ISSN 1195-0226

Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

October 2005

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in September of this year. These decisions will appear in the September/October issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute at www.canlii.org.

Certification – Construction Industry – Discharge – Interim Relief – Unfair Labour Practice – The applicant filed an application for certification, an unfair labour practice complaint and a request for interim relief – The employer filed a response to the certification application but failed to furnish the Board with the employee names in accordance with s. 128.1(3) of the Act – Relying on *Air Kool* (August 17, 2005), the Board held that the employer's omission was fatal to its response – Certification granted – With respect to the interim relief sought, the Board found that the "irreparable harm" criterion (for the union and the individuals) for such a remedy had not been met – Interim relief denied – Unfair labour practice complaint to continue

1621730 ONTARIO INC. O/A NORTHERN CONSTRUCTION AND MAINTENANCE; RE CONSTRUCTION AND ALLIED WORKERS LOCAL 607; File Nos. 1772-05-R; 1797-05-M; 1798-05-U; Dated September 13, 2005; Panel: Jack J. Slaughter (15 pages)

Construction Industry Grievance – Practice and Procedure – After the union had pleaded its case, the Board permitted the employer to bring a motion for a non-suit without electing to call evidence – The grievance related to the demotion of two employees from their respective positions of general foreman and foreman to journeyman status, in purported violation of a provision of the EPSCA collective agreement – The issue before the Board was whether or not there was evidence that could support a finding of a disciplinary act by the employer (non-disciplinary removal was not arbitrable) – Having heard the evidence of only the grievors, the Board found nothing in their conduct that could be called culpable, or that the employer appeared to view as culpable – Grievance dismissed

BLACK & MCDONALD LIMITED; RE I.B.E.W. CONSTRUCTION COUNCIL OF ONTARIO; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; File No. 1258-04-G; Dated September 26, 2005; Panel: David A. McKee (12 pages)

Certification – Construction Industry – Practice and Procedure – Reconsideration – The employer sought reconsideration of the Board's refusal to disclose the contents of membership evidence in Form A-74 before the list of employees in the bargaining unit was settled and the level of membership could be determined – The Board examined its practices prior to vote-based certification and re-affirmed the rationale for non-disclosure articulated in *Cor Jesu Re-education Centre of Timmins Inc.,* [1992] OLRB Rep. March 298: on the one hand, the applicant knows how many cards it has and who has signed them; on the other hand, the employer is in possession of the list of names of employees employed in the bargaining unit on the date of application; on this basis, the parties need to address the initial issue of bargaining unit description – Reconsideration dismissed

CANTERBURY CONTRACTING INC. C.O.B. AS CARTWRIGHT PLUMBING; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 46; File No. 1132-05-R; Dated September 30, 2005; Panel: Harry Freedman (3 pages)

Certification – *Police Services Act* – The applicant applied to certify a bargaining unit of crossing guards employed by the responding party municipality – The city submitted that it was not the employer, but that the crossing guards were employed by the Police Services Board, governed by the *Police Services Act* (PSA) and therefore not subject to the *Labour Relations Act, 1995* – The PSA precludes membership in a trade union without the consent of the police chief (there was no such consent) – Further, the PSA defines a member of the police force to include an employee who is not a police officer, and provides that members, whether they are appointed by the board or not, are under the board's jurisdiction – A majority of the Board found that since the guards were hired, trained and scheduled by the Police Services Board, they must be members of the force – Application dismissed

CORPORATION OF THE CITY OF DRYDEN, THE; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA; File No. 0798-05-R; Dated September 22, 2005; Panel: Timothy W. Sargeant, J.A. Rundle; R.R. Montague (Dissenting) (9 pages)

Employment Standards – The employer applied for review of two orders: one to compensate an employee and one to reinstate him after the employer allegedly violated the emergency leave provisions of the *Employment Standards Act, 2000* – The discipline imposed on the employee related not to his absence from work on a particular day, but to his failure to provide the employer with a medical note justifying his absence – The Board held that an employee's right to emergency leave and the employer's obligation to provide it are counterbalanced by the employer's right to receive and the employee's obligation to provide evidence reasonable in the circumstances that the employee was entitled to the leave – The employee failed to provide such evidence, notwithstanding that the employer made a specific request, launched an investigation and announced a disciplinary meeting with the employee for failing to produce the required document – Applications allowed, orders rescinded

FAG BEARINGS LTD.; RE RICHARD FRANCIS AND DIRECTOR OF EMPLOYMENT STANDARDS; File Nos. 2753-04-ES; 2754-04-ES; Dated September 27, 2005; Panel: Caroline Rowan (12 pages)

Employment Standards – The employer sought review of an order to pay termination pay to an employee employed on contract for seven successive years in a school cafeteria – The Board found the employer had to bid each academic year for the catering work, and employees were hired only after such contracts were secured – Employees were routinely laid off at the end of each academic year, and each contract – The Board found that each contract was for a definite term or specific task, so the employee was not entitled to notice or termination pay – Application granted, order rescinded

JUST CATERING SERVICES; RE TERESA CALABRIA AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 3743-04-ES; Panel: Corinne F. Murray (5 pages)

