

*H*ighlights Ontario Labour Relations Board

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SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in January of this 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.

Certification – Construction Industry – Dependent Contractor – Board considered the status of four employees at least nominally employed by KE – Union challenged the inclusion of the four individuals on the employee list – Responding Party argued the four individuals were dependent contractors and therefore employees of the Employer for the purposes of the application – Union argued KE was an independent contractor and the four individuals were third party employees and not employees of the Employer – Board upheld Union’s challenges to the status of the four individuals – Board found KE was an independent contractor of the Responding Party and the four individuals were KE’s employees and not employees of the Responding Party – The employee / independent contractor assessment must be determined having regard to the context or industry in the which the work is performed – Economic dependence is not determinative of the employee / independent contractor assessment and can be defeated by evidence of entrepreneurial

activity – An important consideration is whether the party is receiving income from the work performed by others on its behalf – Although KE was economically dependent on the Responding Party and under an obligation to perform work for the Responding Party, KE could make a profit or loss depending on how KE assigned and paid the four individuals and how KE managed additional expenses – Individuals in dispute excluded from list of employees - Certificate issued

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 90 and REECE HIGGINS, RE: **BROCK ELEVATOR LTD., DON COWAN, BERT TOLHOEK, PETER TOLHOEK and MATT BELANGER**; OLRB Case Nos. 0423-23-R, 0487-23-U & 0873-23-U; Dated January 24, 2024; Panel: Caroline Rowan (17 pages)

Certification – Status – Application for certification - Voting constituency included all individuals who had an employment relationship with the responding party on the application filing date (“AFD”) and all employees who were not at work on that date so long as there was a reasonable expectation of their return to employment – Issue to be determined was whether Board should count M’s ballot, whose employment was terminated the day before the AFD – Union argued M’s ballot should be counted because his statutory notice period extended well past the AFD – Employer argued M’s ballot should not be counted as he was not in

an employment relationship with the responding party on the AFD – Board concluded M’s ballot should not be counted – As a result of the termination of M’s employment, M was neither at work on the AFD nor had a reasonable expectation of returning to employment – Any claims M had under the *Employment Standards Act, 2000* (the “*Act*”) with respect to termination and/or severance pay were not relevant to the issue of whether he had a reasonable expectation of returning to employment – Board was not willing to expand the analysis of whether there is a reasonable expectation of returning to employment to include considerations of employee’s potential entitlements under the *Act* – M’s ballot not to be counted – Matter continues

LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 493, RE: **BEST BLASTING MATS INC.**, DYNAMAT INC., ENVIRONMENTAL SOLUTIONS 360 (QUEBEC) LTD. AND ENVIRONMENTAL SOLUTIONS LTD.; OLRB Case No. 1690-23-R; Dated January 31, 2024; Panel: Paul Young (14 pages)

Employment Standards – Applicant was awarded on-call pay for the two-year period preceding the claim minus the time after which the Employer had changed its on-call procedures - Applicant filed a second claim in respect of on-call pay after another employee received retroactive on-call pay beyond the two-year limitation period based on the doctrine of fraudulent concealment – Applicant’s second claim denied by Employment Standards Officer who concluded that the doctrine of fraudulent concealment did not apply - Applicant sought review of the decision with respect to the second claim – Board dismissed the application for review – Board declined to exercise its discretion to extend the time limit under s. 116(5) of the *Employment Standards Act, 2000* – However, on the merits, the Board would also have dismissed the application as it was effectively an attempt to relitigate the claim – Applicant’s first and second claims both sought

retroactive wages beyond the two-year limitation period – Applicant was not entitled to re-litigate anew merely because she learned of an argument that may have changed the outcome from her first claim – Application dismissed

CATHERINE BAKER, RE: **WILLIAM OSLER HEALTH CENTRE**, RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB Case No. 0428-22-ES; Dated January 30, 2024; Panel: Roslyn McGilvery (20 pages)

Occupational Health and Safety – Reprisal – Application under s. 50 of the *Occupational Health and Safety Act* (the “*Act*”) alleging applicant was terminated contrary to the *Act* – Applicant was the subject of a harassment complaint by another employee – In the course of the investigation of the harassment complaint, the Applicant indicated that she had also felt harassed by the other employee – Applicant terminated after investigation concluded – Board concluded that the reference to alleged harassment of the Applicant by the other employee in the course of the investigation was not, by itself, an attempt to seek enforcement of the *Act* such that s. 50 did not apply – Application dismissed

HANA NIZAM, RE: **PLANTA QUEEN**; OLRB Case No. 1082-23-UR; Dated January 3, 2024; Panel: Brian D. Mulrone (10 pages)

Related Employer / Sale of Business – Board dealt with application under ss. 1(4) and 69 of the *Labour Relations Act, 1995* (the “*LRA*”), referral from arbitrator under s. 101 of the *Employment Standards Act, 2000* (the “*ESA*”), and applications by non-bargaining unit employees asserting claims under the *ESA* – Common issue to all files was “relatedness” or successorship under the *LRA* and under the *ESA* - Board concluded there was a sale of business from R to TH within the meaning of s. 69 of the *LRA*, despite the time gap between the operations of R and TH – TH conducted the same business as R in the same location as R using the

equipment and operating procedures of R and the skills and know-how of some of the staff of R to serve essentially the same market – However, Board declined to exercise its discretion to declare R, TH, TP, and numbered company were one employer under s. 1(4) of the *LRA* since there was no erosion of bargaining rights – Single employer declaration would have only served to facilitate the collection of debts, which was not a basis for the declaration under s. 1(4) of the *LRA* – Board concluded R, TH, TP and numbered company were one employer within the meaning of s. 4(2) of the *ESA* – Board found R, TH, TP and numbered company were jointly and severally liable for any termination or severance pay owing to bargaining unit and non-bargaining unit employees – Board remains seized with respect to issues arising from implementation of this decision

UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 1006A, RE: **RYDING REGENCY MEAT PACKERS LTD**, TRI-PET HOLDINGS INCORPORATED, TRUHARVEST MEATS INC and 2805463 ONTARIO LTD.; OLRB Case Nos. 0429-21-R, 0625-21-ES, 0675-21-ES, 0676-21-ES & 0677-21-ES; Dated January 2, 2024; Panel: Patrick Kelly (35 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
A. & F. Di Carlo Construction Inc. Divisional Court No. 657/23	0614-23-ES 0638-23-ES	Pending
Errol McHayle Divisional Court No. 013/24	1396-22-U	Pending
Four Seasons Site Development Divisional Court No. 661/23	0168-17-R	September 25, 2024
Bradford West Gwillimbury Public Library Divisional Court No. 611/23	1523-23-FA	September 10, 2024
Jennifer Trumble Divisional Court No. DC-23-00002813-0000 – PEHT (Ottawa)	1566-21-PE	May 22, 2024
Robert Currie Divisional Court No. 365/23	0719-22-UR 1424-22-UR	**
Red N' Black Drywall Inc. Divisional Court No. 350/23	1278-19-R	March 5, 2024
All Canada Crane Rental Corp. Divisional Court No. 037/23	1405-22-G	Dismissed Motion for Leave to Appeal to Court of Appeal
Mina Malekzadeh Divisional Court No. 553/22	0902-21-U 0903-21-UR 0904-21-U 0905-21-UR	May 1, 2024
Simmering Kettle Inc. Divisional Court No. DC-22-00001329-00-JR - (Oshawa)	0012-22-ES	Pending
Susan Johnston Divisional Court No. 934/21	0327-20-U	Motion for Leave to Appeal to Court of Appeal
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
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
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