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

Certification – Timeliness - Unifor sought to displace UBR as the bargaining agent – Employer and UBR argued the application was untimely and should be dismissed because there was an existing collective agreement and the application was not filed in the open period – Having examined the various documents that made up the collective agreement, including the collective agreement, the minutes of settlement extending it, the agreement to arbitrate the new collective agreement, and the arbitrator's award, Board found that duration of the agreement was not readily ascertainable from the documents – The award included a three year wage grid, but this is not the same as specifying the duration or expiry date of the collective agreement – Board found that in the absence of a clear duration clause, pursuant to s. 58(1) of the *Labour Relations Act, 1995* (the "*Act*"), the collective agreement was deemed to have a one year term – Board also found that in the absence of a provision that explicitly made it retroactive, the collective agreement commenced operating on the date of the Award – Parties' proposals to the Arbitrator concerning retroactive wage adjustments did not amount to an agreement that the collective agreement would have retroactive effect – Board also rejected Unifor's argument that collective agreement commenced on the date of the Arbitration Agreement pursuant to s. 40(3) of the *Act*, making this application timely - Arbitration Agreement no longer had the same effect as a collective agreement once the Award was issued, therefore s. 40(3) of the *Act* did not change the outcome of the Board's inquiry – Application dismissed

UNIFOR, RE: **RESIDENCE INN BY MARRIOTT TORONTO MARKHAM**; OLRB Case No. 2430-22-R; Dated June 28, 2023; Panel: Brian Smeenk (26 pages)

Construction Industry – Certification – Timeliness - Displacement application filed by LIUNA in respect of a Carpenters bargaining unit – Carpenters and Employer argued that it was untimely - Following settlement of a certification application, Employer and Carpenters executed a collective agreement with the commencement date delayed by 15 months – LIUNA argued the collective agreement had a term of more than three years and was in an open period in the 35th month of its operation when the displacement application was filed - Employer and Carpenters argued the displacement application was untimely as the collective agreement had an expressed term of exactly three years, making s. 127.3(3) of the

Labour Relations Act, 1995 (the "*Act*") inapplicable - Board held that timeframes set out in a duration/term clause are not necessarily determinative in the context of open periods and whether an application is timely – Open period is determined having regard to the effective date of the collective agreement, its expiry and its duration or term - Board found the collective agreement became effective and operational when it was executed with the terms waived for a period of 15 months – The fact that Employer and Carpenters were complying with the term clause in their mutual recognition that the terms are to have prospective effect supported Board's determination - A waiver of terms does not result in the waiver of statutory open periods – Board found the collective agreement had a term of more than three years given its effective date and clearly indicated expiry date, engaging s. 127.3(3) of the *Act* – Application was timely – Matter continues

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL, RE: **FLATO DEVELOPMENTS INC.**; OLRB Case No. 0092-22-R; Dated June 12, 2023; Panel: John D. Lewis (25 pages)

Construction Industry – Grievances – COVID-19 - Union grieved Employer improperly laid off two employees when it sent them home from work due to their vaccination status - Employer asserted that grievors were placed on unpaid leave of absence as a result of lack of work for individuals who had not complied with its COVID-19 vaccination policy and that layoff provisions were not engaged - Union did not challenge reasonableness of the policy – Union argued a layoff occurs when business conditions require a reduction in the number of employees – Board rejected Union's argument that vaccination policies implemented by Employer's customers amounted to a business condition that resulted in a lack of work and required a reduction of employees – Had grievors complied with the vaccination policy, there would have been sufficient work for them – Employer was not required to re-arrange existing assignments to particular projects and/or allow the exercise of bumping rights, when certain employees became unable to do the work by virtue of their vaccination status – Board also found that management rights clause was broad enough to include Employer's right to place employees on unpaid leave of absence – Employer's decision not to place other workers on leaves of absence was reasonable because workers either had a special skill set or were partially compliant with Employer's vaccination policy – Grievances dismissed

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 90, RE: **SCHINDLER ELEVATOR CORPORATION.**; OLRB Case Nos. 1741-21-G & 1742-21-G; Dated June 28, 2023; Panel: Lindsay Lawrence (16 pages)

Sale of Business – Related Employer - Building Services – Applicant Union asserted that Hospital was successor employer to G – G lost its contract for security services at Hospital's site and Hospital hired its own employees to perform these services – Hospital argued s. 69.1 of the *Labour Relations Act, 1995* (the "*Act*") should only apply when building services are contracted out or re-tendered, not when the services are taken back in-house – Hospital argued that it, as the owner, was not "another employer" within the meaning of s. 69.1 – Board agreed with the Union that nothing in s. 69.1 of the *Act* limits it to contracting out and re-tendering – The wording "another employer" is not limited and does not expressly exclude the owner or manager of the premises – Board held the mischief s. 69.1 seeks to remedy is the same whether the re-tendering is contracting in or contracting out – Board found s. 69.1 of the *Act* applied and that there had been a deemed sale of business from G to Hospital – Potential conflict between Applicant and Intervenor unions' bargaining rights to be determined - Matter continues

UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS), RE: **HEALTH SCIENCES NORTH, AND GARDA CANADA SECURITY CORPORATION**; OLRB Case No. 0709-22-R; Dated June 13, 2023; Panel: Robert W. Kitchen (14 pages)

Unfair Labour Practice – Remedial Certification – Union alleged that DR was terminated contrary to sections 73 and 76 of the *Labour Relations Act* (the "*Act*") and sought remedial certification – Union was engaged in organizing campaign which included visits to Employer jobsites – Employer asserted that it demanded DR's resignation because of a sexually explicit video DR sent to manager in error - Employer witnesses testified that Union affiliation or activity was never discussed at pre-hire interviews or group meetings and that Employer never took steps regarding Union's organizing campaign – Board found no anti-union sentiment in text messages exchanged among Employer's management, but rather they merely reported Union's presence on Employer jobsites – Even if questions of union affiliation were asked of DR in his pre-hire interviews, this happened two full years before the filing of the application and appeared to be an isolated inquiry which did not establish anti-union animus – Board was satisfied that Employer demanded DR's resignation because of the video and did not violate the *Act* – Application dismissed

CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, RE: **BUILD NORTH CONSTRUCTION INC. AND/OR KLEEN-STRUX INC. O/A SERVICEMASTER RESTORE OF SUDBURY**; OLRB case No. 3345-19-U; Dated June 2, 2023; Panel: Michael McFadden (27 pages)

COURT PROCEEDINGS

Employment Standards – Judicial Review – Application for judicial review by Director of Employment Standards challenging three Board Decisions interpreting the meaning of "regular rate" in the overtime provisions of the *Employment Standards Act, 2000* (the "*ESA*") as they apply to commissioned sales people for the respondent – Respondent employees M and P were paid entirely on a commission basis – Employees filed claims seeking additional pay pursuant to the overtime provisions of the ESA – ESO assessed claims and ordered additional pay of $37,447.92 to M and $610.74 to P – Employer sought review of the ESO decisions – In its first decision, the Board held that "regular rates" were calculable based on commissions earned before overtime hours were earned in a given week – Board directed Employer to recalculate overtime pay based on this calculation – Employer reported that M had been underpaid and P had been overpaid – In the second decision, the Board accepted Employer's calculation and held that it could reconcile overpayments and underpayments – In the third decision, Board dismissed requests for reconsideration filed by DES and the Employer – Court held standard of review was reasonableness – DES submitted that Board's interpretation of "regular rate" was unreasonable because the plain wording of clause b) of the definition of "regular rate" in s. 1(1) of the *ESA* required it to be calculated by dividing the entire earnings for the week by the non-overtime hours for the week – DES further submitted that Board erred in interpreting payments above the minimum amount required by the *ESA* to constitute "overpayments" which should be reconciled with underpayments of overtime – Court disagreed that Board's interpretation of "regular rate" was impermissible – Board referred to relevant provisions of the *ESA* and followed Board decision in *RBC* – Board in its expertise arrived at interpretation of "regular rate" that fits within the scheme of the *ESA* which it has

explained in its decision – However, Board's decision permitting Employer to reconcile weeks where it underpaid overtime with those where it overpaid overtime not reasonable – Board's reasons do not explain why Employer was only required to pay only overtime as calculated on the basis of minimum wages set out in the *ESA* each week – Application granted in part

DIRECTOR OF EMPLOYMENT STANDARDS, Re: **SLEEP COUNTRY CANADA INC. O/A SLEEP COUNTRY CANADA**, MARIANNA MOLODKOVA, RICK PANE and THE ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 402/22; Dated June 26, 2023; Panel: Backhouse, Howard and O'Brien JJ; (9 pages)

Unlawful Strike – Final Offer Vote - Judicial Review – Application brought by Union for judicial review of Board decision determining that it was bound by the results of a final offer vote directed by the Minister pursuant to s. 42 of the *Labour Relations Act, 1995* (the "*Act*") – Minister directed final offer vote under s. 42 of the *Act* - Vote was in favour of final offer – Union did not sign collective agreement based on final offer and later engaged in a strike – Employer brought unlawful strike application to Board - Board held that in general, the results of a final offer vote are binding on the union – In the construction industry, the result might be different but in this case, the Union did not object to the final offer vote prior to engaging in strike activity and Board concluded this was a violation of s. 17 of the *Act* – Board upheld its decision on reconsideration - Divisional Court concluded that Board's decisions were unreasonable – Court concluded that there was nothing in s. 42 indicating when, or if, a union was required to object to the final offer vote – Court noted the Board's prior jurisprudence suggesting that in the construction industry, it could be permissible for a union to not abide by the results of a final offer vote if to do so would undermine a pattern agreement – Court also concluded that Board's conclusion that there was no relevant pattern agreement was unsupported – No basis to draw such a narrow definition of pattern agreement – Court set aside Board's Decisions and directed that the matter be remitted to a different panel of the Board to determine whether or not the Union should be required to sign the final offer – Application allowed

