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Ontario Labour Relations Board

HIGHLIGHTS

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NOTICES

PLEASE TAKE NOTICE that the revised Rules of Procedure (March 2016) reflecting the amendments below are now posted on the Board's website.

PLEASE TAKE NOTICE that an amendment to Rule 41.1 making it apply to certain proceedings under the Fire Protection and Prevention Act, 1997 (see clause "i") will come into force on **March 9, 2016**.

PLEASE TAKE NOTICE that the following changes to the Rules will take effect on Friday, March 11, 2016

Rule 25.5 is amended by adding the requirement (consistent with what has been required in Information Bulletin #6) in the second sentence, as follows:

A responding party must file a response to the application, including Schedules A and B, not later than two (2) days after the application was delivered to it. Where the responding party identifies interested or affected parties it must deliver the application and response, and the material listed in Rule 25.4 (b)-(f).

Rule 6.9 is amended by adding clause (b.1) as follows:

when a document [in support of applications, responses and other material filed pursuant to clauses (a) or (b)] is longer than 30 pages, not more than 5 relevant pages shall be faxed, to be followed by filing of the complete hard-copy document by courier or other means no later than 10am the next day

SCOPE NOTES

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

Collective Agreement – Construction Industry Grievance – The Board was asked to determine whether the employer could require workers to take a fitness test prior to being accepted on a construction site and, if so, whether the fitness test was reasonable – The fitness test, administered by a third party, tested each worker on their ability to lift and their vision – Workers had to provide the third party with a detailed medical history, including a list of all current or previous surgeries, dislocations, fractures/broken bones, sprains/stress and medical conditions – In addition, workers were required to list whether they have ever attended a physiotherapist, a chiropractor, had a massage or been in a car accident – Prior to conducting the fitness test, the workers were required to sign a contract releasing the third party from liability for any injury suffered by the worker during testing – The Board found nothing improper about requiring an employee to undergo a fitness test before commencing job duties – However, for the fitness test to be enforceable it

must be reasonable – Given the breadth of medical information the workers were required to provide to the third party, the Board held the testing was not reasonable – The medical information was not logically connected to the work which might be performed and was a gross invasion of privacy – The requirement to provide such detailed information suggested an ulterior and illegal purpose on behalf of the third party and the employer, as the medical information could be used to exclude a worker from the construction site based on perceived risks of future illness or injury – The Board also held the requirement to sign a release in favour of the third party was unreasonable – Grievance allowed; matter referred back to the parties with respect to the issue of damages owing

AECON MINING INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 607; OLRB File No. 1964-15-G; Dated February 10, 2016; Panel: Brian McLean (15 pages)

Duty of Fair Representation – Human Rights Code – AT, a truck driver, entered into a last chance agreement ("LCA") with his employer, SFS, despite being advised not to do so by the Teamsters – AT was later terminated for violating his LCA, and more specifically, for not notifying SFS that his driver's licence had been suspended for impaired driving – Teamsters initially grieved the termination but ultimately decided not to refer it to arbitration after receiving a legal opinion from outside legal counsel – AT alleged Teamsters violated its duty of fair representation based on two grounds: first, his LCA was illegal and void *ab initio* because it was the result of behaviour that was the manifestation of a disability (*i.e.* alcoholism); second, the legal opinion obtained by Teamsters was based on facts Teamsters knew were incorrect, and therefore, its decision not to refer the grievance to arbitration was arbitrary, discriminatory and/or in bad faith – The Board first examined the conduct of the parties at and around the time the LCA was signed, finding that Teamsters and SFS were unaware of AT's alcoholism at this point – Given this finding, the Board held there cannot be a failure to accommodate under the Code when no one in a position to accommodate the employee was aware of his or her disability – Next, the Board examined Teamsters' handling of AT's discharge grievance, finding that Teamsters and SFS were also unaware of AT's alcoholism at the date of his termination – While the Board did find that Teamsters became aware of AT's alcoholism before it made its decision not to refer the grievance to arbitration, the Board held there was no legal nexus between AT's termination and his alcoholism – AT knew he was required to report his driver's license suspension to SFS and failing to do so was a dishonest act which could have had serious ramifications for SFS – The Board held it was this dishonest act, and not the suspension of AT's driver's licence, that led to his termination – Therefore, Teamsters' decision not to refer AT's grievance to arbitration was not arbitrary, discriminatory or made in bad faith – Complaint dismissed

ALAN TAYLOR; RE: TEAMSTERS LOCAL UNION, NO. 419; OLRB Board No. 0005-15-U; Dated February 12, 2016, Panel: Jack J. Slaughter (25 pages)

