ISSN 1195-0226

Ontario Labour Relations Board HIGHLIGHTS

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May 2006

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 at www.canlii.org.

Construction Industry Grievance – Remedies – The employer filed a grievance asking the Board to order the union to return a $50,000 bank draft, which was delivered to the union three years earlier to secure payment of contributions that might have been found owing either as a result of an audit that was to be conducted, or for future violations – There was no evidence of an audit having been done or violations of the collective agreement – The Board found no reason not to order the bank draft or equivalent money returned to the company – The Board made the order effective three weeks hence to give the union time to file a grievance and refer it to arbitration to establish any liability it may be able to establish – Grievance allowed

1210166 ONTARIO LTD. (C.O.B. D.C.C. CARPENTRY); RE CARPENTERS AND ALLIED WORKERS LOCAL 27, CJA; File No. 4306-05-G; Dated April 20, 2006; Panel: David A. McKee; G. Pickell; R. Baxter (4 pages)

Construction Industry – Related Employer – Aecon Industrial and Aecon Buildings agreed that they carry on associated or related activities under common control and direction; however, they asserted that the Board ought not to exercise its discretion to declare the companies related – The Board found that AI and AB had long-rooted presence in different markets in the construction industry and that the evidence of eight years of projects showed: AI had not wavered from its historical focus as a constructor of heavy industry manufacturing operations; AI had not diverted work to AB; and most significantly, there was no evidence of movement of heavy industrial plant work from AI to AB – Since the applicant's bargaining rights had not been harmed by the continued existence and prosperity of AB, the Board declined to make a single employer declaration – Application dismissed

AECON BUILDINGS AND AECON INDUSTRIAL**;** RE SMW, LOCAL 30; File Nos. 0256-05-G; 0257-05-R; Dated April 25, 2006; Panel: Mary Ellen Cummings (5 pages)

Conciliation – Reference – The Minister asked whether he had the authority to appoint a conciliation officer, where the union gave the employer notice to bargain eight years after the collective agreement, containing no renewal clause, had expired – The employer did not assert that the union had abandoned its bargaining rights – The Board found that while s. 59(1) precludes notice from being given until the final 90 days of the collective agreement, it does not provide that notice may only be given in the final 90 days – Therefore the notice of intent to bargain was a valid s. 59(1) notice – The Board's advice to the Minister was that he had the authority to appoint a conciliation officer

EVANS LUMBER AND BUILDERS SUPPLY LIMITED; RE WAREHOUSEMEN, TRANSPORTATION AND GENERAL WORKERS UNION, LOCAL 715; File No. 3205-05-M; Dated April 13, 2006; Panel: Ian Anderson; R. O'Connor; L. Wood (5 pages)

Damages – Employment Standards – Reprisals – The applicant claimed he was terminated for insisting on receiving public holiday pay under the Act – Shortly after the applicant had challenged the company's treatment of holiday pay, the company reduced the applicant's shifts – The company provided the Board with no explanation of this reduction in work – Four weeks later, after a heated argument with a manager, the applicant was terminated – The Board found the reduction in shift work and the termination were both reprisals under the Act – The Board ordered the company to pay the applicant lost wages for loss of shift work and, subject to mitigation, his lost wages between termination and the finding of another position

KEROMENA HOLDINGS LTD. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE MUHAMMAD JAMIL KHATTAK File No. 2110-05-ES; Dated April 19, 2006; Panel: Patrick Kelly (5 pages)

Certification – Construction Industry – Practice and Procedure – Reconsideration – Having failed to file a response or the information required under s. 128.1(3) within the time stipulated, the employer asked the Board to reconsider its decision certifying the applicant on the basis that the applicant did not deliver a copy of the application to the employer – Although a successful facsimile transmission report was entered by the union, the employer argued that the 58 page transmission never came to the attention of the employer – The Board found that in the absence of any record from the employer's facsimile machine to suggest that no transmission was received, the evidence established that the application was received – The risk falls on the employer to keep adequate track of facsimiles received – Therefore the Board found the delivery effective – Request for reconsideration dismissed

