

H Ontario Labour Relations Board **HIGHLIGHTS**

Editors: Aaron Hart, Solicitor
Andrea Bowker, Solicitor

March 2022

The Board welcomes **Danna Morrison** as a new full-time Vice Chair.

Danna Morrison was called to the Ontario Bar in 2010 and has previously worked as a partner in a boutique law firm in Toronto specializing in labour law, as a mediator with the Ontario Labour Relations Board specializing in construction labour law, and as in house counsel with a construction trade union. She holds a Bachelor of Arts (Honours) degree from Queen's University and a Juris Doctor degree from the University of Western Ontario.

SCOPE NOTES

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

Construction Industry - Grievance Referral – Discrimination – Referral of grievances under section 133 of the *Labour Relations Act, 1995* – Union alleged Employer violated collective agreement and the Ontario *Human Rights Code* (the “Code”) on the basis of disability, race and/or national origin when it discharged Grievor – Employer argued Grievor, a Black man, engaged in

a pattern of aggressive conduct, deemed to be “harassing and threatening in nature”, including outbursts and confrontations with other employees – Union argued Employer’s policies failed to deal explicitly with issues of race, systemic racism or anti-black racism, Employer failed to and/or superficially investigated instances where Grievor claimed he was discriminated against on the basis of race, and Employer failed to establish a continued pattern of misconduct – Board determined Employer did not meet burden to establish it had just cause to discharge Grievor – Board held Employer relied on past conduct for which Grievor was never disciplined and Grievor’s conduct did not warrant discharge – Board held the Union demonstrated Employer discriminated against Grievor contrary to the *Code* – Employer failed to thoroughly document incidents with witness statements involving White employees but fully documented Grievor’s outbursts – Union called expert witness to testify as an expert in implicit bias – Board relied on expert testimony and jurisprudence regarding how “decent, fair-minded people who would eschew and denounce racist conduct might still act on unconscious biases to the detriment of a member of an ‘outgroup’ and to the benefit of members of the ‘ingroup’” – Board determined discharge tainted by discrimination – Grievance allowed

LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; CTS (ASDE) INC.; OLRB Case Nos: 0249-19-G, 2580-19-G,

251-19-G; Dated February 23, 2022; Panel: Patrick Kelly (43 pages)

Employment Standards Appeal – Reprisal – Constructive dismissal – Application for review pursuant to section 116 of the *Employment Standards Act, 2000*, (the “Act”) – Employment Standards Officer (“ESO”) determined Employer reprised against employee and constructively dismissed employee after it significantly reduced hours of work – Employer sought to rely on Ontario Regulation 228/20 (the “IDEL regulation”) to argue reduction in hours of work was for “reasons relating” to COVID-19 – Employer was forced to close from March 23, 2020 to May 11, 2020 due to Declaration of Emergency by the Government of Ontario – Reduction in employee’s hours began May 11, 2020 – Employee filed complaint under the *Act* on July 5, 2020 – Employer hired new employee September 28, 2020 and new employee received significantly more hours of work and performed similar function to employee – Employee resigned two weeks after new employee was hired – Employer argued it reduced employee’s hours due to COVID-19 and required changes to its business – Director of Employment Standards argued an exception to the minimum standards provided by the *Act* must be interpreted strictly, however, the IDEL regulation is not a clear or simple exception and should be interpreted broadly because it provides significant benefits and imposes inconveniences to both employers and employees – Employee argued he was reprised against and constructively dismissed on the basis of the reduction in hours – Board determined the IDEL regulation constitutes an exception to the minimum standards and should be interpreted strictly – Board held the IDEL regulation applied up until the Employer hired a new employee to perform same duties as the employee, concluding that at that time, the reduction in the employee’s hours was no longer due to COVID-19 and IDEL regulation was no longer applicable – Once IDEL regulation ceased to apply, changes to employee’s duties and reduction in hours had to be viewed through lens of constructive dismissal – Board also

concluded that reduction in employee’s hours of work was tainted by an anti-Employment Standards motive – Compensation order and order to pay amended