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793, Re: **1476247 ONTARIO LTD. O/A DE GRANDIS CONCRETE PUMPING** and THE ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 401/22; Dated June 9, 2023; Panel: Backhouse, Petersen and Schabas JJ; (16 pages)

Construction Industry – Certification - Judicial Review – Application brought by Union for judicial review of Board decision dismissing application for certification on the basis that the work performed by employees was not work in the construction industry – Part of work in question was installation of cured-in-place pipe ("CIPP") – Board considered factors relevant to determining whether or not the work was work in the construction industry – Board concluded that inspection, cleaning and CIPP re-lining was the main purpose of the work and aspects of it that might be considered construction were incidental – work was to sustain the life of the pipe, which had not failed nor reached the end of its intended design life – Re-lining did not change the function or capacity of the pipe – Divisional Court concluded that Board's decisions were reasonable – Determining what constituted "construction" involved interpreting the *Labour Relations Act, 1995* and applying the Board's extensive jurisprudence was well within the Board's expertise – Court concluded that Board did consider union's argument that the Board's jurisprudence had changed what constituted "construction" but disagreed with Union on this point – Board's Decision was internally coherent and rational and

justified in relation to the relevant facts and law – Application dismissed

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL, Re: **CAPITAL SEWER SERVICES INC**; Divisional Court File No. 280/22; Dated June 20, 2023; Panel: Firestone R.S.J., Pomerance and Matheson; (6 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
Robert Currie Divisional Court No. 365/23	0719-22-UR 1424-22-UR	Pending
Red N' Black Drywall Inc. And Red N' Black Inc. Divisional Court No. 350/23	1278-19-R	Pending
RT HVAC Holdings Inc. Divisional Court No. 131/23	0721-21-R 0736-21-R	October 23, 2023
All Canada Crane Rental Corp. Divisional Court No. 037/23	1405-22-G	September 28, 2023
Mina Malekzadeh Divisional Court No. 553/22	0902-21-U 0903-21-UR 0904-21-U 0905-21-UR	Pending
Temporary Personnel Solutions Divisional Court No. 529/22	3611-19-ES	August 23, 2023
Mulmer Services Ltd. Divisional Court No. 504/22	2852-20-MR	June 8, 2023
Simmering Kettle Inc. Divisional Court No. DC-22-00001329-00-JR - (Oshawa)	0012-22-ES	Pending
1476247 Ontario Ltd. o/a De Grandis Concrete Pumping Divisional Court No. 401/22	0066-22-U	Allowed
Elementary Teachers' Federation of Ontario Divisional Court No. 367/22	0145-18-U	April 3, 2023
Michael Peterson, et al. Divisional Court No. 003/22	2301-21-R & 0046-22-R	Dismissed
Strasser & Lang Divisional Court No. 003/22	2301-21-R & 0046-22-R	Dismissed
Sleep Country Canada Divisional Court No. 402/22	1764-20-ES 2676-20-ES	Allowed in part
Capital Sewer Services Inc. Divisional Court No. 280/22	1826-18-R	Dismissed
The Ontario Secondary School Teachers' Federation Divisional Court No. 187/22	0145-18-U 0149-18-U	April 3, 2023
Susan Johnston Divisional Court No. 934/21	0327-20-U	Motion for Leave to Appeal to Court of Appeal
Joe Placement Agency Divisional Court No. DC-21-00000017-0000 **(London)**	0857-21-ES	Pending

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Candy E-Fong Fong Divisional Court No.	0038-21-ES	Pending
Symphony Senior Living Inc. Divisional Court No. 394/21	1151-20-UR 1655-20-UR	Pending
Joe Mancuso Divisional Court No. 28291/19 **(Sudbury)**	2499-16-U – 2505-16-U	Pending
The Captain's Boil Divisional Court No. 431/19	2837-18-ES	Pending
EFS Toronto Inc. Divisional Court No. 205/19	2409-18-ES	Pending
RRCR Contracting Divisional Court No. 105/19	2530-18-U	Pending
AB8 Group Limited Divisional Court No. 052/19	1620-16-R	June 27, 2023
Tomasz Turkiewicz Divisional Court No. 262/18, 601/18 & 789/18 Court of Appeal No. C69929	2375-17-G 2375-17-G 2374-17-R	Application for leave to appeal to Supreme Court of Canada
China Visit Tour Inc. Divisional Court No. 716/17	1128-16-ES 1376-16-ES	Pending
Front Construction Industries Divisional Court No. 528/17	1745-16-G	Pending
Enercare Home Divisional Court No. 521/17 Court of Appeal No. C69933	3150-11-R 3643-11-R 4053-11-R	Application for leave to appeal to Supreme Court of Canada
Ganeh Energy Services Divisional Court No. 515/17 Court of Appeal No. C69933	3150-11-R 3643-11-R 4053-11-R	Application for leave to appeal to Supreme Court of Canada
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
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

Valoggia Linguistique Divisional Court No. 15–2096 **(Ottawa)**	3205–13–ES	Pending