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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 July of this year. These decisions will appear in the July/August issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.canlii.org.

Employment Standards – Evidence – Practice and Procedure – Employer in application for review under section 116 of the *Employment Standards Act* sought to call the claimant employee as its witness in the hearing, and asserted a right to cross-examine the employee – No dispute that employee could be called as a witness by the Employer, but parties disagreed regarding Employer's right to cross-examine – Board noted that legislation and custom in Quebec permitted an employee to be called and cross-examined by the opposing party employer – Practice not supported in Ontario law and custom – Board reviews its jurisprudence governing a party's ability to cross-examine its own witness, including the concepts of an adverse witness or a hostile witness – Board also made reference to Ontario's *Evidence Act* and *Rules of Civil Procedure* which, while not binding on the Board, helped illustrate Ontario custom and practice and differentiate these from Quebec custom and practice – Ontario's consistent practice in the labour context is that a party has no automatic right to cross-examine its own witness – Board found no reason to depart from its normal practice, and that the employer could call the employee as its witness, but could not cross-examine him unless the Board granted leave to do so pursuant to its normal discretion to allow a party to deal with adverse or hostile witnesses – Employer also permitted to lead evidence to contradict the employee – Matter continues

COMMONWEALTH PLYWOOD CO. LTD. - LA COMPAGNIE COMMONWEALTH PLYWOOD LTÉE OPERATING AS COMMONWEALTH PLYWOOD CO LTD.; RE: RÉJEAN RANCOURT; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 1735-17-ES; Dated July 31, 2018; Panel: Graham J. Clarke (17 pages)

Construction Industry Grievance – Employment Standards – Grievance arising from employer association's direction to its members, and subsequent employer practice implementing unilateral change, to pay 0.8% of employees' "base hourly rate" on all non-overtime hours worked effective May 1, 2018 – Parties posed several questions regarding the unilateral change to the Board for resolution – Unilateral change in purported compliance with new *Employment Standards Act* requirement that employees receive two paid personal emergency leave ("PEL") days, except where the employee receives "0.8 per cent or more of his or her hourly rate or wages for personal emergency pay" as provided for in amended Reg. 285/01 – First, Unions argued that unilateral change violated either the *Labour Relations Act* and/or the collective agreement – Focusing on the collective agreement, the Unions argued that the wages set out in the collective agreement could not be altered without consent – Board concluded that the amendment to the *ESA* and regulation compelled employers to choose one

of two alternatives: paid days off or payment of 0.8% of the hourly rate or wages – Employers' choice of 0.8% payment neither amended collective agreement wage schedule nor challenged Unions' exclusive bargaining agency, and therefore did not violate either the collective agreement or the *LRA* – Second, Unions argued that "hourly rate or wages" in Reg. 285/01 included all payments under the collective agreement including the base rate, overtime and other premium pay, vacation and holiday pay and contributions to benefit funds, not just the "base hourly rate" as implemented by the Association's members – Association argued that it included only the base wage rate and no other amount - Board concluded that contributions to benefit funds were not included in "hourly rate or wages", but that all other earnings by an individual employee were included and so subject to the 0.8% calculation – Where employee takes a paid PEL day off instead, he or she is to be paid the base rate together with vacation and holiday pay, for all hours that would have been worked had the day not been taken off – Third, Unions argued that in order for the 0.8% "exemption" to apply, the amount had to be paid retroactively to January 1, 2018 when the regulation became effective – Association argued that the payment was only to be calculated effective May 1, 2018 – Board concluded that having chosen the 0.8% exemption option, the Association's members were required to comply with that option from its effective date, namely January 1, 2018 – Finally, Unions argued that if an employee had taken a paid PEL day prior to the effective date of the Association's direction to its members, the employee was still entitled to 0.8% calculated from January 1, 2018 – Board found that in such circumstances, Association's members had the option to either provide a second paid PEL day or to pay the 0.8% retroactive to January 1, 2018 – Grievances allowed in part

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE: IBEW ELECTRICAL POWER COUNCIL OF ONTARIO; RE: ONTARIO SHEET METAL WORKERS' CONFERENCE FOR LOCALS 30, 47, 235, 269, 397, 473, 504, 537 AND 562; OLRB File No. 0741-18-G & 0756-18-G; Dated July 6, 2018; Panel: Bernard Fishbein (29 pages)

