salespeople, and found that the applicants were in fact "route salespersons" since they exercised little or no control over the manner in which sales were conducted – Accordingly, the applicants were awarded minimum hourly wages and vacation pay, in addition to the commissions already ordered – Application allowed

AMATO, MARIA AND GIUSEPPE AMATO O/A THE ALL ONTARIO YOUTH GROUP AND MINISTRY OF LABOUR; RE ALEX ORLOV, SAMEER JALALZAI, AND ZAKI JALALZAI; File Nos. 2319-02-ES, 2342-02-ES, 2343-02-ES; Dated June 23, 2003; Panel: Kevin Whitaker (8 pages).

Construction Industry – Jurisdictional Dispute – A dispute arose during a period of downsizing

and subsequent lay-offs between the Labourers and Cement Masons over which of them should perform the work of laying and finishing of cement floors – The employer, Bravo, was bound by both of the two trades' provincial collective agreements – The work in dispute included operating a laser screed, saw cutting & concrete drilling, and cement finishing – Although the collective agreement analysis favoured the Cement Masons, the employer practice significantly favoured the Labourers – The laser screed, which had been in use since 1992, had only been used by the Labourers; saw cutting & concrete drilling was done exclusively by the Labourers for many years; and while a majority of cement finishing was done by the Cement Masons, five senior members of the Labourers had been performing this work as well for over twenty years – The Board upheld the employer's decision to retain long term employees (Labourers) and to assign them some cement finishing work of the sort which they had been doing for years and to lay off the more recently hired employees of the Cement Masons – The Board found that the ability to assert and maintain a claim *for members of the union* must surely imply that (a) there are members of the union to whom the work may be assigned, and (b) that they have the skills to do the work – A claim for work which is not grounded in those two factual contexts will not likely achieve much success – Application succeeds

BRAVO CEMENT CONTRACTING (WINDSOR) INC.; OPERATIVE PLASTERERS', CEMENT MASONS', RESTORATION STEEPLEJACKS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA UNION, LOCAL 598, AND; RE LIUNA, LOCAL 625; File No. 2628-02-JD; Dated June 19, 2003; Panel: David A. McKee (15 pages)

Certification – Representation Vote – The Board followed its practice and jurisprudence (*Crocodile Labour Services* and *Theatrecorp Ltd.*) in this industry and found, for reasons similar to those underlying its practice in the construction industry, that only those at work in the bargaining unit on the date of application were entitled to vote

CANADIAN STAGE COMPANY, THE; RE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, LOCAL 822; File No. 2662-02-R; Dated June 18, 2003; Panel: Laura Trachuck, J.A. Ronson, R.R. Montague (4 pages)

Construction Industry – Certification – The Board considered whether the applicant union was entitled to certification under the construction industry provisions notwithstanding that it was not "a trade union that according to established trade union practice pertains to the construction industry" as defined in section 126(1) of the Act – In light of the new amendments to the Act, the applicant challenged the Board's previous decision in *Ontario Hydro*, where it was found that only an existing and established construction trade union could apply for certification under section 158(4) – The Board held that the construction industry definitions continue to apply to all of the construction industry provisions, that the definition of trade union in section 126(1) does not conflict with the definition of trade union in section 1(1) and that section 126(1) acts as an additional requirement that an applicant must meet if it is applying for certification under the construction industry provisions – Since the applicant acknowledged that it was not a trade union that according to established trade union practice pertained to the construction industry, the Board found that it was not a trade union under section 126(1) and therefore could not be certified under the construction industry provisions – The Board did not consider whether the applicant could have been certified under the non-construction provisions of the Act – Application dismissed

FURFARI CONSTRUCTION LTD. RE FURFARI CONSTRUCTION EMPLOYEES' ASSOCIATION; File No. 4137-02-R; Dated May 29, 2003; Panel: Laura Trachuk, J. Tomlinson, G. McMenemy (5 pages).

Employment Standards – In this employer appeal, the Board considered whether the employee had voluntarily quit her employment or was unlawfully terminated upon her return from maternity leave – The Board found that neither of the versions of the parties was more reliable or probable than the other, and therefore was unable to conclude whether there had been a termination or resignation – Accordingly, the Board held that the employer had not discharged the statutory burden of proof that it did not violate section 74 of the Act – In its assessment of an appropriate remedy, the Board determined that the Employment Standards Officer had not sufficiently entertained the remedy of reinstatement due to the employee's unproven allegation of a "poisoned" environment – The Board concluded

that there must be very compelling reasons not to consider the remedy of reinstatement, that there was nothing particularly egregious about these circumstances, and that the Officer should have ordered reinstatement – The damages were thereby reduced as the employer had offered to continue the claimant's employment – Application allowed in part

HAWRYLYSHYN, DR. NICHOLAS; DR. ROBERT KRZEWSKI AND DR. NANCY TING OPERATING AS SQUARE ONE DENTAL CENTRE; RE: DELORES, A.K.A. CHRISTINE JABALEE AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 1721-02-ES; Dated June 23, 2003; Panel: Patrick Kelly (9 pages).

