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Ontario Labour Relations Board HIGHLIGHTS

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Changes

Diane Gee has been appointed Alternate Chair of the Ontario Labour Relations Board and Chair of the Pay Equity Hearings Tribunal, effective August 1, 2008. Diane was a Vice-Chair at the OLRB from 1994 to 2002, and has been in private practice for the past six years. She brings a wealth of experience as adjudicator, as labour relations counsel and as an organizational leader to both institutions. We warmly welcome Diane back to the Board and to her new responsibilities.

Mary Ellen Cummings will, after over ten years as Alternate Chair of the OLRB and Chair of the PEHT, move to part-time status and continue pursuing her already very successful arbitration practice. We take this opportunity to thank Mary Ellen for her invaluable contributions as leader, mentor and colleague, and look forward to the benefit of her wisdom and guidance in her new role.

Scope Notes

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

Employment Standards – The employer sought review of an order requiring it to pay termination pay and overtime to the employee, arguing that it had given the employee adequate written notice of proposed changes to the terms of employment – The employee submitted that she never acceded to the proposed changes, and was constructively dismissed – The Board found that although the employer provided the employee in writing with certain changes it was contemplating in the future, it in fact made certain immediate alterations to the employee's work conditions (changing from a salary to hourly wage; eliminating religious holidays; restricting flexibility in start time) without proper notice – The Board also found that the employee resigned within a reasonable time in response to these changes, triggering a finding of constructive dismissal – Application dismissed

730372 ONTARIO LIMITED o/a BLOW MOULD ENGINEERING; RE ROZANA FIRER, AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 2226-07-ES; Dated May 12, 2008; Panel: Patrick Kelly (8 pages)

Bargaining Unit – Certification – Construction Industry – Reconsideration – Two unions sought certification for the same employees in non-ICI units in two adjacent Board Areas (9 and 11) – The employer agreed with the bargaining units proposed for Board Area 11, and provided identical Schedule "A" lists in response to each application; however, the employer disagreed that the scope of any bargaining unit should encompass Board Area 9 and asserted that it had no employees working in that Area on the application date – In an earlier decision, the Board (differently constituted) concluded that it had no option but to issue a certificate to each applicant for Board Area 11 – In a continuation of the proceeding, the parties argued about whether it was necessary for each applicant to establish that at least one employee performed work of its trade in Board Area 9 for a majority of his or her working day and what effect this would have on the earlier certificates – The employer argued the Board should reconsider its earlier decision so it could ascertain the "majority of the day" issue –

The applicants asserted that the responding party cannot resile from its original position, and the Board should find that someone worked in each Area on the application date, and should either issue two new certificates relating to Board Area 9 or revoke the earlier certificates and issue fresh ones for the broader geographic scope – The Board held that it has never required an applicant applying for a bargaining unit encompassing more than one Board Area to pass a "majority of the day" threshold with respect to more than work in a particular trade – The *Gilvesy* focus is on *what work* was performed, not *where* – The appropriate approach for the Board would be to reconsider the earlier certificates, revoke them and re-issue new certificates reflecting the expanded geographic scope – This should not be an opportunity for the responding party to renege on an earlier position – Hearing directed to ascertain if applicants had any employees performing work in Board Area 9 on the application filing date

BONNECHERE EXCAVATING INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; File Nos. 1913-06-R and 1915-06-R; Dated May 13, 2008; Panel: Lee Shouldice (9 pages)

Certification Where Act Contravened – Construction Industry – Remedy – Unfair Labour Practice – The union sought remedial certification because of the employer's alleged breaches of the Act – It held captive audience meetings with employees, questioned who had signed union cards, threatened job security, and violated the freeze provisions of the Act by unilaterally giving unprecedented across the board wage increases to employees at the start of the construction season – The Board found that the employer used its standard morning meetings to express views in opposition to the union, and in particular made more than veiled threats to the employees in the captive meetings – Further, the employer implemented wage increases without consultation or input from the union, and contrary to its historical practice – The Board held that no remedy short of remedial certification would sufficiently counter the effects of the employer's conduct – Certificate issued

CARLOS BARBOSA CONCRETE LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059; File Nos. 1893-05-R and 1907-05-U; Dated May 26, 2008; Panel: Caroline Rowan (17 pages)