Public Sector Labour Relations Transition Act – Application arising from voluntary integration of three health care facilities – *PSLRTA* enables Board to determine the number and description of appropriate bargaining units for the successor employer's operation following integration – Each predecessor facility had a different bargaining unit structure covering clerical, service and laboratory employees – In respect of clerical and service employees, first facility had a single service unit represented by SEIU and the clerical employees were non-union – Second facility had four bargaining units: full-time and part-time service and full-time and part-time clerical, all represented by CUPE – Third facility had two bargaining units: full-time and part-time service, both represented by CUPE, and the clerical employees were non-union – CUPE argued that a single bargaining unit of all service and clerical employees was appropriate, since such a structure is common in the hospital sector, that Board jurisprudence expresses a preference for larger bargaining units rather than smaller, and that the collective agreements at the two CUPE locations were historically administered in a co-ordinated way – SEIU and the Employer argued that two bargaining units, one of all service employees and one of all clerical employees, was appropriate, since such a structure was also common in the hospital sector, that Board jurisprudence expresses a preference for minimizing disruption to existing bargaining patterns when directions are made under *PSLRTA*; and that a single bargaining unit of 3000 employees could lead to labour relations problems, while the two-unit structure would increase employees' current mobility rights even if it would be less than in a single-unit structure – Board found that either the single-unit or the two-unit structure would be appropriate, such that it should prefer the least disruptive option – Either structure will result in a change of representation for a significant number of employees – Historical practice at all three locations was for service and clerical employees to be organized separately (having regard also to the non-union clerical employees at two locations) and none of the parties ever sought to combine these groups – Two-unit structure more fairly replicates the choices made by existing employees regarding representation – In respect of laboratory employees, first facility had one bargaining unit of employees of three labs (medical, sleep and heart and vascular) under one collective agreement (although they had been separately certified) represented by CNFIU – Second facility had one bargaining unit of employees of the medical lab, represented by OPSEU, while the other two labs' employees were unrepresented – CNFIU argued that two units were appropriate: one unit of all medical lab employees, and one unit of the sleep and heart and vascular lab employees, on the basis that the three groups were administered in "silos" and that it would be unfair to allow OPSEU to seek to represent the employees of all three labs, when it had only sought bargaining rights for the medical lab at the second facility – Employer and OPSEU argued that the least disruption would result from a

single unit – OPSEU argued that its choices in initially organizing employees were not relevant in the context of a PSLRTA application – Board concluded that a single unit of all lab employees would minimize disruption, most closely track the existing bargaining unit structures, and reduce the possibility of fragmentation – Appropriate bargaining unit structure declared and matter remitted back to parties

PROVIDENCE HEALTHCARE; RE: CANADIAN NATIONAL FEDERATION OF INDEPENDENT UNIONS (LIUNA LOCAL 3000); RE: ST. JOSEPH'S HEALTH CENTRE; RE: ST. MICHAEL'S HOSPITAL; OLRB File No. 1889-17-PS; Dated July 17, 2018, Panel: Paula Turtle (12 pages)

Application under section 98 of Labour Relations Act – Interim Relief – Termination – Unfair Labour Practice – Union sought interim reinstatement of key inside organizer terminated during organizing campaign for alleged misconduct unrelated to organizing campaign – Board considers factors described in *National Judicial Institute* and particularly "the apparent strength of the applicant's case and defence that the responding party may have" and irreparable harm – Approach under both former section 98(3) and in *NJI* requires the Board to perform a "high level" review of the apparent strength of an applicant's case – The timing of the organizer's termination (8 months after the campaign began), the absence of any alleged unfair labour practices prior to the termination, and the fact that the organizer admitted to the misconduct are factors suggesting that the employer may be able to mount a successful defence – Discharge of a known organizer causes labour relations harm and can have a chilling effect on employees – This termination was unlikely to cause irreparable harm because the misconduct in question and subsequent investigation were widely known to employees such that employees were less likely to ascribe an anti-union animus to the termination – Board rejected argument that reinstatement would cause irreparable harm to the employer – Board concluded that this was not an appropriate case for the interim relief sought – Application dismissed

THE ORIGINAL CAKERIE LTD.; RE: UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW CANADA); OLRB File No. 1135-18-IO; Dated July 20, 2018; Panel: Adam Beatty (12 pages)

COURT PROCEEDINGS

Certification – Judicial Review – Employer and Union parties to certification application brought joint motion before a single judge of the Divisional Court to quash an interim decision of the Board – Court concluded that it did not have jurisdiction to grant the order, as only the panel hearing the proceeding could grant relief in the nature of *certiorari*, unless section 6(2) of the *Judicial Review Procedure Act* [which permitted an application for judicial review to a single judge of the Superior Court, as opposed to the Divisional Court, if the case was urgent and that delay involved in an application to the Divisional Court would likely involve a failure of justice] applied – In view of the strong privative clauses protecting the Board's decisions, the Divisional Court must consider the merits of the application for judicial review when quashing a decision – Motion could therefore only be heard by the panel of the Divisional Court – No urgency to the motion and other options available to the parties – Motion dismissed

CANADA BREAD COMPANY, LIMITED; RE: ONTARIO LABOUR RELATIONS BOARD; RE: MILK AND BREAD DRIVERS, DAIRY EMPLOYEES, CATERERS AND ALLIED EMPLOYEES, LOCAL 647, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS; Divisional Court File No. 11/18; Dated July 27, 2018, Panel: Swinton J. (3 pages)