MARVIN ROY CABARABAN PAGUIRIGAN OPERATING AS SKYFOX GAMES; MICHAEL COONS; DIRECTOR OF EMPLOYMENT STANDARDS; OLRB Case No: 2292-20-ES; Dated March 1, 2022; Panel: Peigi Ross (39 pages)

Successorship – Successor Trade Union – Application filed under section 68 of the *Labour Relations Act* – PWU claimed employees of CTS and NOW voted to transfer bargaining rights from CUPE, Local 71 to PWU – Shortly after alleged vote, some CTS employees became employees of The Corporation of the Town of Cochrane (the “Town”) - Town claimed employees became part of a larger bargaining unit still represented by Local 71 – PWU sought a declaration it was the successor union to Local 71 and a re-definition of the bargaining units such that it was the bargaining agent of transferred CTS employees – The Board applied “substantial compliance” test to determine whether union complied with constitutional requirements regarding a reorganization; predecessor and successor unions as well as employees must give clear approval of transaction – Board held Local 71 was not clear with its members as to how it would proceed with reorganization under its constitution, the specifics of which are substantive and define the movement of members – Board held a union must demonstrate it sufficiently complied with core provisions of its constitution – Application dismissed

POWER WORKERS' UNION, CUPE LOCAL 1000; THE CORPORATION OF THE TOWN OF COCHRANE; COCHRANE TELECOM SERVICES AND NORTHERN ONTARIO WIRES INC.; CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 71; OLRB Case No: 0350-21-U; Dated February 9, 2022; Panel: Brian Smeenk (25 pages)

Unfair Labour Practice - Duty of Fair Representation – Applicant alleged Union breached duty of fair representation contrary to section 74 of the the *Labour Relations Act* by failing to consult with or advocate for her and not acting on her request to investigate or grieve her discharge – Applicant argued Union has a positive obligation to investigate and consider a long-term employee’s termination of employment for a grievance, even if not requested to do so – Union argued a trade union is not presumed to have a positive obligation to act if a member makes no request for assistance – Board determined Union offered no rationale to Applicant when asked about entitlements under the *Employment Standards Act* or after Applicant’s request to file grievance – Board held Union’s response to Applicant was superficial and cursory – Board held Union placed an unrealistic responsibility on Applicant to properly frame legal basis for a grievance – Board ordered Union to file a challenging the Applicant’s discharge – Further ordered Union to fully investigate the merits of advancing the grievance to arbitration, including obtaining a legal opinion from an independent law firm of the Union’s choosing – Application granted

JANINA MOLINA DE LEON; CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1590-01; OLRB Case No: 0833-21-U; Dated February 7, 2022; Panel: Patrick Kelly (21 pages)

Unfair Labour Practice - Statutory Freeze – Applications filed under section 96 of the *Labour Relations Act* (the “*Act*”) – Union alleged Employer violated sections 70, 72 and 86 of the *Act* by refusing to grant recently unionized employees market and wage step increases payable pursuant to Employer policy – Union argued “business as before” approach should be applied and Employer’s policy created a reasonable expectation employees would receive increases – Union further argued failure to comply with policy would punish employees for choosing to unionize – Employer argued policy expressly applied to non-union employees and once employees become unionized,

the Employer would bargain such issues with the Union – Board has consistently rejected concept of a “static freeze” such that section 86 need not be interpreted as an absolute halt to any changes to wages or conditions of employment – Board held Employer’s interpretation of policy made it such that, but for unionizing, the affected employees would be entitled to increases – Applications granted

ONTARIO PUBLIC SERVICE EMPLOYEES UNION; LIFELABS LP; OLRB Case Nos: 2869-20-U; 1091-21-U; Dated February 11, 2022; Panel: Roslyn McGilvery (21 pages)