Health and Safety – Reprisal – The applicant claimed that he had been subject to reprisals for raising health and safety concerns when he was laterally transferred from the position of Radiation Supervisor in the Solid Waste Management Services Division to his former position as Shift Supervisor, and also removed from the Divisional Health and Safety Committee – While occupying the position of Radiation Supervisor, the applicant made various complaints to his supervisors, and to persons to whom they reported, concerning "health & safety concerns", while also complaining that he did not have sufficient time to adequately do all the tasks assigned to him and that his job required more time and energy than could reasonably be expected of one individual (a perceived problem he continually emphasized, notwithstanding the opposite conclusions reached in the resulting audit process) – The city maintained that the applicant's lateral transfer was the result of his expressed inability to adequately perform his assigned duties, and was not disciplinary in nature – The Board found that the applicant's permanent reassignment to the position of Shift Supervisor was wholly in response to his consistent workload complaints, and so was not a reprisal within the meaning of the Act – As such, the city had satisfied its evidentiary burden of establishing that the reassignment was free of any taint of reprisal for voicing health and safety concerns – Application dismissed

CITY OF TORONTO; RE JOHN A. HARWOOD; File No. 1123-06-OH; Dated May 27, 2008; Panel: Ian Anderson (16 pages)

Certification – Construction Industry – Practice and Procedure – The Sheet Metal Workers International Association (SMWIA) sought to displace the Carpenters performing roofing or siding work in the low rise portion of the residential sector – The Carpenters argued that the applications should be dismissed because the SMWIA Constitution prohibited persons compensated on a lump sum or piecework basis from being members of that union – The Board found that SMWIA had adopted the Carpenters' existing terms and conditions for residential roofers and siders, such that the workers fit into the exemption for pieceworkers and were not prohibited from membership – The responding parties argued that the individuals the SMWIA sought to represent were employers themselves, and not employees – The Board found that the nature of the relationship between pieceworkers and their helpers, on the one hand, and the responding parties, on the other, had evolved over time so the companies' argument that they had no employees could not be sustained – The Board also held that it was impossible, at this stage in the proceedings, to determine whether an individual working as a pieceworker or helper on a

company's job site was employed by that company or by some other employer (or perhaps was an employer himself) – Finally, the Board refused to vary the *Gilvesy* test for voter eligibility in certification applications in the construction industry, given that the decisions ordering votes had clearly identified those eligible as "individuals who were employed by Eastern Eavestroughing" on a specific date – Since there was a potential for more than six hundred status disputes in these applications, the Board issued directions for the filing of book-in sheets and other documentary evidence which would assist in indicating who may have been at work on the date of application – Matters continue

EASTERN EAVESTROUGHING LTD.; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51; RE CARPENTERS & ALLIED WORKERS LOCAL 27, CJA; File Nos. 3394-06-R et al; Dated May 5, 2008; Panel: Mark J. Lewis (19 pages)

***Prima Facie* Motion – Strike –** The IBEW brought a motion to dismiss an illegal strike application on the basis that the Board should not exercise its discretion to make one or more declarations in the circumstances pleaded by the applicant, Enwin Utilities – The Board determined the motion based on the employer's allegations about a series of refusals by IBEW members to work emergency overtime – The Board was satisfied that if the facts as alleged were proven, then it could provide a remedy since: there was a history of allegedly unlawful strikes; the union did not appear to be in control of the situation; there was no evidence that the underlying dispute had been eliminated; and the implications of the concerted activity extended beyond the immediate parties to jeopardize the applicant's ability to service its customers in a safe and efficient manner and to restore power to affected areas in a timely manner – Motion dismissed; matter continues

ENWIN UTILITIES LTD.; RE IBEW, LOCAL 636, PATRICK VLANICH ET AL; File No. 2898-07-U; Dated May 1, 2008; Panel: Lee Shouldice (8 pages)