Health and Safety – *Trades Qualification and Apprenticeship Act* – The IBEW complained to the Ministry of Labour that the employer was employing unqualified labourers to perform electrical work – Following the issuance of a stop-work order by the health and safety inspector, the employer ensured that its workers were registered as apprentices in the electrical trade – The stop-work order was lifted – The IBEW appealed the inspector's lifting of the order, arguing that mere compliance with the *Trades Qualification and Apprenticeship Act* (TQAA) was insufficient: the inspector had to assure herself that the workers were appropriately trained, duly registered and properly supervised – The IBEW conceded that there was no present or imminent safety issue at the workplace – The Board held that it had no authority to oversee the inspector's conduct, nor to issue directions to the Ministry with respect to its administration of the TQAA – Even if the Board possessed a *mandamus* power, that power would not extend to a supervisory role over the Ministry of how its inspectors carry out their duties – Appeal dismissed

KE ELECTRICAL SERVICES LTD., AND GREGORY TAYLOR, INSPECTOR; RE INTERNATIONAL BROTHERHOOD OF

ELECTRICAL WORKERS, LOCAL 586; File No. 0188-05-HS; Dated September 26, 2005; Panel: David A. McKee (6 pages)

Bargaining Unit – Certification – Employee – Status – The Board was asked to determine the status of Quality Assurance Technicians (QATs), the subject of a union challenge in this certification application – Both parties agreed prior to the hearing that technical employees were to be excluded from the bargaining unit – The Board examined the duties of the QATs in the context of this workplace: their duties included production supervision, gauge calibration, audit functions, and training; in addition, their reporting hierarchy was different from the production employees – The Board found that the QATs were technical employees and therefore excluded from the bargaining unit – Further dates scheduled to determine other status disputes

MAXTECH PRECISION PRODUCTS, A DIVISION OF MAXTECH MANUFACTURING INC.; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS); File No. 1179-05-R; Dated September 16, 2005; Panel: Patrick Kelly (8 pages)

Evidence – Related Employer – Sale of Business – In this s. 69/1(4) application, the Board issued an interim ruling on an objection to the admissibility of documents in the possession of the insurance company that provided bonding to both employers – The documents were produced to the applicants on the first day of hearing – The applicants sought to have the documents admitted as business records although their authors would not be called and they would consequently constitute hearsay evidence – The Board considered the criteria for admissibility of business records and held that its focus must be on whether the context in which the documents were created would establish a circumstantial guarantee of trustworthiness – Admissibility to be argued on document-by-document basis – Matter continues

TORBEAR CONTRACTING INC., MALFAR MECHANICAL INC., TORONTARIO PLUMBING AND HEATING INC. AND CENTRO MECHANICAL INC.; RE ONTARIO PIPE TRADES COUNCIL; File Nos. 0163-02-R; 1058-02-R; Dated September 23, 2005; Panel: Harry Freedman (5 pages)

Certification – Practice and Procedure – Representation Vote – In this application for certification, the employer complained that the Labour Relations Officer prevented the employer from contacting an employee to ensure her attendance at the vote – The Board noted that its vote processes cannot and do not ensure that all employees cast a ballot – The Board held that the Officer's comments to the employer were advice only, and did not prevent the employer from doing anything – There was no evidence before the Board that the employee could have or would have wanted to attend the vote, nor was there any evidence of the nature of her illness – Certification granted

UNICCO FACILITY SERVICES CANADA COMPANY; RE SEIU LOCAL 2.ON BREWERY, GENERAL AND PROFESSIONAL WORKERS' UNION; File No. 0978-05-R; Dated September 7, 2005; Panel: Brian McLean (3 pages)

Certification – Discharge – Interim Relief – Unfair Labour Practice – On the interim relief application, the Board found that the circumstances and timing of the discharge of a key organizer met the five criteria set out in s. 98 of the recently amended Act – Although three employees were implicated in certain wrongdoing, two were dismissed immediately, while the key organizer's discharge was delayed and took place at about the time the application for certification was filed – The employer's justifications could not be substantiated – Reinstatement ordered, notice to employees posted – Matter continues

UPS SUPPLY CHAIN SOLUTIONS INC.; RE TEAMSTERS LOCAL UNION NO. 938; File Nos. 1262-05-R; 1457-05-U; 1642-05-M; Dated September 14, 2005; Panel: Brian McLean (9 pages)

Court Proceedings

Duty of Fair Representation – Judicial Review – The Court held that a dismissal of a duty of fair representation complaint for delay was subject to a standard of patent unreasonableness – The Board's unpublished rule of thumb regarding delay was presumptive only, and the Board gave consideration to applicable criteria – There was nothing clearly irrational or so flawed in the

Board's ruling to cause the Court to interfere with the decision – Application dismissed

JAMAL, NASEEM; RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION AND THE OLRB; File No.2464-03-U (Ct. File No. 567/04); Dated September 29, 2005; Panel: Greer, Chapnik, Lax JJ. (6 pages)