COURT PROCEEDINGS

Judicial Review – Construction Industry Grievance Referral – Applicant Employer sought judicial review of decision of the Board in a grievance referral to the Board pursuant to s. 133 of the *Labour Relations Act, 1995* – Employer did not file a Notice of Intent to Defend (“NOID”) in grievance referral which was then adjourned to allow for a jurisdictional dispute to proceed – Grievance was relisted after jurisdictional dispute decision concluded that work should have been assigned to the Carpenters’ Union rather than to the Labourers’ Union, noting that the Carpenters had a collective agreement with the Employer covering the work and the Labourers did not – Employer did not participate in jurisdictional dispute nor file a NOID after the Carpenters relisted grievance for hearing – Board issued default decision finding that only issue for hearing in grievance referral would be the quantum of damages – Employer filed NOID on the same day as the damages hearing - Employer filed untimely request to reconsider the default decision, noting, among other things, that although it had not filed a NOID, the Labourers had done so, and asserting that damages against an employer following a jurisdictional dispute was not the norm – Board declined to reconsider decision, noting that the Employer had not sought to participate in any way in the proceedings until the day of the damages hearing – Labourers did not have standing to

participate in Carpenters grievance once jurisdictional dispute resolved – Nothing in reconsideration request suggested that work assignment was “a rational business decision made in good faith” – No basis for reconsideration – Divisional Court concluded that Board’s initial and reconsideration decisions were reasonable and not procedurally unfair – Court concluded that Board’s decision that Labourers had no standing to intervene in the grievance once jurisdictional dispute proceeding resolved was neither procedurally unfair nor unreasonable – Court also found that Board had not disregarded long-standing jurisprudence regarding damages in such circumstances since Employer had not justified its decision to assign the work to a union that had no collective agreement claim to the work, either in the grievance or jurisdictional dispute proceedings – Court further concluded that allowing default judgment after matter adjourned on consent for jurisdictional dispute proceeding was not procedurally unfair or unreasonable despite NOID having been filed by the Labourers – Application dismissed.

BOMANITE TORONTO LTD.; RE: CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 273/21; Dated February 16, 2022; Panel: D.L. Corbett, Perell, and Sheard JJ. (25 pages)

Judicial Review – Duty of Fair Representation -

Applicant sought judicial review of decisions of the Board in which the Board dismissed the Applicant’s duty of fair representation complaint on the basis that the grievance and arbitration procedure had not concluded and complaint was therefore premature – Board noted earlier decision dismissing an earlier application by the same Applicant on the same ground, and that the circumstances had not changed in that the arbitration had still not concluded – Divisional Court found that the Board’s decision was

reasonable – Court concluded that Board had reasonably exercised its discretion to not inquire into the complaint as premature while the arbitration was ongoing, and that this decision was consistent with the approach taken in the Board’s jurisprudence – Board reasonably concluded that complaint was identical to previously-dismissed complaint other than for an additional remedy being sought - Application for judicial review dismissed

MIR HASHMAT ALI; RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION; RE ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 275/20; Dated February 3, 2022; Panel: Sachs, E. Stewart, and Mew JJ. (7 pages)

Judicial Review – Duty of Fair Representation -

Applicant sought judicial review of decisions of the Board in which the Board dismissed the Applicant’s duty of fair representation complaint on the basis that it primarily concerned the Applicant’s WSIB claim and therefore fell outside the Union’s duty to fairly represent the Applicant, among other reasons – Request for reconsideration simply re-argued the same points made in the application and was dismissed – Court held that Board’s decision was reasonable in that it was justified, transparent and intelligible, consistent with prior jurisprudence and the Board’s decision fell within a range of acceptable outcomes and was defensible – Court also concluded that Board met its duty of fairness in that the Applicant had a full opportunity to respond to the Board’s concerns – Court declined to inquire into Applicant’s *Charter* claims since these were not raised before the Board and there was no adequate evidentiary basis for the claims – Application dismissed.

