

*H*IGHLIGHTS

Ontario Labour Relations Board

Editors: Andrea Bowker, Solicitor
Aaron Hart, Solicitor

November 2022

New Alternate Chair

The Board welcomes its new Alternate Chair, **Lindsay Lawrence**.

Prior to joining the Board as Solicitor in 2020, Lindsay Lawrence was a partner at a prominent labour law firm with many years of practice in both the construction and industrial sectors, as well as being a member of that firm's Steering Committee for a number of years. Lindsay was then appointed as a Vice-Chair in 2021. She is also a contributing editor for the leading text Ontario Labour Relations Board Law and Practice.

NOTICES TO THE COMMUNITY

Holiday Season Board Schedule

The Board's Holiday operations schedule is attached and can be found on the Board's website.

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in October of this year. These decisions will appear in the September/October 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 – Certification – Review of membership evidence filed in support of application for certification indicated that some cards had incomplete dates - Board allowed the Union to file supplementary declarations to address date issue – Employer argued that the Board should not have regard to the supplementary declarations - Employer argued there was no valid explanation for the omission of complete dates - Employer argued that permitting the Board to allow the supplementary declarations allows the Union to avoid the requirements of Rule 25.2, which is prejudicial to the Employer - Union argued that the legislature did not intend for employees to be disenfranchised because they made an inadvertent omission of the date in the card - No prejudice to the Employer and the Board is simply correcting an oversight - Board held that relief against the strict application of Rule 25.2 in this case was not analogous to an employer filing an untimely response to an application for certification or seeking to add job sites or employee names after a response is filed since there was no prejudice to the Employer in this case - All of the declarations are clear this was an oversight and a minor omission – Certificate issued.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 853, RE: SPRINKLER FITTERS OF ONTARIO, RE: **RIDGE FIRE PROTECTION INC**; OLRB Case No: 0861-22-R; Dated October 14, 2022; Panel: Michael Mitchell (8 pages)

Construction Industry – Certification – Status Disputes

- Union asserted that certain disputed individuals were employees of the responding party – Responding party asserted that a temporary help agency was the true employer of two of the individuals – Responding party argued that the agency’s contract with the individuals provided extensive benefits, vacation policies and administrative oversight, distinguishing this arrangement from other temporary help agency cases - Board found the essence of the contact was no different than other agencies in respect of fundamental direction and control over the economic lives of the individuals – Board concluded that the responding party was their employer – Union challenged another individual on the basis of s. 1(3)(b) of the Labour Relations Act (“LRA”) - Board examined the non-traditional construction characteristics of the Employer and the employee’s managerial and non-managerial duties, and concluded that the individual was managerial – Individual in dispute made effective recommendations which affect employees’ economic lives, played a role in hiring, was involved in management meetings, and performed supervisory duties – Responding party challenged two other employees on the basis that their work on the date of the application was not work of the bargaining unit - Employees performed primarily clean-up and removal of debris - Board referred to its previous jurisprudence concluding that clean-up of debris on a construction site is the work of a construction labourer – Based on the nexus between the work performed and the nature of the work the responding party was carrying out, Board concluded that the work was integral or clearly connected to the construction work that came both before and after it – Employees included in bargaining unit – Application granted.

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL, RE: **GREG MILLER RESTORATION LIMITED O/A MILLER RESTORATION OR MILLER DKI**; OLRB Case No: 0583-21-R; Dated October 18, 2022 Panel: Jack Slaughter (28 pages)

Construction Industry – Grievance Referral - Human Rights Code - Reprisal – Discrimination

– **Remedy** – Board previously determined that Employer had violated the Human Rights Code (“Code”). by failing to accommodate grievor’s disability - Board now considered the appropriate remedy, including lost wages and damages for violations of the Code - Board assessed the lost wages at the average rate of hours worked by other millwrights – Union sought \$15,000 in human rights damages - \$10,000 for reprisal and \$5000 for discrimination - Union argued this case warrants damages in the higher range for the human rights code primarily because of the employer’s size and its impact in the construction industry - Union argued the impact of the reprisal and discrimination significantly affected the grievor’s future earnings - Employer argued the Board should consider two principles: the consistency of awards and that similar facts should produce similar results – Employer argued that the damages should be comparable to a previous case involving the same grievor but a different employer - Board found that the circumstances of the two cases were not the same – Board found that damages in the higher range were appropriate - Board awarded 65 hours of lost wages at the journeyman millwright rate and \$12,500 in human rights damages (\$5000 for discrimination and \$7500 for reprisal).

