ISSN 1712–4506 (Online)

Ontario Labour Relations Board

HIGHLIGHTS

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May 2016

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in April of this year. These decisions will appear in the March/April 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.

Certification – Unfair Labour Practice – Local Union 647 filed an application to certify Canada Bread's franchisees – The main issue before the Board was whether Canada Bread's decision to implement an alternative distribution method ("ADM") was motivated by anti-union animus contrary to sections 70, 72 and 76 and/or in violation of the statutory freeze pursuant to section 86(2) – The Union's primary position was that Canada Bread failed to establish that it had made and announced a decision to implement the ADM in Ontario prior to the union's filing the applications for certification – The union argued there could not be a decision as contemplated and required by the Board's decision in *Middlesex*, until Canada Bread told its franchisees the actual date of implementation and identified the directly affected customers that would be moved to ADM routes – In response, Canada Bread urged the Board to follow the test established by the Supreme Court of Canada in its *Wal-Mart* decision: how would the responding party have acted in the absence of the Union and the applications for certification? – Canada Bread took the position that the evidence before the Board required it to conclude that the history of the ADM implementation in the GTA was entirely separate from and unaffected by the advent of the Union and the applications for certification – The Board found "that the continuation of Canada Bread's plans for the implementation of the ADM in Ontario would have occurred in the absence of the Union (as contemplated by the Court in *Wal-Mart*), and had been 'put in motion' as part of 'business as usual' within the 'reasonable expectations' of the franchise", without any expectation of dissuading franchisees from organizing and exercising their rights under the Act – In reaching this conclusion, the Board reviewed jurisprudence put forward by Canada Bread, setting out tests routinely applied by the Board that were contrary to the *Middlesex* decision – These lines of case law established and explained the "business as before" and the "reasonable expectations" tests – The Board also reviewed jurisprudence that added to these tests, such as *Royal Ottawa Health Care*, in which the Board said it is also important to consider whether "the kind of change to employee 'terms and conditions of employment rights, privileges or duties' requires the consent of the bargaining agent" in these circumstances – Applying the Board jurisprudence and the test in *Wal-Mart*, the Board found Canada Bread's actions satisfied all elements of all tests – The Board concluded that Canada Bread had not interfered with the formation of a trade union or the representation of the franchisees – The continued implementation of the ADM was not tainted by anti-union animus, nor was it a violation of the statutory freeze – Application dismissed

CANADA BREAD COMPANY LIMITED; RE: MILK AND BREAD DRIVERS, DAIRY EMPLOYEES, CATERERS AND ALLIED EMPLOYEES, LOCAL UNION 647,

AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS; OLRB File No. 1051-15-U; Dated April 29, 2016; Panel: Derek L. Rogers (94 pages)

Bar – Bargaining Unit - Certification – Colleges Collective Bargaining Act – The response filed by the College Employer Council (the "Council") to OPSEU's application for certification under the *Colleges Collective Bargaining Act, 2008* (the "CCBA") estimated the number of employees in the bargaining unit was much larger than OPSEU had estimated – OPSEU requested that the Board dismiss its application – The Council urged the Board to treat OPSEU's letter as a withdrawal, rather than to dismiss the application pursuant to paragraph 5 of section 31(5) – With a withdrawal, the statute imposes a one-year bar, whereas with a dismissal a bar is discretionary – The Board's process under section 31 of the CCBA is fundamentally identical to its process in dealing with section 8.1 of the *Labour Relations Act* – The Board takes a practical and purposive approach in dismissing a union's application in these circumstances, rather than deeming it withdrawn – This ensures that the parties will "get to the inevitable end of the process at the start to avoid a needless vote and futile litigation" – Following this approach in applying section 31 of the CCBA, the Board found no merit in the Council's argument that OPSEU had withdrawn its application – Application dismissed – No discretionary bar imposed

COLLEGE EMPLOYER COUNCIL; RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION ("OPSEU"); OLRB Board No. 3189-15-R; Dated April 11, 2016, Panel: Brian McLean (14 pages)

Certification – Construction Industry – Practice and Procedure – DeFaveri Construction sought to amend the address of a listed job site to reflect the correct location – In determining whether to permit a respondent to amend its response, the Board considered the explanation justifying the amendment and the prejudice that the applicant and respondent would suffer if the amendment were granted or not – The IUOE asserted the Board ought not to allow the amendment because DeFaveri Construction's explanation did not justify granting the amendment and it was prejudiced by the error – The Board found DeFaveri Construction's explanation sufficient to justify granting the amendment – DeFaveri Construction had explained that the owner of the property, where its employees were working, had provided the wrong address – Once DeFaveri Construction learned of the error, it provided the correct address to both the IUOE and the Board before the IUOE's challenges to DeFaveri Construction's employee list were due – The Board also concluded that the prejudice to the IUOE from receiving the correct address for a listed job site one week after the application date did not outweigh the significant prejudice DeFaveri Construction would suffer if it was not permitted to amend its response – The Board reached this conclusion as a result of the following factors weighing in favour of granting the amendment: (1) DeFaveri Construction provided the correct location to the IUOE, (2) the correct information was provided one week after filing its submission and before the IUOE had to submit its challenges to the employee list, (3) the amendment was a correction, not an addition of a job site, (4) if not permitted to rely on the correct address, DeFaveri Construction would have had to strike an employee from the list, and (5) the IUOE did not show that the work performed a week after the application date vanished during the following week when it was made aware of the correct address – Motion to amend the response by DeFaveri Construction permitted

