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Ontario Labour Relations Board HIGHLIGHTS

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NOTICE TO COMMUNITY

Please be advised that the Ontario Labour Relations Board will neither schedule nor hold hearings between **December 23, 2013 and January 3, 2014** inclusive. Matters of an urgent nature, however, may be scheduled on an expedited basis as determined by the Board, during this period. Applications will be processed in the usual manner on the dates that the Board is open for business, including: December 23, 24, 27, 30 and 31 2013 and January 2 and 3, 2014.

Please note the default dates and hearing schedule for s. 133 grievance referrals over the holiday season.

Thank you for your attention to the above. Please have a safe and very happy Holiday Season.

DATE REFERRAL FILED	*HEARING DATE*
December 9, 2013	January 6, 2014
December 10	January 6
December 11	January 7
December 12	January 7
December 13	January 8
December 16	January 8
December 17	January 9
December 18	January 9
December 19	January 10
December 20	January 10
December 23	January 13
December 24	January 13
December 27	January 14
December 30	January 14
December 31	January 15
January 2, 2014	January 16
January 3	January 17

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in November of this year. These decisions will appear in the November/December issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.canlii.org.

Construction Industry Grievance – Discharge – EllisDon relied exclusively on video surveillance to justify its discharge of the grievor – The video showed the grievor committing multiple breaches of EllisDon's health and safety policy and drug and alcohol policy – The Board previously held that the video was admissible – Local 506 argued the video should be given no weight because it violated the grievor's privacy rights – The Board held that the video surveillance should be given full weight because it was reliable and accurate – The factors used to assess the weight given to evidence are: relevance, reliability and credibility – The manner in which a video is taken is not relevant to the determination of weight – The grievor did not apologize for the conduct recorded on the video and did not acknowledge any wrongdoing – The grievor had been employed for only 17 calendar days – Discharge upheld – Grievance denied

ELLISDON LTD; RE: Labourers' International Union of North America, Local 506; OLRB File No. 1255-12-G; Dated November 1, 2013; Panel: Diane L. Gee (4 pages)

Interim Relief – Unfair Labour Practice – OPSEU sought the interim reinstatement of an active inside organizer pending a decision on its unfair labour practice complaint – Heritage denied knowing the terminated individual was a union organizer and relied on two allegations of elder abuse to justify his dismissal – The union organizer was terminated two days after the alleged incidents of elder abuse, six days before the representation vote, and in circumstances where Heritage expressed its opposition to unionization and had been promoting an employer initiative to set up an employee association – OPSEU denied the allegations of elder abuse, pointed to the suspicious timing of the termination, and emphasized that Heritage failed to follow its own written elder abuse policy, including a failure to: (i) advise the employee of the allegations against him, (ii) obtain witness statements, and (iii) place the employee on paid leave or on supervisory suspension while conducting an investigation – In these circumstances, OPSEU argued the termination suggested a "rush to judgement" and undermined Heritage's claim that the employee's termination was unrelated to his organizing activity – The Board then considered the "irreparable harm" aspect of the interim relief provisions in the Act, and concluded that in the circumstances of the termination, including its timing and surrounding events, a "chill" was likely to result which could only be remedied by reinstatement – The balance of harm also favoured interim relief; Heritage has several options available to it, short of termination, to address the possibility of reprisals against residents during the course of a thorough investigation into the allegations of elder abuse – The circumstances and timing of the organizer's termination, and particularly the lack of due process in Heritage's investigation, suggested a causal connection between the employee's organizing activities and his discharge – Reinstatement ordered

HERITAGE HEIGHTS RETIREMENT HOMES INC RE: Ontario Public Service Employees Union; OLRB File No. 2342-13-M; Dated November 28, 2013; Panel: Eli A. Gedalof (14 pages)

Interim Relief – Unfair Labour Practice – The Teamsters sought the interim reinstatement of an inside organizer and a vocal union supporter pending a decision on its unfair labour practice complaint – The Teamsters argued the dismissal of these two individuals had detrimentally affected its organizing efforts – Jennmar presented a business justification for the terminations, noting that the fifteen most junior machine operators were laid off in response to lower than expected growth and decreased profit margins –The Board considered the "irreparable harm" aspect of the interim relief provisions in the Act, and noted that the failure to reinstate an inside organizer or a known union supporter may not only irreparably harm the union's present ability to collect cards, but it may have a prospective effect including: (i) disrupting the union's channel of communications with employees, (ii) eroding the union's support during a vote in the event it acquired enough cards to file an application for certification, and (iii) making employees reluctant to assist the union in litigation against the employer – The Board found the remaining aspects of the interim relief provisions were also satisfied – The balance of harm favoured reinstatement, and "inconsistencies" and "gaps" in Jennmar's business explanation for the terminations led the Board to conclude the terminations were not unrelated to the Teamster's organizing campaign – Reinstatement ordered

JENNMAR CANADA; RE: Teamsters Local Union, Local 938; OLRB File No. 2172-13-M; Dated November 14, 2013; Panel: Mary Anne McKellar (10 pages)