Certification – *Hospital Labour Disputes Arbitration Act* – Judicial Review – Practice and Procedure – Timeliness – The Board considered three issues that remained in dispute in this displacement application for certification – First, the Board found that the Hospital's 8.1 notice was untimely (received eight days after the application date) pursuant to s 8.1(3) and that even if the Board could exercise a discretion to accept the notice, there were no extraordinary circumstances in this case that would cause it to do so – Second, the Board addressed the question of when an arbitration board "gives its decision" thereby creating the effective date of the document that constitutes the collective agreement – The Board found this case stood between two lines of cases: one standing for the principle that when a board of arbitration settles all matters between the parties, but remains seized to deal with outstanding issues of clarification, the award constitutes a decision; and the other line describing those cases where one or more issues remain in dispute (and the board of arbitration remains seized to deal with them), where the award does not constitute a decision – The Board found that substantial issues remained in dispute, which the board of arbitration remained seized of, even though the parties believed (correctly) that they could ultimately resolve them, and that given the importance of clarity and certainty to employees and third parties, the Board found that the "decision" was not given until the January award – Finally the Board interpreted the word "from" to determine whether it was inclusive or exclusive – The Board found it should be read to exclude the day of the decision, because it was more consistent with the legislative intent to provide 90 full days, it provided more clarity and certainty where there was not necessarily public knowledge of the date, and it was more in harmony with the *Labour Relations Act, 1995* – Application was timely – Ballots ordered counted – OPSEU applied for a judicial review of this interim ruling – Subsequent to the filing of the application for judicial review, the ballots were counted and OPSEU (the incumbent union) was successful in retaining its bargaining rights – The Divisional Court dismissed the application for judicial review for mootness

OTTAWA HOSPITAL, THE; RE THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA; RE OPSEU; File No. 0372-04-R; (Court File No. 378/04); Dated September 28, 2005; Panel: Aston S.J. Greer, Swinton JJ. (2 pages)

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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
Gus Nedelkopoulos v. Peter F. Chauvin of the OLRB **Divisional Court No. 77287/05 WHITBY**	3704-04-U	Pending For the Nov. Highlights
Leonard Gott v. Director of Employment Standards , et al **Divisional Court No. SC-05-24523-00** **(Civil Suit)**	0444-02-ES; 1537-03-ES	Pending
Century Bldg. Restoration Inc. v. Universal Workers Union LIUNA Local 183, et al Divisional Court. No. 76931/05 NEWMARKET	1880-04-G	Pending
BA International v. UA Local 412 et la Divisional Court No. 05-DV-001103	1363-04-U	Pending – Nov. 29/05
1333833 Ontario Inc. v. OLRB, Employment Standards Officer, Norstead Building Products Inc. Divisional Court No. DV-05-236	3559-04-ES	Pending
Wellington De Oliveira v. L.U.I.N.A 183 Divisional Court No. 51/05	0430-04-R	Pending
Sundial Homes (Bronte) Limited v. R.E.S Real Estate Services Limited., et al (Stated Case) Divisional Court No. 50/05	0846-03-R, 0959-03-R, 1046-03-U	Pending – Oct. 14/05
Wabco Standard Trane Co. v. UA Local 787 Divisional Court No. 11/05	0194-03-G	Pending – Oct 7, 2005
Benjamin Blasdell v. UFCW Local A.F.L.-C.I.O.-C.L.C. Local 1000A; Loblaws Supermarkets Ltd. Divisional Court No. 74010/04 NEWMARKET	1431-03-M; 1341-03-U	Pending
Gerald Thomas v. SEIU Local 1.ON; Toronto East General & Orthopaedic Hospital Inc. Divisional Court No. 638/04	0281-04-U	Pending
Naseem Jamal v. OPSEU, et al Divisional Court No. 56704	2464-03-U	Dismissed Sept. 29/05;
Christopher Kabala v. Attorney General of Canada, Ombudsman Ontario, et al Divisional Court No. 575/04	0458-00-ES	Pending – October 31, 2005
Premier Fitness Clubs Inc. & 992434 Ontario Inc. v. Hopeton Bailey, et al Divisional Court No. 537/04	0341-03-ES	Dismissed Sept 7, 2005
Assurant Group v. Ignacia Menor Fillion, et al Divisional Court No. 528/04	2999-03-ES	Pending – Jan. 16-17/06

Case name & Court File No.	Board File No.	Status
Maurice Leblanc v. TTC, and ATU, Local 113 Divisional Court No. 468/04	2326-00-U	Dismissed for delay Sept 13,2005
OPSEU v. PIPSC, **The Ottawa Hospital**, OLRB Divisional Court No. 378/04	0372-04-R	Dismissed – Sept. 28, 2005
Grantley Howell v. OLRB Divisional Court No. 04/178	0933-01-U; 1273-01-U; 3552-00-U	Pending
Association of Professional Ambulance Employees v. City of Toronto, Toronto Emergency Medical Services et al Divisional Court No. 44/04	2456-01-R	Pending
Mississaugas of Scugog Island First Nation v. Great Blue Heron et al Divisional Court No. 10/04	1271-03-U; 1336-03-M; 1414-03-M	Heard – Feb. 23,24,25,28/05 - Reserved