Bargaining Unit – Certification – The applicant sought to certify certain workers of the employer, who had a contract with the Greater City of Sudbury to provide security and bylaw enforcement services at various locations for the city – The applicant sought a bargaining unit consisting of employees at some but not all of the permanent landfill sites, and excluding the mobile landfill sites, and the City's administration and transit centres – The employer suggested that the most appropriate unit would encompass all employees – At the hearing, the applicant sought to expand its bargaining unit to include all the permanent landfill sites – The Board found that even this expansion was not an appropriate bargaining unit as it would cause undue fragmentation – The Board examined what would constitute an appropriate unit in the context of this workplace and determined that all landfill employees (permanent and mobile) could be appropriate, given that there was no apparent intermingling with the other employees at the administration and transit sites, and that a separate unit of landfill employees would not cause serious labour relations problems for the employer – The parties were given an opportunity to address the labour relations consequences of the Board's proposed unit – Submissions invited

HI-TEC SECURITY & INVESTIGATIONS LTD.; RE U.F.C.W. Local 333; File Nos. 1902-02-R; 3848-02-U; Dated June 4, 2003; Panel: Christopher J. Albertyn (7 pages)

Financial Statements – Practice and Procedure – Trade Union – The applicant complained he had not received the audited financial statements from the Union that he was entitled to pursuant to sections 92 and 93 of the *Act* – The Board noted the distinctions between the requirements in section 92 and 93 and the Board's jurisprudence that the latter requires the services of a chartered accountant, while the former does not – The Board found that the trade union is only required to produce a financial statement for its "last fiscal year" pursuant to section 92, and that section 93 only refers to vacation pay, welfare and pension funds – The Board found that the complainant had received copies of all the financial statements to which he was entitled and that the statements met the requirements of the Act – Application dismissed

JOANISSE, MARCEL; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 105; File Nos.1836-02-M; 1837-02-M; Dated June 13, 2003; Panel: David A. McKee (12 pages)

Employment Standards – In this employee appeal, the Board considered whether the applicant's lay off was somehow related to her impending maternity leave, thereby entitling the applicant to lost wages for a contravention under section 74 of the Act – The employer argued that the decision to lay off the applicant was entirely related to *bona fide* business and economic considerations – The evidence showed that the applicant lacked certification, the staffing levels were higher than necessary, other employees had also been laid off and that no additional staff had since been hired to replace the applicant – The Board found that the employer had satisfied its burden of establishing that its decision to lay off the applicant was not in any way connected to the applicant's pregnancy and/or her eligibility or intention to take a leave contemplated under Part XIV of the Act – The Board concluded that section 74 does not insulate employees from *bona fide* business decisions, which are not in any way related to an employee's eligibility or intention to take a leave – Application dismissed

MENORAH NURSERY AND DIRECTOR OF EMPLOYMENT STANDARDS; RE: ESMERALDA MELGAR; File No. 2845-02-ES; Dated June 10, 2003; Panel: Caroline Rowan (5 pages)

Certification – Construction Industry – On a request by the intervening union the Board declined to exercise its discretion to treat the intervener's, not yet filed, certification application pursuant to s. 113 of the *Act* as if it were filed on the same day as the Applicant's – First, since the intervener's certification application had not been

filed the threshold for considering the exercise of discretion under section 113 had not been met; and secondly, due to the competition for the "hearts and minds" of employees and the importance of "date of application" in the construction industry, treating the two applications as having been made on the same day would simply create more litigation

PROMARK ALUMINUM LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS DRYWALL AND ALLIED WORKERS, UBCJA; File No. 1013-03-R; Dated June 25, 2003; Panel: Mary Ellen Cummings, John Tomlinson, A. Haward (3 pages)

Construction Industry – Jurisdictional Dispute – Practice and Procedure – Subsequent to a pre-consultation conference, which the employer did not attend, resulting in a decision from the Board describing the work in dispute pursuant to the agreement of the three union parties who attended the pre-consultation conference, the applicant sought production of certain documents from the employer – The Board noted that the objective of the consultation process in work assignment disputes was to provide the parties with a relatively quick, efficient and fair determination of their dispute – The Board found that a production order at this time would not meet these objectives as it would undermine the schedule the Board had fixed for the filing of briefs and the consultation; the material requested in the order was not necessary or even appropriate, in any event; and that parties in jurisdictional disputes generally know the relevant facts that tend to support their position – Accordingly, in the absence of compelling reasons for requiring production, the Board denied the request

ROBERTS GROUP INC., THE; UA, LOCAL 593, AND IBEW, LOCAL 120; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 736; File No. 0523-03-JD; Dated June 25, 2003; Panel: Harry Freedman (3 pages)

Certification – Remedy – Representation Vote – Unfair Labour Practice – Despite its failure to file membership evidence of at least 40% of the employees in the proposed bargaining unit, the applicant submitted that the Board should order a representation vote as a remedy in an unfair labour practice application it had also filed – For the purposes of dealing with this remedial request, the Board accepted that the applicant could establish in its unfair labour practice complaint that the responding party's violation of the Act was so egregious that employees were, in effect, unable to sign membership evidence – The Board found that s. 96(8) expressly prohibits such a remedy in a section 96 application and that pursuant to section 10 the Board *shall dismiss* the application – Applications dismissed