DEFAVERI CONSTRUCTION INC.; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE: DEFAVERI GROUP CONTRACTING INC.; OLRB file No. 3150-15-R; Dated April 8, 2016; Panel: Harry Freedman (11 pages)

Discharge – Duty of Fair Representation – Grievance – Union withdrew a discharge grievance of a hospital custodian with 10 years of service and a clean record – He was dismissed for allegedly making an extremely rude and vulgar remark and for other minor infractions – The Board found that the union had failed to provide a persuasive account or a rational pathway to its ultimate decision that was commensurate with the interests that were at stake for the complainant – The Board could not understand how the other alleged infractions, beyond the vulgar remark, were disciplinable and accordingly why the union would not test the alleged misconduct the employer was relying upon – The Board found the union's decision not to pursue the grievance arbitrary and found the vote at a full membership meeting did not cure this breach since the rationale provided by the union to the members did not change – Application granted

DERRICK DILLON; RE: CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 2875; OLRB file No. 2003-15-U; Dated April 20, 2016; Panel: Roslyn McGilvery (8 pages)

Bargaining Unit – Certification – Employee – Status – In this certification application by the IUOE, a previous panel of the Board found the employer's primary business was horticulture – The only issue before the Board was whether four individuals employed as landscape truck drivers and one individual employed to repair the landscape trucks, were employed in horticulture, which would exclude them from the application of the Act pursuant to subsection 3(c) – The Employer argued the five individuals were employed in horticulture because they were performing work integral to its primary business of horticulture – The Union urged the Board to narrowly interpret the phrase "employed in horticulture" in light of the Act's purpose of facilitating collective bargaining, the fact that section 64 of the *Legislation Act* gives remedial legislation a "fair, large and liberal interpretation", and the guarantee of "freedom of association" pursuant to section 2(d) of the *Canadian Charter of Rights and Freedoms* – Although the Board can certify non-horticultural employees of a horticultural employer, the essential question is what does it mean to be employed in horticulture – The jurisprudence supports a purposive interpretation of the phrase "employed in horticulture" – The Board found that work may be horticultural, even if functions performed by the employees in question "are not usually, or necessarily, associated with the cultivation of soil," so long as the functions are "vital and integral" to the employer's horticulture business – The Board determined that all five individuals were employed in horticulture – Driving a truck to deliver water, plant materials, soils and trees, and the repair of such trucks, is integral and vital to the employer's horticulture business – The five individuals were not included on the list of employees employed in the bargaining unit – Matter continues

HERMANNS CONTRACTING LIMITED; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; OLRB File No. 1626-12-R & 1660-12-R; Dated April 22, 2016; Panel: Jack J. Slaughter (14 pages)

Delay – Discharge – Health and Safety – Practice and Procedure – Reprisal – The Applicant alleged a reprisal under the *Occupational Health and Safety Act* (the "OHSA") that her employment was terminated because she reported incidents of workplace harassment to the Respondent – The Applicant also alleged deficiencies in the Respondent's workplace harassment policy and in its efforts to take reasonable precautions after she expressed health and safety concerns – The Respondent brought a motion to dismiss the application for delay (application filed 11.5 months after her termination) – While the Board presumes prejudice to the other party where there is a delay of 12 months or more, it does not apply this guideline in a mechanical fashion – The Board balances the respondent's need to know the allegations promptly in order to mount a defence with the need to hear serious allegations of reprisal – The Board is careful not to dismiss an application for delay where there are such allegations – The Board found the respondent's ability to mount a defence was seriously prejudiced as a result of the delay – The Respondent would have to interview employees about conversations more than 11.5 months after the events occurred and it no longer employed a key employee to the investigation – The Board also requires that the delaying party put forward a credible explanation justifying the delay – The Applicant asserted her medical issues caused the delay, preventing her from handling complex matters and that the application before the Board was the Applicant's first opportunity to raise the allegations of reprisal under the OHSA – The Board found the Applicant's explanation insufficient – The Applicant had retained two different lawyers and instructed them to send a detailed letter and file a complaint under the *Human Rights Code* within a few months of her termination – Neither claim made reference to reprisal, harassment or the OHSA – The Board found the Applicant's issue crystallized at the time of the dismissal and the allegations should have been raised at that time or shortly thereafter – Application dismissed