MILLWRIGHT REGIONAL COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ON ITS OWN BEHALF AND ON BEHALF OF ITS AFFILIATED LOCAL 1592, RE: **E.S. FOX LTD.**; OLRB Case No: 2991-18-G; Dated October 17, 2022; Panel: Kelly Waddingham (18 pages)

Employment Standards - Tribunal Adjudicative Records Act (“TARA”)

- Request from a third party under section 2(1) of TARA for all publicly accessible documents filed with the Board in application for review under section 116 of the Employment Standards Act (“ESA”) - Board considered whether documents attached to an application for review under the ESA were

“adjudicative records” within the meaning of TARA – Application in question did not go to hearing and was not adjudicated - Board considered the background to section 2(1) of TARA and the “open-court principle” - Board must consider when and why a document was filed to determine whether to make it available to the public – Documents sought in this case were neither the “application or other document by which a proceeding before a tribunal commenced” nor entered as evidence - Documents were not “adjudicative records” within the meaning of TARA – Request for documents denied.

MARA DICKSON, RE: **ROTALEC CANADA INC.**, RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB Case No: 1256-20-ES; Dated: October 19, 2022; Panel: Michael McCrory (10 pages)

the handing out of union hats and shirts, and the pursuit of a labour relations purpose or objective - Board noted that the termination took place after the Union was certified, in contrast to most interim reinstatement applications – There was no suggestion that the Employer’s actions had adversely affected collective bargaining that was underway - Board found the harm suffered is insufficient to warrant the Union’s requested extraordinary remedial relief and that it did not make labour relations sense to grant the relief requested on an interim basis - Application dismissed.

LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 837, RE: **1712033 ONTARIO INC. O/A WINMAR**; OLRB Case No: 1439-22-IO; Dated October 28, 2022; Panel Patrick Kelly (25 pages)

Unfair Labour Practice - Interim Relief – Interim Reinstatement - Union sought interim reinstatement under the *Labour Relations Act* (“Act”) of a terminated employee and an interim order staying the Employer’s introduction and enforcement of a dress code policy – Union was previously certified and bargaining was ongoing - Terminated employee, an open supporter of the Union during the organizing campaign, received discipline for wearing apparel with a trade union logo during working hours, pursuant to Employer’s policy, and was terminated for failing to respond to an emergency call while on call - Employer submitted the employee had an extensive discipline history – Board considered factors set out in *National Judicial Institute*, noting that the parties focused on the balance of labour relations harm, irreparable harm and the relative strength of each party’s case, and to a lesser extent, the purposes of the Act - Union asserted that the wearing of union paraphernalia is a recognized right during both the certification and collective bargaining process and that it had a strong case that the employee should be reinstated – Employer argued that the employee was terminated solely for his extensive discipline history and that there was no obvious link between

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 |
|--|--|----------------------|
| 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 | Pending |
| 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 | April 25, 2023 |
| Elementary Teachers' Federation of Ontario Divisional Court No. 367/22 | 0145-18-U | Pending |
| Michael Peterson, et al. Divisional Court No. 003/22 | 2301-21-R & 0046-22-R | December 5, 2022 |
| Strasser & Lang Divisional Court No. 003/22 | 2301-21-R & 0046-22-R | December 5, 2022 |
| CTS (ASDE) INC. Divisional Court No. 295/22 | 0249-19-G 2580-19-G 2581-19-G | Pending |
| Aecon Group Inc. Divisional Court No. 301/22 | 1016-21-HS | January 24, 2023 |
| Sleep Country Canada Divisional Court No. 402/22 | 1764-20-ES 2676-20-ES | June 6, 2023 |
| Capital Sewer Services Inc. Divisional Court No. 280/22 | 1826-18-R | Pending |
| The Ontario Secondary School Teachers' Federation Divisional Court No. 187/22 | 0145-18-U 0149-18-U | April 3, 2023 |
| City of Hamilton Divisional Court No. 967/21 | 1299-19-G 1303-19-G 1304-19-G | December 12-13, 2022 |
| Susan Johnston Divisional Court No. 934/21 | 0327-20-U | November 2, 2022 |
| 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 | February 2, 2023 |
| 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 |
| Capital Sports & Entertainment Inc. Divisional Court No. 20-DC-2593 | 1226-19-ES | Abandoned |
| 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 | Pending |
| 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 | Appeal granted |
| 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 | Appeal granted |
| Ganeh Energy Services Divisional Court No. 515/17 Court of Appeal No. C69933 | 3150-11-R 3643-11-R 4053-11-R | Appeal granted |
| 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 |
| Vallogia Linguistique Divisional Court No. 15-2096 (Ottawa) | 3205-13-ES | Pending |