Certification – Construction Industry – Practice and Procedure – Timeliness – The dispute was whether the Board ought to exercise its discretion to accept the employer's response filed one day late – The application for certification was filed on December 24 and delivered to the employer's premises on December 29th, which meant the employer's response was due on December 31 – The employer discovered the application on December 30 and assumed it was delivered that day despite a covering letter indicating it was delivered on December 29 – Prior to 5:00 pm on December 31, the employer's counsel wrote to the union and the Board stating the employer's position was that the application was delivered on December 30 – The union's counsel responded that the application was delivered on December 29 – The employer proceeded as if the application were delivered on December 30 and filed its response on January 4th, which contained errors, so a subsequent response was filed on January 14 – At the Case Management Hearing the employer conceded the application was delivered on December 29, but argued the Board should exercise its discretion to permit the late filing of the response because: (1) its offices were closed between Christmas and New Year's Day, (2) the delay was only one day, and (3) the union suffered no prejudice – The union argued the employer did not have a compelling reason for the late filing and that failing to file a correct response until January 14 prejudiced the union – The Board acknowledged that, while the union did nothing contrary to the Board's Rules, the timing of the filing and delivery of the application was intended to achieve a tactical advantage – The Board indicated it will not be persuasive for a union to bemoan inherent

prejudice where the union undertakes a tactical advantage to produce a result of non-compliance with the Rules – However, the Board also emphasized missed statutory deadlines should not easily be overlooked and exceptions for late filing will not be granted in the usual course – The Board held this was not a situation where it would be appropriate to grant an exception for late filing, as it was not persuaded the employer acted reasonably in the circumstances: delivery of the application for certification came to the employer's attention on December 30 and there was no reason why the employer could not have filed a response in time; no basis for the employer's assumption that the application was delivered on December 30; and when the employer filed its response on January 4 the response was flawed – Considering the need for certainty and timeliness in construction industry certification applications, the Board held it was not persuaded the employer's conduct warranted the exercise of the Board's discretion to allow a late filed response

DI BLASIO HOMES; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: DI BLASIO CORPORATION; RE: DI BLASIO (GEORGETOWN) CORPORATION, RE: DI BLASIO CONSTRUCTION LTD., RE: 1215846 ONTARIO LTD., RE: 765901 ONTARIO LTD., RE: ARTEMIS RIDGE LTD., RE: AUTUMNWOOD PROPERTIES INC., RE: DI BLASIO GROUP INC., OLRB file No. 2600-15-R; Dated February 26, 2016; Panel: Bernard Fishbein (19 pages)

Certification – Construction Industry – Termination – The Board clarified that the *April Waterproofing* principle has not fundamentally changed as a result of the Case Review process in the 2013 Open Period – The Board held the *April Waterproofing* principle will be invoked to disqualify an individual as an employee for a representation proceeding where: the employer knowingly breached the collective agreement for the purpose of terminating or displacing an incumbent union's bargaining rights; the employees in question acted in a manner consistent with the employer's purpose; the incumbent union did not acquiesce or act inappropriately – The Board also clarified that a party need not specifically demonstrate collusion for the *April Waterproofing* principle to apply; if it is an appropriate remedy to deal with the mischief it was intended to address, the *April Waterproofing* principle should not be denied simply because there is no proof of collusion – Additionally, the Board acknowledged the *April Waterproofing* principle strikes a balance that recognizes if an employer inadvertently breached the hiring or retention provisions of a collective agreement, the employees who are the subject of that breach who have not acted in an improper way should not be disqualified from a termination or displacement application – In applying these principles to the present application, the Board found the employer knowingly contravened the collective agreement when it hired two employees "off the street" and not through the incumbent union – The Board also found the employees in question were hired for the purpose of facilitating this displacement application and acted in a manner consistent with this purpose – Finally, the Board found the incumbent union did not acquiesce to the employer's conduct or behave inappropriately in the circumstances – Displacement application for certification dismissed

FORTE CONCRETE INC.; RE: OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, LOCAL 598; OLRB File No. 0363-13-R; Dated February 26, 2016; Panel: John D. Lewis (42 pages)

Certification – Construction Industry – Practice and Procedure – Reconsideration – By decision dated January 5, 2016 the Board, having received no response, found that the Carpenters, after filing on December 23, 2015, were in a certifiable position, subject to resolution of the correct responding party name – On January 6, 2016 the Board received a response and a request for reconsideration by Mosaic – The late response took the position that none of Mosaic's employees were in the construction industry and alternatively that 47 persons were performing such work (not only the 5 in the Carpenters' application) – The Carpenters had used the proper facsimile number for delivery of their application on December 24th, however they did not know that Mosaic had closed completely for the seasonal holidays from December 24th until January 4th – In considering whether to accept the late filed response and whether to reconsider the earlier decision, the Board noted that an important consideration was the allegation that the employees in question were not performing construction work and hence s. 128.1 was not applicable – The Board noted that a complete shutdown during the holiday season was a reasonable explanation for the delay and also that once Mosaic staff became aware of the

application they moved promptly to file a response – On weighing all the factors from *Weathertech* the Board decided to accept the late-filed response and reconsider its decision – However the Board only permitted Mosaic to litigate the issue relating to whether the employees were doing construction work – The Board found that to permit Mosaic to add employees to the list when the names were not set out until over a month after the date of application would create significant and irremediable prejudice to the union – Matter continues