ITW CONSTRUCTION PRODUCTS; RE: CHRISTINA SHU-SHEN LEE; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB file No. 2357-14-UR & 2004-15-ES; Dated April 6, 2016; Panel: Matthew R. Wilson (12 pages)

Certification – Construction Industry – Termination – Unfair Labour Practice – Voluntary Recognition – Inter-related applications were filed by the Carpenters – In first considering the application to terminate the Labourers' bargaining rights, the Board addressed

the validity of a voluntary collective agreement (entered into by the Labourers and Rio) and a preliminary motion by the Labourers requesting the Board order a representation vote before determining the merits of s. 66(1) – While recognizing that the Board has the discretion to order such a vote (which has been exercised very rarely in the past) the Board decided not to make such an order for the following reasons: it would not be of assistance since the voluntary collective agreement was significantly defective; it would present logistical problems regarding voter eligibility; and the lateness of the Labourers' request (only after three days of evidence) – Concerning the merits the Board first found that the four employees for whom membership evidence was supplied by the Labourers were not in the bargaining unit on the date the agreement was entered into (the four individuals did not start work, nor get paid, until four days after; and the Board found there had been no "clear offer of work and acceptance of employment" before) – Finally, the Board found, if it was wrong about the employees being in the bargaining unit, it would still find the Labourers were not entitled to represent employees – First, the four employees were directed to sign with the Labourers by the employer—a clear example of what s. 66 is intended to prevent – Second, the Board made it clear that there are preconditions to the applicability of *Nicholls-Radtke* to prevent abuse and protect employee choice: there must be no existing employees, an empty bargaining unit, and then the employer must hire its employees from the trade union it enters into the pre-hire agreement with – None of those preconditions were met in the circumstances before the Board – Board found that the Labourers do not represent those employees and the collective agreement ceased to operate pursuant to s. 66(4) – Matter continues

RIO DRYWALL SYSTEMS INC.; RE: DRYWALL ACOUSTIC LATHING AND INSULATION, LOCAL 675, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE: WESTBROOK INTERIOR SYSTEMS INC.; RE: BOLD INTERIOR CONTRACTORS INC.; RE: CANADIANA CONTRACTING & CONSULTING LTD.; RE: CANADIANA DRYWALL & ACOUSTICS SYSTEM LTD.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: JOE MONTESANO C.O.B. AS NORTH HILL INTERIORS; RE: NORWEST DRYWALL LTD.; OLRB file No. 0887-15-U, 0888-15-U, 0889-15-R, 0890-15-R & 0891-15-R; Dated April 22, 2016; Panel: Bernard Fishbein (38 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
Ajay Misra Divisional Court No. 176/16	1849-15-U	Pending
Labourers' International Union of North America, Local 183 ***(Alliance Site Construction Ltd.)*** Divisional Court No. 133/16	3192-14-JD	Pending
Public Service Alliance of Canada Divisional Court No. 115/16	0119-13-R	Pending
R. J. Potomski Divisional Court No. 12/16 **(London)**	1615-15-UR 2437-15-UR 2466-15-UR	Pending
Serpa Automobile (2012) Corporation (o/a Serpa BMW) Divisional Court No. 095-16	0668-15-ES	Pending
David Houle Divisional Court No. 1021-16 **(Sudbury)**	0292-15-U	Pending
Qingrong Qiu Divisional Court No. 669/15	2714-13-ES	Pending
Airside Security Access Inc. Divisional Court No. 670/15	1496-15-ES	Pending
Cotton Inc. Divisional Court No. 554/15	3254-13-U 3255-13-R	Reserved April 21, 2016
Kognitive Marketing Inc. Divisional Court No. 51/15 **(London)**	0621-14-ES	Pending
W.H.D. Acoustics Inc. Divisional Court No. 52/15 **(London)**	3151-14-G 3716-14-R	Pending
IBEW Electrical Power Council of Ontario ***(Crossby Dewar Inc.)*** Divisional Court No. 501/15	1697-11-G 1698-11-G	Pending
Labourers' International Union of North America, Local 1059 ***(McKay-Cocker)*** Divisional Court No. 384/15	0883-14-R	June 17, 2016
Universal Workers Union, Labourers' International Union of North America, Local 183 ***(Maystar)*** Divisional Court No. 368-15	1938-12-R	September 12, 2016
EMT Contractor Division Inc Divisional Court No. 32-15 (**London)**	3514-13-R	Dismissed April 20, 2016
Carlene Bailey Divisional Court No. 173/15	0480-13-U	Pending

Valoggia Linguistique Divisional Court No. 15-2096 (**Ottawa)**	3205-13-ES	Pending
Toran Carpentry Inc. Divisional Court No. 49/15; Court of Appeal No. M46308	0229-13-R	Dismissed March 8, 2016, LIUNA seeking leave to CA
Dean Warren Divisional Court No. M-45870	2336-13-U	Allowed Leave to CA dismissed March 30, 2016
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Dismissed Seeking leave to CA