GLASBAU HAHN GMBH + CO. KG; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, CJA; File No. 1410-05-R; Dated April 7, 2006; Panel: Caroline Rowan (14 pages)

***Occupational Health and Safety Act* – Work Refusal** – OPSEU appealed an Inspector's decision not to make an Order requiring the Ministry of Transportation (MTO) to provide OC (pepper) spray to its Transportation Enforcement Officers (TEOs), arguing this was contrary to section 25(2)(h) of the *OHSA* – The Union also appealed the Inspector's decision not to treat a work stoppage as a work refusal under section 43 of the *OHSA* – The Board held that under section 25(2)(h), it is not every precaution which must be taken by an employer, but only reasonable precautions – Determining what is reasonable involves balancing the benefit to be gained by taking the precaution against all other relevant factors, including the cost of the precaution and its effect on efficiency – The Board established that the magnitude and the frequency of the risk of assault were relevant considerations in determining whether the provision of OC spray was necessary – The circumstances under which OC spray could be used were exceedingly rare – Further, deploying OC spray contradicted the MTO disengagement policy – Accordingly, the Board concluded that the issuance of OC spray was outside the range of reasonable precautions that the employer was required to take – The Board exercised its discretion not to make any decision with respect to the work refusal – Five years had passed between the work refusals and the conclusion of the hearing – Given that the work refusals were primarily about whether OC spray should be provided, and the merits of the TEOs' complaints were dealt with by the inspectors in a relatively short period of time, there was little benefit to be gained by deciding the work refusal issue so long after the fact – Appeal dismissed

THE CROWN IN RIGHT OF ONTARIO (MINISTRY OF TRANSPORTATION), MINISTRY OF LABOUR; RE ONTARIO PUBLIC SERVICE EMPLOYEES' UNION; File Nos. 0966-00-HS; 2311-00-HS; Dated April 4, 2006; Panel: Brian McLean (27 pages)

Employment Standards – Related Employer – Three applicant companies appealed the employment standard officer's order that they owed termination and severance pay to nearly 100 employees as a result of a finding that they were related businesses to "C", a bankrupt company, and should be treated as one employer pursuant to s. 4 – The Board found that s. 4 requires a finding that both subsections (a) and (b) must be answered positively before there is a declaration of one employer under the section – There must be more than the mere fact that one company is solvent and the other not, before it amounts to an "effect" under the Act – That is, there must be some connection between the relationship and the insolvency – The Board found there was no evidence that the insolvency of C was caused or affected by its relationship with two of the companies, nor any evidence that any action taken in respect of the third company had

the effect, either indirectly or directly, on the entitlements of the employees – Finally, the Board noted that it would not examine whether the principal of C personally had more money to invest in the company, since it would be inappropriate to examine the actions or holdings or personal worth outside the corporation – Application granted; direction to return the monies held in trust

NOVAQUEST FINISHING INC.; RE ABDURAHMAN ABDOULRAB, JOSEPHINE ADRES, ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS; File Nos. 2222-04-ES; 2223-04-ES; 2224-04-ES; Dated April 27, 2006; Panel: Mary Ellen Cummings (13 pages)

Certification – Construction Industry – Practice and Procedure – Reconsideration – PRW requested reconsideration of the Board's decision certifying the applicant on the basis of only the information provided by the applicant, as PRW had failed to file its response in a timely manner as required by s. 128.1(3) – Since PRW's allegations, if true, meant there would be only one employee in the bargaining unit, it argued that the applicant's information "misrepresented" the bargaining unit and the Board should exercise its discretion to consider the information under s. 128.1(5) – The Board found that misrepresentation must include some additional element or aspect that could not have been addressed by the provision of information in the normal course by the employer under s. 128.1(3), otherwise common construction industry status disputes could be characterized as misrepresentations – Additionally the Board noted that PRW had not alleged any wrongdoing by the applicant through the statements filed – Request for reconsideration dismissed

PRW EXCAVATING CONTRACTORS LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File No. 3627-05-R; Dated April 3, 2006; Panel: Corinne F. Murray; G. Pickell; A. Haward (6 pages)

