ISSN 1195-0226

Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

October 2005

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in September of this year. These decisions will appear in the July/August 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.

Certification – Construction Industry – The union filed two applications for certification for the same group of employees; an industrial application and a construction application – The union delivered the materials for both applications at the same time and although the employer claimed they only received the industrial application, the Board found that the employer had some idea that there were two applications because it posted the notices for both – The employer requested that the Board allow them to file materials regarding the nature of the bargaining unit for the construction application even though the two day deadline had expired – The Board held that it does not have the authority to extend a deadline specified in the Act – Further the Board held that the use of the word "shall" in the provision indicates that the deadline is mandatory and cannot be extended – The Board also found that the word "shall" has a similar meaning in other parts of the Act and the objective of the Act, to ensure an expedient certification process, supports this interpretation – The Board also denied the employer's request to order a representation vote reasoning that there must be some flaw or doubt with respect to the membership evidence or some problem arising from the process of the application, before it would consider ordering a vote where it was satisfied that more than 55 per cent of the employees in the bargaining unit are members of the union – The Board further held that the results of the certification vote in the industrial application have no bearing on the construction application – Construction certification granted

AIR KOOL LIMITED; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 787; File No. 0919-05-R; Dated August 17, 2005; Panel: David A. McKee (15 pages)

Bargaining Unit – Sale of a Business – The Ministry of Health and Long-Term Care made a decision that resulted in employees being transferred from the Ottawa Regional Cancer Centre to the Ottawa Hospital – OPSEU requested that all the employees fall under their bargaining unit, while PIPSC requested that separate bargaining units be maintained and in the event that the units were merged a representation vote be taken – The Board found that there should be a single unit because of the strong preference for large, broader-based units and because the types of employees in the PIPSC bargaining unit, including the Radiation Therapists, were the kinds of highly skilled professional employees routinely found in broad-based paramedical bargaining units and frequently represented by OPSEU – The Board also found that it was not necessary to order a representation vote because one had already been recently held among these parties over this very bargaining unit and a significant number of the employees voted in favour of OPSEU – Application granted

CANCER CARE ONTARIO; THE OTTAWA HOSPITAL; THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA; AND CUPE AND ITS LOCAL 3316; RE CUPE AND ITS LOCAL 4000; RE OPSEU; File No. 3231-03-R; Dated August 12, 2005; Panel: Brian McLean (7 pages)

Fire Protection and Prevention Act, 1997 – Standing – Status – The Toronto Professional Fire Fighters' Association claims that certain individuals who are represented by CUPE are performing the work of firefighters and should be in their bargaining unit – The Fire Fighters brought this application pursuant to s. 114(2) of the LRA – The FPPA lists the sections from the LRA that apply to it and s. 114(2) is not listed – The Board held that the FPPA clearly mandates those situations where the Board has jurisdiction in relation to individuals covered under the FPPA and so the Board does not have jurisdiction to hear this application – Further the Board held that only the employer and CUPE have standing to bring an application under s. 114(2) – Application dismissed

CITY OF TORONTO; RE TORONTO PROFESSIONAL FIRE FIGHTERS' ASSOCIATION; RE CUPE, LOCAL 79; File No. 0331-05-M; Dated August 10, 2005; Panel: Timothy W. Sargeant (4 pages)

Employment Standards Act – This is an application for review under the *ESA* by a director of Energy Plus 2000 in respect to a director order to pay respecting vacation pay – The director claims that no vacation pay is owed to the employee because it was paid to him when he was on sick leave – In the alternative the director claims that the employee should not get the vacation pay owed to him during his entire period of employment because he only claimed vacation pay for a shorter period – The Board held that the employer has the obligation to demonstrate that the vacation pay had already been paid and since no evidence was provided to demonstrate that the amount paid to the employee during his sick leave was his vacation pay this burden had not been met – The Board further held that it was irrelevant that the employee claimed a lesser amount earlier since he made it clear at the hearing that he was claiming the entire amount – The entire claim was within the limitation period prescribed in the *ESA* because vacation pay becomes due long after it is earned – However, according to the *ESA* a director's maximum liability for vacation pay is 12 months – Order to pay amended for 12 months of vacation pay

ENERGY PLUS 2000 LIMITED, GORDON FRANCIS KERR, A DIRECTOR OF; RE DAVID TUNNEY AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 4021-04-ES; Dated August 15, 2005; Panel: Caroline Rowan (8 pages)

Bargaining unit – Certification – Construction Industry – In these applications for certification relating to the ICI sector, the applicants sought to displace themselves and their parent international unions and also to expand the scope of the bargaining unit for which they currently hold bargaining rights under the EPSCA collective agreement – At the time of the certification applications there were no employees at work in the "expanded" portion of the bargaining unit – First, the Board found there was no proper basis for it to find that a province wide electrical power systems sector is an element of an appropriate bargaining unit under section 158(1) – Second, the "appropriate geographic area" is a Board area in which employees were working on the application date – Third, the Board's approach to finding the appropriate bargaining unit in a displacement application was almost invariably, the bargaining unit for which the incumbent union holds bargaining rights – Finally, that if it were to permit the applicants to rely exclusively on the membership support from employees working under a collective agreement obtained through voluntary recognition to expand the scope of the bargaining unit contained in that collective agreement, the Board would, in effect, be permitting one of the parties to change the agreement unilaterally – The Board found the single bargaining units sought by the applicants to be inappropriate, holding that there were two units in each application that were appropriate: first, the current units for which the applicants already held rights, and second the unit mandated by s. 158 – As there were no employees at work on the application date in the "ICI" units, the applications, as they pertained to those units, were dismissed

ONTARIO POWER GENERATION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE EPSCA, LIUNA, UBCJA, IUOE, POWER WORKERS' UNION CUPE, C.L.C. LOCAL 1000; File Nos. 3448-03-R; 3450-03-R; 3457-03-R; 3502-03-R; 0094-04-R; 0096-04-R; 0112-04-R; 0113-04-R; 0114-04-R; 0506-04-R;

0507-04-R; 0527-04-R; 0529-04-R; 0531-04-R; 0532-04-R; 0533-04-R; 0534-04-R; 0561-04-R; 0917-04-R; 0925-04-R; 0926-04-R; 1026-04-R; 1045-04-R; 1534-04-R; 1688-04-R; Dated August 22, 2005; Panel: Harry Freedman, G. Pickell, A. Haward (13 pages)

Certification – Constitutional Law – In this application for certification, Phasecom, an installer of satellite receiving dishes and related equipment pursuant to a contract with Bell ExpressVu, argued that its operations were integral to Bell's operation of a satellite television system, a federal undertaking, and hence the labour relations between Phasecom and its employees was subject to federal, rather than provincial, legislation – The Board reviewed the general principles for determining whether a subordinate operation is integral to a federal undertaking – The Board found that Phasecom directly services the customers of Bell by delivering, installing and occasionally repairing the satellite dishes and other receiving equipment, without which the customer could not receive the programming; the work it performs for Bell (and other cable companies) comprises all of its business; Phasecom supplies a service, not just a product; Phasecom continually dispatches installers to service Bell's customers; and Phascom's operations are an ongoing and habitual part of Bell's operations and not "casual" or "exceptional" – The Board found that Phasecom was an integral part of Bell's maintenance and delivery of satellite television services to its subscribers and as such Phasecom's labour relations fell within federal jurisdiction – Application dismissed

PHASECOM SYSTEMS INC.; RE TEAMSTERS INTERNATIONAL UNION, LOCAL 847; File No. 0814-05-R; Dated August 24, 2005; Panel: Mary Anne McKellar (9 pages)

Employment Standards – Parties – Practice and Procedure – Standing – These applications were filed by Securitas ("old building service provider") under s. 116 – The ESO had refused to issue Orders to Pay against Maxama ("new building service provider") in connection with claims for termination pay and severance pay made by employees – Securitas took the position that Maxama's obligation to pay termination and severance pay under s. 75(2) was triggered when it failed to extend reasonable offers of employment to the employees – The Board requested that the parties address the issue of Securitas' standing to bring the application and found that only the employees were entitled to apply for review of the refusal to issue an order – While Securitas may be entitled to party status as an "employer" to a review, this entitlement is engaged only once a proper application for review has been made – Securitas was not entitled to apply for review – Application dismissed

SECURITAS CANADA LTD.; RE BOB GRAHAM AND DIRECTOR OF EMPLOYMENT STANDARDS; File Nos. 0464-05-ES; 0466-05-ES; Dated August 15, 2005; Panel: Caroline Rowan (5 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
Century Bldg. Restoration Inc. v. Universal Workers Union LIUNA Local 183, et al Divisional Court. No. 76931/05 NEWMARKET	1880-04-G	Pending
BA International v. UA Local 412 et la Divisional Court No. 05-DV-001103	1363-04-U	Pending
1333833 Ontario Inc. v. OLRB, Employment Standards Officer, Norstead Building Products Inc. Divisional Court No. DV-05-236	3559-04-ES	Pending
Wellington De Oliveira v. L.U.I.N.A 183 Divisional Court No. 51/05	0430-04-R	Pending
Sundial Homes (Bronte) Limited v. R.E.S Real Estate Services Limited., et al (Stated Case) Divisional Court No. 50/05	0846-03-R, 0959-03-R, 1046-03-U	Pending
Wabco Standard Trane Co. v. UA Local 787 Divisional Court No. 11/05	0194-03-G	Pending - Oct 7, 2005
Benjamin Blasdell v. UFCW Local A.F.L.-C.I.O.-C.L.C. Local 1000A; Loblaws Supermarkets Ltd. Divisional Court No. 74010/04 NEWMARKET	1431-03-M; 1341-03-U	Pending
Gerald Thomas v. SEIU Local 1.ON; Toronto East General & Orthopaedic Hospital Inc. Divisional Court No. 638/04	0281-04-U	Pending
Naseem Jamal v. OPSEU, et al Divisional Court No. 56704	2464-03-U	Dismissed Sept. 29/05; Reserved Sept 12, 2005 For Oct Highlights
Christopher Kabala v. Attorney General of Canada, Ombudsman Ontario, et al Divisional Court No. 575/04	0458-00-ES	Pending – October 31, 2005
Premier Fitness Clubs Inc. & 992434 Ontario Inc. v. Hopeton Bailey, et al Divisional Court No. 537/04	0341-03-ES	Dismissed Sept 7, 2005 for Oct Highlights
Assurant Group v. Ignacia Menor Fillion, et al Divisional Court No. 528/04	2999-03-ES	Pending – Jan. 16-17/06
Maurice Leblanc v. TTC, and ATU, Local 113 Divisional Court No. 468/04	2326-00-U	Dismissed for delay Sept 13,2005 for Oct Highlts
OPSEU v. PIPSC, **The Ottawa Hospital**, OLRB Divisional Court No. 378/04	0372-04-R	Dismissed – Sept. 28, 2005 for Oct Highlights
Grantley Howell v. OLRB Divisional Court No. 04/178	0933-01-U; 1273-01-U; 3552-00-U	Pending

Case name & Court File No.	Board File No.	Status
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