Judicial Review – Ministerial Reference – Employer sought judicial review of a decision dismissing a request for reconsideration – Decision arising from Employer's unfair labour practice application alleging that the Union breached Minutes of Settlement arising from a certification application, and from Ministerial Reference arising from the Employer's application for a conciliation officer – Employer asserted that it was denied procedural fairness because the question posed by the Minister of Labour in the Ministerial Reference was not directly communicated to either party and was different from the issues identified in the Confirmation of Filing – The Confirmation of Filing identified the issues as whether an arbitrator/mediator should be appointed and whether a "No Board Notice" should be issued, whereas the question posed by the Ministerial Reference was whether the parties was bound to a collective agreement – Employer argued that it was denied procedural fairness as a result of the Ministerial Reference and the Confirmation of Filing stating the issues differently – Board

concluded that the core issue of whether a collective agreement came into effect and obviated the need for a conciliator was the same regardless of how the issues were framed, and declined to vary or revoke its decision – Court held that the Board's decision on the Ministerial Review was an advisory opinion and therefore not subject to judicial review – Court further concluded that no "substantial wrong or miscarriage of justice" occurred as a result of the misstatement of the Minister's question to the parties in the Confirmation of Filing – Questions substantially the same and addressed whether or not the parties were bound to collective agreement – Employer did not identify any evidence it would have called or argument it would have made that would have been different – Hearing was conducted fairly – Application dismissed

S. & T. ELECTRICAL CONTRACTORS LIMITED; RE: S & T INDUSTRIAL INC.; RE: IRON WORKERS DISTRICT COUNCIL OF ONTARIO; RE: INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 786; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. DC-17-562-JR; Dated July 10, 2018, Panel: C. Horkins, Thorburn and Pomerance JJ. (8 pages)

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 Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
D. Andrew Thomson Divisional Court No. 238/18 **(Sudbury)**	1070-16-ES	Pending
Tomasz Turkiewicz Divisional Court No. 262/18	2374-17-R	Pending
Deloitte Restructuring Inc. Divisional Court No. 238/18	2986-16-R	Pending
Alicia R. Allen Divisional Court No. 199/18	0255-17-UR	Pending
Provincial Employers' Bargaining Agency - Labourers Divisional Court No. 141/18	2221-15-U	Pending
Trisect Construction Corporation Divisional Court No. 087/18	2553-15-R	Pending
Matrix North American Construction Canada Divisional Court No. 051/18	0056-16-JD	Pending
Brookfield Multiplex Ltd. Divisional Court No. 025/18	1368-15-R	October 1, 2018
Canada Bread Company, Limited Divisional Court No. 11/18	3729-14-R 3730-14-R 3731-14-R 3732-14-R 3733-14-R	Pending
Bricklayers (Prescott) Divisional Court No. 18/18	3440-14-U	Pending
Robert Daniel Laporte Divisional Court No. 037/18	2567-15-U	Pending
Highcastle Homes Inc. Divisional Court No. 7/18	3196-15-R 3282-15-U	Pending
China Visit Tour Inc. Divisional Court No. 716/17	1128-16-ES 1376-16-ES	Pending
Rouge River Farm Inc. Divisional Court No. 637/17	0213-16-ES	January 24, 2019
Sheet Metal Workers' International Association Divisional Court No. 613/17	1536-16-R	September 12, 2018
Dennis McCool Divisional Court No. 566/17	0402-16-U	Pending
S. & T. Electrical Contractors Limited Divisional Court No. 562/17	1598-14-U 1806-14-MR	Dismissed

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Ramkey Construction Inc. Divisional Court No. 539/17	1269-15-R	June 7, 2018
Front Construction Industries Divisional Court No. 528/17	1745-16-G	Pending
Enercare Home Divisional Court No. 521/17	3150-11-R 3643-11-R 4053-11-R	Pending
Ganeh Energy Services Divisional Court No. 515/17	3150-11-R 3643-11-R 4053-11-R	Pending
LIUNA *(Pomerleau Inc.)* Divisional Court No. 257/17	3601–12–JD	Pending
Myriam Michail Divisional Court No. 624/17 **(London)**	3434–15–U	Pending
Peter David Sinisa Sesek Divisional Court No. 93/16 **(Brampton)**	0297–15–ES	Pending
Yuchao Ma Divisional Court No. 543/16	2438–15–U	October 4, 2018
Byeongheon Lee Court of Appeal No. M48402	0095-15-UR	Pending
Byeongheon Lee Court of Appeal No. M48403	0015-15-U	Pending
R. J. Potomski Divisional Court No. 12/16 **(London)**	1615–15–UR 2437–15–UR 2466–15–UR	Pending
Qingrong Qiu Court of Appeal No. M48451	2714–13–ES	Pending
Kognitive Marketing Inc. Divisional Court No. 51/15 **(London)**	0621–14–ES	Pending
Valoggia Linguistique Divisional Court No. 15–2096 **(Ottawa)**	3205–13–ES	Pending