Practice and Procedure – Contempt – Remedies – In the context of this sale of business application, the Board ruled, in an earlier decision, that counsel for the union had breached a Confidentiality Order and an implied undertaking of confidentiality with respect to certain documents produced in the proceeding – The Board addressed the issue of relief available to the employer – The Board found that counsel for the union had aggressively denied having committed the breach for several months, then eventually admitted to it, apologized and claimed inadvertence – The Board determined that the issue of relief was a procedural matter and could be decided on the basis of written submissions – The Board issued a number of orders and declarations, including: (a) that both the union and its counsel breached the implied undertaking and the Confidentiality Order in several ways; (b) that the union and its counsel improperly reproduced the contents of the confidential document in question and improperly used information contained therein for their own purposes (the Board found that the confidentiality applied to both the union and the law firm and that the law firm was acting on behalf of the union) (c) that employer's counsel acted appropriately throughout the proceedings and there was no basis for the allegations of inappropriate or unprofessional conduct complained of by union counsel; (d) that the Confidentiality Order is permanent until the Board directs otherwise, subject to the caveat that the Order does not apply to documents that are otherwise available and were obtained other than through the production order in question; (e) that the law firm ensure that individual counsel do not communicate any information or disclose any documents obtained, or to be obtained, through production in the instant proceeding to anyone in the firm who is not engaged in the instant proceeding or its corollaries; that counsel for the union advise the employer and its counsel of the steps taken to satisfy the obligations under the preceding directions – The Board declined to order that union counsel pay the employer's and its counsel's legal and other expenses incurred as a direct result of the vehement denial of wrongdoing, stating it did not have the jurisdiction to award such costs – The Board also refused to state a case to the Divisional Court asking the Court to inquire into the breach of the implied undertaking and the contempt of the Confidentiality Order, stating that the exercise of such discretion would not sufficiently further labour relations purposes since the underlying purpose of the request was to secure costs – Matter continues

KIMBERLY-CLARK CORPORATION AND KIMBERLY-CLARK INC., NEENAH PAPER, INC. AND NEENAH PAPER COMPANY OF CANADA, EAGLE LOGGING INC., BUCHANAN FOREST PRODUCTS LTD., TERRACE BAY PULP INC.; RE UNITED STEELWORKERS, LOCAL 1-2693; RE KOSKIE MINSKY LLP; File No. 3769-05-R; Dated May 21, 2008; Panel: Peter F. Chauvin (21 pages)

Employment Standards – The employer sought review of an order to pay wages, alleging that the employee had taken various items when he left the company, and that he had provided a written authorization to make a deduction when he took vacation days he had not yet accrued – The Board held that an employer cannot withhold wages because of allegations of theft or because it is seeking to recover the value of items purportedly removed by the employee through other proceedings – The Board ruled, however, that s. 13 of the Act is not so prescriptive as to prevent an employer from recovering an overpayment, provided the deduction occurs within a reasonable time; in such circumstances, the recovery is not a "set-off" – Application allowed in part

MENUPALACE.COM CORPORATION; RE VINCE SALADINO AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 2810-07-ES; Dated May 29, 2008; Panel: Susan Serena (5 pages)

Discharge – Employment Standards – Timeliness – Wilful Misconduct – Evidence – The applicant was terminated from his position as assistant manager of a grocery store following the alleged theft of some apples, an act that he denies doing (his evidence before the Board was uncontradicted) – The Ministry of Labour did not receive the applicant's claim until more than eight months after his termination – The Employment Standards Officer reasoned that she was prohibited from issuing an order under subsection 111(1) of the Act because more than six months had elapsed since the termination of employment – The Board held that the applicant's last day of work was not determinative of the issue since a proper analysis must take into account the nature of the wages and when they became due – The claim for unpaid wages was denied, but vacation pay was awarded – In considering whether the applicant was entitled to termination pay, the Board noted that the employer had simply told the applicant not to report to work until further advised – The Board held that the applicant was entitled to conclude that his employment was terminated 13 weeks after his last day worked; as such, any claim for outstanding wages, including termination pay, was clearly within the parameters of subsection 111(1) – Finally, the Board considered whether the applicant had been guilty of wilful misconduct so as to disentitle him to termination pay: since the employer failed to appear at the hearing (and there was no other evidence available that spoke directly to the alleged offence), there was insufficient evidence to conclude that the applicant was so guilty – Application allowed in part

NASR FOODS INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE RAFI KALTAKIAN; File No. 2083-07-ES; Dated May 28, 2008; Panel: Patrick Kelly (7 pages)