Health and Safety – *Prima Facie* Motion – Reprisal – The Applicant argued his employment was terminated because he reported an incident of workplace violence and harassment to the Respondents – The Respondents brought a motion to dismiss the application on the basis that it failed to make out a *prima facie* case for relief under the *Occupational Health and Safety Act* – The Board found that the facts pleaded by the Applicant did not support an allegation of workplace violence – The Board then considered whether the reprisal provisions contained in section 50 of the *OHSA* were violated when an employee is discharged for making a harassment complaint – The Board's authority under section 50 only arises when an employee suffers a reprisal as a result of seeking the enforcement of a right under the *OHSA* or as a result of acting in compliance with the *OHSA* – At issue, therefore, is whether an employee is seeking the enforcement of, or acting in compliance with,

the *OHSA* when he or she files a workplace harassment complaint with his or her employer – The Board's decision in *Investia* indicated this issue should be answered in the negative, however the Board noted in the present proceedings that any comments in *Investia* related to this issue were, strictly speaking, *obiter dicta* – The *OHSA* requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – Since the *OHSA* is public welfare legislation, it should be interpreted liberally in a manner that will give effect to its broad purposes and objectives – While an employer is not obligated to substantively guarantee a harassment-free workplace, it must institute procedural guarantees and cannot penalize an employee for participating in a complaints procedure – The requirement to develop and maintain "a program to implement" a workplace harassment policy would be illusory if it only entailed merely creating and posting the policy; an employer must ensure the policy is carried out and complied with, which includes providing a procedure to enable employees to make complaints about incidents of workplace harassment – The corollary to this is that an employee who makes a workplace harassment complaint to his or her employer is seeking the enforcement of the *OHSA*, thereby bringing them within the ambit of the protection afforded by section 50 of the *OHSA* – The Board refused to dismiss the application for failing to plead a *prima facie* case or because the Board lacked jurisdiction to inquire into the complaint – Motion dismissed

THE AIM GROUP INC AND GENERAL MOTORS OF CANADA LIMITED RE: Peter Ljuboja; OLRB File No. 0852-13-OH; Dated November 22, 2013; Panel: Jesse M. Nyman (24 pages)

Interference with Trade Unions – Unfair Labour Practice – ETFO complained that the employer was interfering with the administration of a trade union when it launched an investigation under its harassment policy relating to incidents involving individuals on leave from their teaching duties and engaged in internal union business – Although ETFO was not claiming bad faith or anti-union animus, it contended the employer's investigation will provide the employer direct access to the internal affairs of the Federation – A majority of the Board acknowledged that while the *Labour Relations Act* strives to facilitate collective bargaining, encourage communication between employers and employees, and promote cooperation between employers and trade unions in resolving workplace disputes, it recognizes the adversarial nature of labour relations – The majority decision noted the employer's stated objective in its harassment policy to maintain an environment free from workplace harassment; at the same time, ETFO has a competing interest in protecting its internal processes from employer scrutiny – The Board held that any investigation by the employer of this particular complaint would run the considerable risk of exposing the Federation's internal workings and processes – There appeared to be no substantial risk of a spill-over of the antagonism at the heart of the complaint into the workplace; if there had been, other considerations might apply - Application allowed; employer ordered to stop investigating the complaint

UPPER GRAND DISTRICT SCHOOL BOARD; RE: Elementary Teachers' Federation of Ontario; OLRB File No. 0948-13-U; Dated November 28, 2013; Panel: Patrick Kelly, Shannon McManus and Richard O'Connor (dissenting) (19 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
Jefferson Mendonca Divisional Court No. 478/13	2146-10-U 0006-13-R	Pending
DH General Contracting Inc. Divisional Court No. 13-DV-1966 (**Ottawa)**	1820-12-R 3025-12-G	Pending
Neivex et al. Divisional Court No. 416/13	0441-13-R	Pending
Merc Electrical Limited Divisional Court No. 437/13	0452-13-G	Pending Stay Motion: Dec 11, 2013
Nadalin Electric Company (Ontario) Inc. Divisional Court No. 498/13	0615-13-R	Pending
Sysco Fine Meats of Toronto a division of Sysco Canada Inc Divisional Court No. 414/13	3484-11-R	Pending
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Pending
Gate Gourmet Canada Inc. Divisional Court No. 276/13	3688-11-U	Pending
Charles W. Colhoun Divisional Court No. 293/13	0260-12-U	January 8, 2014
Robert Pardy Divisional Court No. 2004/13 (**London)**	0501-12-ES	November 26, 2013 Allowed; Reasons to Follow
Signature Contractors Windsor Inc. Divisional Court No. 231/13	3315-12-R 3316-12-R 3317-12-R	Pending
Biggs & Narciso Construction Services Inc. Divisional Court No. 181/13	1307-10-R	January 30, 2014
Weihua Shi Divisional Court No. 158/13	0273-10-ES	Dismissed, Reasons to Follow
Rail Cantech Inc. Divisional Court No. 127/13	1506-12-U	Quashed for Prematurity; Reasons to Follow
Durval Terciera, et al Divisional Court No. 520/12	1475-11-U	Allowed (Seeking Leave to CA)
Bur-Met Construction Divisional Court No. DC-12-010	3893-11-R	January 31, 2014
Albert Tsoi v. UNITE HERE Divisional Court No. 330/12	3908-09-U	February 19, 2014

IBEW, Local 894 Divisional Court No. 321/12	3174-09-U	March 26, 2014
EllisDon Corporation Divisional Court No. 310/12 M42989	0784-05-G	Allowed; Seeking Leave to CA
SMW v. EllisDon Divisional Court No. 363/12 M42989		Dismissed; Seeking Leave to CA
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
Rainbow Concrete Industries Limited Divisional Court No. 925/13 M43026	2692-06-ES	Dismissed; Seeking Leave to CA
Landmart Building Corp. Divisional Court No. DC 12-346JR (**Hamilton)**	2519-11-R	Week of February 24, 2014
John McCredie v. OLRB et al Divisional Court No. 1890/11 (**London)**	1155–10–U	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Dismissed; Seeking Motion to set aside
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	See above
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	See above