EUGENE LAHO; RE: UNIFOR LOCAL 414; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 336/21; Dated February 11, 2022; Panel: Stewart, Matheson, and Kurke 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 |
|--|--|----------------------|
| Dr. Daneshvar Dentistry Professional Corporation Divisional Court No. 123/22 | 0758-21-ES | Pending |
| City of Hamilton Divisional Court No. 967/21 | 1299-19-G 1303-19-G 1304-19-G | December 12-13, 2022 |
| Manalco Contracting Ltd. Divisional Court No. 971/21 | 0295-14-R | Withdrawn |
| Susan Johnston Divisional Court No. 934/21 | 0327-20-U | November 2, 2022 |
| Reliable Choice Contract Inc. Divisional Court No. 915/21 | 0486-21-R | February 14, 2022 |
| Royal Group Inc. Divisional Court No. 911/21 | 2440-20-U | Pending |
| Joe Placement Agency Divisional Court No. DC-21-00000017-0000 (London) | 0857-21-ES | Pending |
| Holland, L.P. Divisional Court No. 673/21 | 2059-18-R 2469-18-R 2506-18-R 2577-18-R 0571-19-R 0615-19-R | June 21, 2022 |
| Black and McDonald Ltd. Divisional Court No. 502/21 | 2425-20-G | April 6, 2022 |
| Ontario Catholic School Trustees' Association Divisional Court No. 650/21 | 2067-20-M | May 24, 2022 |
| Ontario Catholic School Trustees' Association Divisional Court No. 645/21 | 2067-20-M | May 24, 2022 |
| Mammoet Canada Eastern Ltd. Divisional Court No. 609/21 | 2375-19-G | April 20, 2022 |
| Candy E-Fong Fong Divisional Court No. | 0038-21-ES | Pending |
| Eugene Laho Divisional Court No. 336/21 | 1869-20-U | Dismissed |
| Symphony Senior Living Inc. Divisional Court No. 394/21 | 1151-20-UR 1655-20-UR | Pending |
| Bomanite Toronto Ltd. Divisional Court No. 271/21 | 2057-19-G | Dismissed |
| Cambridge Pallet Ltd. Divisional Court No. 187/21 | 0946-20-UR | May 16, 2022 |

(March 2022)

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| Mir Hashmat Ali Divisional Court No. 275/20 | | 0629-20-U | Dismissed |
| Guy Morin Divisional Court No. 20-DC-2622 | (Ottawa) | 2845-18-UR 0892-19-ES | September 15, 2022 |
| Capital Sports & Entertainment Inc. Divisional Court No. 20-DC-2593 | | 1226-19-ES | Pending |
| Joe Mancuso Divisional Court No. 28291/19 | (Sudbury) | 2499-16-U – 2505-16-U | Pending |
| Daniels Group Inc. Divisional Court No. 018/20 | | 0279-16-R | April 5, 2022 |
| 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 | Pending |
| Tomasz Turkiewicz Divisional Court No. 262/18, 601/18 & 789/18 | | 2375-17-G 2375-17-G 2374-17-R | Leave to Appeal to CA granted – M52577 |
| 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 | | 3150-11-R 3643-11-R 4053-11-R | Leave to Appeal to CA granted – M52413 |
| Ganeh Energy Services Divisional Court No. 515/17 | | 3150-11-R 3643-11-R 4053-11-R | Leave to Appeal to CA granted – M52413 |
| 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 |

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| R. J. Potomski Divisional Court No. 12/16 <p style="text-align: right;">(London)</p> | 1615-15-UR 2437-15-UR 2466-15-UR | Pending |
| Qingrong Qiu Court of Appeal No. M48451 | 2714-13-ES | Pending |
| Vallogia Linguistique Divisional Court No. 15-2096 <p style="text-align: right;">(Ottawa)</p> | 3205-13-ES | Pending |