SEWER MATIC SERVICES; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File Nos. 0122–03–R; 0123–03–R; Panel: Harry Freedman, J.A. Ronson, R.R. Montague (5 pages)

Court Proceedings

***Employment Standards Act* – Judicial Review – Strike –** The Board reviewed an ESO's refusal to issue an order requiring the employer to pay holiday pay to each of the claimants in respect of a public holiday – The claimants' Union had advised the employer that a legal strike would begin two days after the public holiday – The employer directed the employees not to report for work on the day following the public holiday – To successfully claim holiday pay, the claimants must be found to have worked on both their last scheduled regular day of work preceding the public holiday (which they did), and their first scheduled regular day of work following the public holiday **–** The issue before the Board was whether the claimants' scheduled regular day of work following the public holiday was the day the strike began or the day of recall after it ended – The Board noted that an employer retains the right, during a strike, to continue its operations and schedule employees – The Board held that on a plain reading of the Act, a day on which an employee is participating in a lawful strike can be a scheduled regular day of work – The Board also noted that the alternative interpretation leads to a result where employees during a long strike could be entitled to holiday pay for a number of days, and that such a result would be unreasonable – Since the claimants failed to work their scheduled regular day of work following a public holiday they were not entitled to holiday pay – Application dismissed – The Court found on a reasonableness standard, that the Board's decision was a reasonable one, supported by a tenable explanation in keeping with a purposive interpretation of the *Act* – Application for judicial review dismissed

DISTINCTIVE DESIGNS FURNITURE INC., MINISTRY OF LABOUR AND OLRB; RE HAIMANOT ABEBE ET AL; File No. 3704-01-ES (Court File No. 30/03); Dated June 30, 2003; Panel: Lang, Somers, Epstein JJ. (8 pages)

Construction Industry Grievance – Judicial Review – Natural Justice – Practice and Procedure – Reconsideration – Related Employer – Unfair Labour Practice – The Board heard a related employer application, unfair labour practice complaint and grievance and reserved its decision on the last day of hearing, September 1998 – On December 30, 2000 section 115.1 of the *Act* (Chair's discretion, on application by a party, to terminate a proceeding where over six months have passed with no decision or order) became law – On April 12, 2001 the applicant applied to the Chair under s. 115.1 – On May 7, 2001 the Board issued its decision – In July 2001 the Chair issued a decision dismissing the 115.1 application and then issued a reconsideration of that decision confirming that the Chair saw no reason to exercise his discretion, assuming it still existed (after the "overdue decision" had issued) – The Court held that the former Chair's decisions not to exercise his discretion were not patently unreasonable – The Court also found that the Board's related employer decision was not patently unreasonable – Finally, the Court found that the thirty-one month delay was not a denial of natural justice – A "determination of whether delay is inordinate is not based on the length of delay alone, but on contextual factors" and given that there was no evidence on the record that anyone's sense of fairness was offended by the delay (there was no evidence of any inquiry as to when or if the decision would be forthcoming), the delay was not considered oppressive and the proceedings not tainted – Applications were dismissed

K2 CONTRACTING INC. KANTEC ELECTRIC INC. CRANHAM HOLDINGS LIMITED, BOLDT ELECTRICAL CO. (1991) LTD., CARLING ELECTRIC INC. AND OLRB; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586; File Nos. 0007-96-R; 0006-96-U; 0008-96-G; 0172-01-M (Court Files Nos. 01-DV-666; 01-DV-667); Dated June 23, 2003: Panel: O'Driscoll, Cusinato, Howden JJ. (11 pages)
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586; RE K2 CONTRACTING INC. KANTEC ELECTRIC INC. CRANHAM HOLDINGS LIMITED, BOLDT ELECTRICAL CO. (1991) LTD., CARLING ELECTRIC INC. AND OLRB;

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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
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
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
Haimanot Abebe et al v. Distinctive Designs Furniture Divisional Court File No. 30/03	3704-01-ES	Dismissed June 30/03 [see Scope Notes]
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	Pending
Marc A. Crockford et al v. UFCW et al Divisional Court No. DV-543/02	1350-99-U; 2809-99-U	Pending
IBEW Local 586 v. K2 Contracting et al Divisional Court Nos 01-DV-666; 01-DV-667	0007-96-R; et al	Dismissed June 23/03 [see Scope Notes]
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
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	3616-99-U;	Heard Dec. 12/02; reserved

Case name & Court File No.	Board File No.	Status
Divisional Court No. 254/02	3297-99-OH	
Dundas Realities Ltd. v. MOL, et al Divisional Court No. 01-5359	3256-99-ES	Pending
Tender Choice Foods Inc. v. Mirjana Jazvin Divisional Court No. 454/02	3058-01-ES	Adjourned