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Ontario Labour Relations Board HIGHLIGHTS

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Goods and Services Tax

Effective, February 11, 2010, the Board will no longer collect GST on the $200 filing fee in construction industry grievances (Referrals and Notices of Intent to Defend). While under review, the tax remains applicable for hearing fees.

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 now available on-line through the Canadian Legal Information Institute at www.canlii.org.

Employment Standards – The employer sought review of an order to pay overtime to its former executive chef – The Board found that the employee's work was supervisory or managerial in character so that he would normally be exempt from the overtime provisions of the Act – The Board further determined that the chef's assisting the line cooks during peak hours was irregular or exceptional and did not remove him from the exemption to overtime pay – However, the Board considered, for the first time, the significance of s. 22(9) of the Act, where an employee's time is divided between exempt work and non-exempt work and includes hours that would qualify for overtime pay – The Board held that the chef was entitled to overtime for those weeks where he spent more than 50% of his time performing tasks that were not supervisory or managerial – Application allowed in part

GLENDALE GOLF AND COUNTRY CLUB, LIMITED; RE MASSIMO SANAGO AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 3325-08-ES; Dated January 20, 2010; Panel: John D. Lewis (13 pages)

Bargaining Unit – Certification – Status – This application raised two issues: whether the Union's proposed bargaining unit improperly excluded five yard dispatchers; and whether S and B were employees at the time of the vote – The Board noted that the Union's proposed bargaining unit need not be the best possible, but its configuration should be viable without causing serious labour relations problems – There were several considerations: the dispatchers would be the only full-time employees in the distribution centre not represented; they had little prospect of attracting a trade union; there would be fewer work opportunities for bargaining unit members because many of the dispatchers were sourced from bargaining unit positions; it was a condition of employment that bargaining unit employees cover the dispatcher positions; and a dispatcher position was a logical placement for employees with physical restrictions and/or who were in need of accommodation due to disability – The Board held that the Union's proposed exclusion of the yard dispatchers created undue fragmentation – As for the two remaining disputed employees, the Board determined that S, on maternity leave of finite duration with a statutorily protected right to return to her position, was an employee at the time of the vote, but B, away from the workplace, earning no wages, for almost twenty months, was not – B's continued group benefit coverage and employee discount were not evidence of a

substantial connection to the workplace – Ballots to be counted in accordance with Board decision

HUDSON'S BAY COMPANY; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW CANADA); File No. 1459-09-R; Dated: January 6, 2010; Panel: Patrick Kelly (8 pages)

Certification – Construction Industry – Timeliness – Because of a defective initial delivery (by fax) of one of two applications for certification, and the subsequent delivery of the application by courier, the employer asserted that the application was untimely – The Board (differently constituted) ruled on the delivery some three weeks after it was actually made – The present panel held that the employer was required to file its response and Schedule A within two days of the delivery of the application – The Board rejected the employer's position that the application for certification was not "valid" until the Board exercised its discretion to extend the time for delivery: once filed with the Board, the application was always valid – The employer's failure to provide a timely response prejudiced the applicant's ability to ascertain where employees were working on the application date – One certificate issued; second matter continues

JAY-DEE CONCRETE FORMING, VANSMIT LTD. O/A**;** RE LABOURERS' INTERNATONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File Nos. 2118-09-R, 2130-09-R; Dated January 29, 2010; Panel: Lee Shouldice (13 pages)

Construction Industry – Interim Relief – **Unfair Labour Practice –** During the course of a LIUNA investigation into the operations and affairs of Local 183, the Local complained that LIUNA was interfering with Local 183's ability to perform its duties – The complaint alleged that the investigator refused to disclose reasons for the investigation, the source of the information that instigated the investigation, or when the investigation would be completed – Local 183 said the investigator was intrusive and interfering with its autonomy by requesting huge volumes of original documents including material that encroached on its executives' personal lives and by ordering Local 183 to reinstate employees who they say were laid off for good reasons – The Board found that it has jurisdiction to make interim orders concerning procedural matters only and it must be satisfied that the order(s) requested are necessary to preserve the processes of the Board until the hearing in the Main Application is concluded – Local 183 was seeking to restrain LIUNA's activities without the necessary connection between these activities and the need to protect the Board's process interests being present – Unlike Local 183's 2004 application which the Board distinguished, this investigation was not initiated following filing of an application; it had been ongoing at the time the Main Application was filed – The investigation was not commenced in a way that was an attempt to or would have the effect of interfering with the Board's processes – The Board was not satisfied that the investigation would have any significant impact on Local 183's ability to carry out its statutory obligation to bargain – Application dismissed

LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C., AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD; File Nos. 2388-09-U, 2536-09-M; Dated January 5, 2010; Panel: Charles E. Humphrey (7 pages)