Health and Safety – Ontario Power Generation (supported by the Power Workers' Union and the Society of Energy Professionals) sought suspension of an order requiring it to produce the results of an internal investigation following a workplace mishap which caused minor injuries to a maintenance worker – The OPG submitted that it asked the MOL inspector if he was conducting an inspection or an investigation when he sought production of the report, and was told that he was conducting an investigation – OPG argued that the distinction between an inspection and an investigation is the subject of continuing *Charter* litigation, and the requirement to disclose the report would irretrievably prejudice its position in any potential prosecution – The Board considered the standard criteria for suspension requests and determined that there was no threat to worker safety; the inspector will not be precluded from continuing his investigation or issuing other orders if the order is suspended (i.e., if production is denied), whereas OPG's position will be severely prejudiced if the report is ordered released to the Ministry; OPG has made a strong *prima facie* case in favour of the suspension – Suspension granted – Appeal forwarded to Registrar for scheduling

ONTARIO POWER GENERATION INC.; RE POWER WORKERS' UNION, SOCIETY OF ENERGY PROFESSIONALS AND DOUGLAS CETTINA, MINISTRY OF LABOUR; File Nos. 3899-07-HS and 3900-07-HS; Dated May 2, 2008; Panel: Peter F. Chauvin (8 pages)

Employment Standards – Reprisal – The employer sought review of an order for compensation awarded to the employee for an alleged violation of the pregnancy/parental provisions of the Act – The Board found that although the circumstances surrounding the employee's departure from the workplace were clumsy and confusing, and an e-mail sent by a manager to staff was unequivocal that the employee was not returning to the workplace, the employer clarified its position with respect to the employee's status in subsequent communication with the employee's counsel – The Board ruled that it was what the employer actually did, and why, rather than what the employee believed to have happened, that determines the outcome of the review – The Board found that the employee had been granted parental leave, and that he

never sought or offered to return to work – Application allowed

SKIIS LTD.; RE KEVIN ST. AUBIN, AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 0343-07-ES; Dated May 28, 2008; Panel: Mark J. Lewis (6 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
Solid Gold Inn Divisional Court No. 224/08	3823-07-ES	Pending
LIUNA, Local 183 (PineValley Enterprises) Divisional Court No. 201/08	0910-07-R	Pending
LIUNA, Local 183 (Saddlebrook) Divisional Court No. 201/08	3414-06-R et al	Pending
BCC Constructors v. International Union of Painters Divisional Court No. 138/08	3174-06-R	Pending
Edgewater Gardens Long Term v. OPSEU Divisional Court No. 08-0015	3166-07-R	Stay application dismissed March 31, 2008 with reasons to follow
Jacobs Catalytic Ltd. v. IBEW Local 353 Divisional Court No. 66/08	2127-05-G; 3437-05-G	Pending
Ottawa Fertility Centre v. Ontario Nurses Association, OPSEU, CUPE Local 4000, Ottawa Hospital and OLRB Divisional Court No. DV-08-1394 OTTAWA	1531-06-PS	Pending
Puri Sons Inc. o/a Tally Ho Manor v. Director of Employment Standards et al Divisional Court No. 30/08	1490-06-ES; 1491-06-ES	Pending
Ottawa-Carleton Public Employees Union (CUPE), Local 503 v. City of Ottawa et al Divisional Court No. 423/07	1386-06-R	Pending
Dev Misir v. Muluneshi F. Agago et al Divisional Court No. 281/07	0769-06-ES	October 2, 2008
Dr. Oliver Bajor v. OLRB Divisional Court No. 258/07	0353-06-ES	Heard May 29, 2008, reserved
Jacobs Catalytic Ltd. v. IBEW Local 353 et al Divisional Court No. 117/07	3737-05-U	Heard January 10 & 11, 2008, reserved
Dana Horochowski v. OECTA; York Catholic DSB Divisional Court No. 93/07	1115-04-U	October 20, 2008
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending
Abduraham, Abdoulrab v. Novaquest Finishing Divisional Court No. 327/06	2222-04-ES, 2223-04-ES, 2224-04-ES	Dismissed – August 13/07 Seeking leave to C.A.
City of Hamilton v. Carpenters, Local 18 Divisional Court No. 209/06	1785-05-R	Pending