Employment Standards – Termination – This was an employee application under the *ESA, 2000* for review of a refusal to issue an Order to Pay termination and severance pay – After suffering a workplace injury, the employee did not work again for the responding party past February 28, 2003, although he continued to remain employed – On February 1, 2005, the responding party mailed him a pre-printed pension form replete with references to termination, both within the heading and throughout the various sections – The Board found that the most probable interpretation of the pension form was that the responding party unilaterally severed the applicant's employment consistent with the definition of "severance" under section 63(1)(a) – Whether or not it intended to sever the applicant's employment was immaterial – The Board also held that, in light of section 9(2)(b) of *O. Reg. 288/01*, the doctrine of frustration did not apply in this case to prevent the applicant's entitlement to severance – The onus was on the party raising the defence of frustration to demonstrate that the applicant's severance was not prohibited by the *Human Rights Code* – To succeed, the party was required to demonstrate that it had accommodated the applicant's injury to the point of undue hardship – This threshold had not been reached in this case – Since the applicant's severance pay entitlement comprised the monetary limit set by section 103(4), the Board concluded that it was unnecessary to determine whether the applicant was also entitled to termination pay – Application granted

RAINBOW CONCRETE INDUSTRIES LTD.; RE MARC BARRETTE; File No. 0048-05-ES; Dated April 10, 2006; Panel: Patrick Kelly (10 pages)

Court Proceedings

Duty of Fair Representation – Judicial Review – The Board had dismissed four duty of fair representation complaints by the applicant against his union – The court found that the standard of review was patent unreasonableness and that the Board's decisions not only met that test, but were all correct – Application dismissed

GRANTLEY, HOWELL; RE UNITED STEELWORKERS OF AMERICA, LOCAL 7135; OLRB; File Nos. 3552-00-U; 0933-01-U; 1271-01-U (Court File No. 04/178); Dated April 13, 2006; Panel:

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
Bricklayers Local 7 v. 921879 Ontario Ltd. Et al Divisional Court No. 06-DV-1209 OTTAWA	3261-04-JD; 3504-04-JD	Pending
Elena, De Monelli Foerster v. Toronto Catholic District School Board (Civil Suit) Divisional Court No. 06-CV-310231PD1	1373-04-U	Pending
Gus Nedelkopoulos v. OLRB Divisional Court No. 78978/06 NEWMARKET	1838-05-U 2644-05-U	Pending
Guild Electric Limited et al v. IBEW, Local 1739 Divisional Court No. 202/06	4179-05-U; 4307-05-M	Pending
Greater Essex County District School Board v. International Brotherhood of Electrical Workers, Local 773 et al Divisional Court No. 126/06	1702-04-R; 3120-04-R; 3172-04-R; 3173-04-R; 3174-04-R	Pending
Kostantinos Iaonnidis v. Amalgamated Transit Union, Local 1572, Corp. of City of Mississauga, Transportation and Works Dept., Transit Division Divisional Court No. DC 0500947400	2287-04-U	Pending
United Brotherhood of Carpenters v. United Brotherhood of Carpenters, Local 93 Divisional Court No. 01/06	2069-05-U; 3055-05-M	Pending
Gus Nedelkopoulos v. OLRB Divisional Court No. 77287/05 NEWMARKET	3704-04-U	Pending
Century Bldg. Restoration Inc. v. Universal Workers Union LIUNA Local 183, et al Divisional Court. No. 76931/05 NEWMARKET	1880-04-G	Pending
1333833 Ontario Inc. v. OLRB, Employment Standards Officer, Norstead Building Products Inc. Divisional Court No. DV-05-236	3559-04-ES	Pending
Grantley Howell v. OLRB Divisional Court No. 04/178 HAMILTON	0933-01-U; 1273-01-U; 3552-00-U	Dismissed – April 13, 2006
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
Naseem Jamal v. OPSEU et al Divisional Court No. 567/04	2464-03-U	Leave to C.A. dismissed Feb. 3/06, seeking leave to SCC
Joseph S. Rooke v. OLRB and Stelco Hamilton Divisional Court No. 404/04	1584-02-OH; 2647-02-OH	June 27, 2006