MOSAIC SALES SOLUTIONS CANADA OPERATING CO.; RE: CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; OLRB file No. 2580-15-R; Dated February 17, 2016; Panel: Jack J. Slaughter (8 pages)

Public Sector Labour Relations Transition Act – The only issue before the Board was whether the discontinuance of mental health crisis services previously provided by SE and the subsequent provision of similar services by the CMHA was a full or partial health integration under the Act, and if so, whether the Act should apply – The dispute revolved around whether this was a case of a service provider losing its contract due to its own performance issues (which would not typically attract the application of the Act) or whether this was a case where the CMHA was motivated to make the transition because it believed it could offer improved services regardless of the performance of the service provider (which could attract the application of the Act) – The Board held that while the CMHA may have been dissatisfied with the way SE delivered the mental health services, it viewed the transition as a benefit to clients due to integration of these services with existing CMHA services, infrastructure and expertise, and therefore this was a health integration – The Board also held it was appropriate to exercise its discretion to apply the Act based on: the direct benefit of rationalizing the services (*i.e.* improved service delivery); the fact that at least two agreements were continued through the transition; the fact SE services were discontinued and seamlessly transitioned to the CMHA; and the labour relations consequences (*i.e.* the transfer of work previously performed by bargaining unit employees to another entity) – The Board remitted the matter back to the parties to reach an agreement on the remedial order(s)

ST. ELIZABETH HEALTH CARE; RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION; RE: CANADIAN MENTAL HEALTH ASSOCIATION, PEEL BRANCH; OLRB file No. 3144-14-PS; Dated February 8, 2016; Panel: Matthew R. Wilson (17 pages)

COURT PROCEEDINGS

Duty of Fair Representation – Judicial Review – Practice and Procedure – DW applied for judicial review of a Board decision dealing with his complaint that the ATU violated its duty of fair representation when it failed to deal appropriately with his overtime assignment complaint covering two different time periods – The Board dismissed the complaint with respect to one time period where the ATU settled DW's grievance, but held the ATU failed in its duty of fair representation with respect to the other time period – The Board ordered the Union to file a grievance on DW's behalf and directed the TTC to waive any time limits with respect to the grievance – On judicial review, the Divisional Court held the Board's decision with respect to both time periods was reasonable: in reference to the first time period, the Board reasonably made its conclusions respecting the adequacy of communications to DW, the adequacy of ATU's investigation, its lack of bad faith and the reasonableness of its settlement; concerning the second time period, the Board's remedial order was reasonable as it made DW whole by requiring the ATU to launch a grievance on his behalf – DW also alleged the Board denied him procedural fairness when it refused his request to audiotape or transcribe the proceedings, and when the Board proceeded by way of consultation rather than a hearing, thereby denying him the opportunity to cross-examine ATU witnesses – The Court held DW failed to demonstrate any denial of procedural fairness, as there is no statutory or common law requirement that the Board record or transcribe its proceedings – Furthermore, the Court added, the Board has a longstanding practice of not recording proceedings in the interests of economy, efficiency and informality, and DW failed to demonstrate the lack of a transcript prejudiced his ability to make his case – Proceeding by way of consultation is also authorized under the Act, has been found to be consistent with the duty of procedural fairness, and there were no issues of credibility that required cross-examination – Application for judicial review was dismissed

DONALD A. WILLIAMS; RE: THE ONTARIO LABOUR RELATIONS BOARD; RE: AMALGAMATED TRANSIT UNION, LOCAL 113; OLRB File No. 1129-13-U; (Court File No. 327/14); Dated: February 18, 2016; Panel: Swinton, Rady and C. Horkins JJ. (4 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
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
Byeongheon Lee Divisional Court No. Unknown **(Ottawa)**	0015-15-U	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	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
LBM Construction Specialties Inc. Divisional Court No. 353/15	0121-14-R	March 17, 2016
EMT Contractor Division Inc Divisional Court No. 32-15 (**London)**	3514-13-R	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	0229-13-R	January 26, 2016 Heard, Reserved
Royal Ottawa Hospital Divisional Court No. 14-62782 **(Ottawa)**	2461-14-IO	Pending
Dean Warren Divisional Court No. M-45870	2336-13-U	Allowed, ER seeking leave to CA
Donald A. Williams Divisional Court No. 327/14	1129-13-U	Dismissed
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Dismissed, Seeking leave to CA