Health and Safety – The employer challenged the propriety of an order requiring it to ensure that workers are protected from falling during the offloading of flatbed trailers – The Inspector issued the order under a section of the Regulation that deals with material handling rather than fall protection – The Board found that the risk identified by the Inspector had nothing to do with *what* the workers were doing, and had everything to do with *where* they were doing it – The elevation of the workers securing the loads on the flatbed trailers (approx 1.5 metres) did not meet the minimum to be captured by the fall protection provisions (3 metres) – The Board held that the Inspector's order imposed a more stringent standard on the Employer than the actual standard in the regulation designed to address the specific hazard – Appeal allowed; order rescinded

NATIONAL STEEL CAR; RE UNITED STEEL WORKERS OF AMERICA, LOCAL 7135 AND JOHN PIERROZ, INSPECTOR; File No. 2151-08-HS; Dated January 27, 2010; Panel: Mary Anne McKellar (8 pages)

Employment Standards – The employer sought review of an order to pay compensation for alleged violations of the pregnancy provisions of the *Employment Standards Act, 2000* – The employee worked as a customer service representative for the employer who operated a call centre – Employees were engaged in campaigns handling either inbound calls

(assisting callers with purchases they had already made) or outbound calls (offering products for sale to current or new customers) – The employee's work history showed that she had worked almost exclusively on the inbound side of the operation prior to her last leave – When she returned from her leave, the employer was winding down two inbound campaigns and assigned the employee to outbound work – Following several months in the new position, where the employee performed less successfully than her colleagues, she was terminated – The employer conceded that the employee was entitled to termination and severance pay, but challenged the order for compensation – The Board found that the inbound and outbound position were not substantially and qualitatively the same, and the employee held an inbound position when her leave commenced – At her return, there was no inbound position to which she could return – The Board held that the outbound position was sufficiently comparable to the inbound position to fulfil the employer's obligations to place the employee following her leave – Order amended accordingly; termination and severance pay payable

TRG CUSTOMER SOLUTIONS INC.; RE AIMERANCE KABONGO AND DIRECTOR OF EMPLOYMENTS STANDARDS; File No. 1025-07-ES; Dated January 21, 2010; Panel: Patrick Kelly (9 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
Brant Haldimand-Norfolk Catholic S.B. v. Pay Equity Hearings Tribunal Divisional Court No. 30/10	0559-08-PE	Pending
Windsor Star v. Pay Equity Hearings Tribunal Divisional Court No. 29/10	2875-08-PE 3035-08-PE	Pending
Christopher Henderson (Proteus Craftworks) v. Director of Employment Standards et al Divisional Court No. 02/10	1953-07-ES	Pending
K.A.S. Group of Companies v. Metro Waste Paper Recovery Divisional Court No. 611/09	0723-08-R 1037-08-R	Pending
Reliable Painters & Decorators Divisional Court No. 620/09	1443-09-R	Pending
Riverside Mart & Service v. Bilal Jebahi Divisional Court No. 09-DC-1566 **Ottawa**	1598-09-ES	Pending
Lennox Drum Limited v. Joseph Ah-hone Divisional Court No. 465/09	0657-08-HS	Pending
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574-04-R	Pending
IBEW v. Ellis Don Divisional Court No. 437/09	2836-08-G	Pending
Blue Mountain Resorts v. Ontario Ministry of Labour Divisional Court No. 373/09	1048-07-HS 0255-08-HS	Pending
Julie Desgrosseillers v. North Bay General Hospital Divisional Court No. DV-830-09 **SUDBURY**	0827-08-U	Pending
Robert McLaughlin v. Graphite Specialty Products, et al Divisional Court No. 09/191 **LONDON**	2221-07-OH	Pending
Rainbow Concrete v. International Union of Operating Engineers Divisional Court No. 332/09	0116-06-R	January 28, 2010
Roy Murad v. Les Aliments Mia Foods Divisional Court No. 291/09	1999-07-ES	Pending
Greater Essex County District School Board v. IBEW, Local 773 et al Divisional Court No. 212/09	1776-04-R et al	Pending
Donald Amodeo v. Ontario Ministry of Labour Divisional Court No. 147/09	2837-07-U 2839-07-OH	March 15, 2010
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 79/09	0290-08-U; 0338-08-U	Dismissed - July 8/09; seeking leave to CA
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045-06-U et al	Pending
Comfort Hospitality Inc. o/a Days Inn v. Director Employment Standards et al Divisional Court No. 344/08	2573-07-ES	Pending
L.I.U.N.A. v. Barclay Construction et al Divisional Court No. 310/08	0837-06-R	Pending
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending