ISSN 1712–4506 (Online)

Ontario Labour Relations Board

HIGHLIGHTS

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September 2019

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in August 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 www.canlii.org.

Employment Standards – Jurisdiction – Employee sought remedies under the *Employment Standards Act* – Preliminary jurisdictional issue arose concerning application of *ESA* – Employee had worked in Ontario, initially in employer's office and then at his home through a work at home agreement, which allowed for the arrangement to be terminated by the employee or the employer at any time – Employee then moved to British Columbia, reporting to a manager resident in the United States – After more than 2 years of this arrangement, the employer requested that he relocate to Ottawa to work in an office setting – Employee was willing to relocate to Ontario but not to Ottawa and as a result was deemed to have resigned – Employee claimed severance and other remedies – Employer raised preliminary jurisdictional issue of whether *ESA* applied to his employment – Board concluded that the employee's work was not performed in Ontario – After moving to B.C., employee never attended in Ontario to perform any work – The fact that he worked remotely with some employees in Ontario and some in the U.S., and the fact that the employer retained the right to terminate the work from home arrangement, did not mean that he was to "perform work in Ontario" – Further, nothing in the arrangement indicated that there was any "back and forth" between work in Ontario and work elsewhere – As a result, Board also concluded that employee's work was not, as required by s. 3 of the *ESA* "to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario" – *ESA* therefore had no application – Application dismissed

IBM CANADA LIMITED; RE: SHU ZHANG; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 3355-18-ES; Dated August 20, 2019; Panel: Caroline Rowan (14 pages)

Interim Relief – Unfair Labour Practice – Union sought interim reinstatement of known union supporter after termination – Considering factors set out in *National Judicial Institute*, Board reviewed the apparent strength of the parties' positions, the balance of convenience, labour relations or other harm, and whether or not the alleged damage was irreparable – In considering apparent strength of the case, Board takes a "high level" view of the facts and arguments, without making factual conclusions or findings of credibility – Employee terminated on the basis that "it was not working out" but no issues with his performance had been brought to his attention – Employer also asserted at hearing that there was a shortage of work, but no shortage of work was identified prior to employee's termination, and another employee who quit the same day was called back to work – Shifting explanations for termination for which virtually no evidence was offered in support suggested that union's case was relatively stronger than the employer's – Board

accepted that irreparable harm is not presumed where a union supporter is terminated – Declarations filed indicated that union's campaign came to a halt – Board concluded that it was likely that employees would question the decision to exercise their rights under the Act – Harm to employer in having an employee reinstated during busy paving season is minimal – Employer took position that since employee was a "salt", he was loyal to union and not to employer – Board reiterated case law finding that there is nothing improper or illegal in salting – Nothing about support for union or union activity, or salting, is inconsistent with fulfilling duties to employer, in the absence of a specific allegation – Employee reinstated on interim basis

MILLER PAVING LIMITED C.O.B. GEORGIAN PAVING; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; OLRB File No. 1396-19-IO; Dated August 23, 2019; Panel: Matthew R. Wilson (11 pages)

Certification – Construction Industry – Union applied for certification under s. 128.1 of the *Labour Relations Act* – Employees in proposed bargaining unit were performing traffic control in respect of material sampling work occurring near a bridge and highway interchange, for the purpose of making pavement design recommendations for a planned replacement of the bridge – Employer asserted that work was not work in the construction industry as defined in the *Labour Relations Act* – Union argued that work was integral and necessary to construction because the reconstruction of the bridge was "inevitable" – Employer argued that link between work and any ultimate construction was too remote – Board considered facts of this situation to be comparable to those in *Atcost* where employer was drilling samples for construction work that might occur at some point in the future or not at all – Work in that case was not done in connection with ongoing construction work and that might not necessarily lead to any construction, and in any event, it occurred well prior to any actual construction – In instant case, no certainty that construction would be performed at the specific site where the material sampling was occurring – Funding commitments not yet in place – Project not yet tendered – Method of replacing bridge and nature of ultimate project not yet determined – Actual construction would likely not start until two or more years after the work in question was performed – Although there was a nexus between the traffic control work and the future project, it was not strong and obvious but tenuous and indistinct – Work not work in the construction industry – Application dismissed

ON TRACK SAFETY LTD.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; OLRB File No. 1405-18-R; Dated August 28, 2019; Panel: Patrick Kelly, Ron Martin, and Bill Nicholls (9 pages)

Certification – Construction Industry – Union applied for certification under s. 128.1 of the *Labour Relations Act* – Dispute over whether certain employees were employed in bargaining unit as they were covered by "cross-over" clauses contained in collective agreements binding on Union and responding party employer – Employees were transferred to a different Board area, where the Union did not have bargaining rights binding on the employer – Union asserted that the cross-over clauses could not serve as a bar to the application as the employer was simply applying the terms of the other collective agreements, and they did not create bargaining rights – Employer argued that the applicable principle was not whether or not a cross-over clause created bargaining rights, but whether employees transferred to another geographic area pursuant to a cross-over clause were "employees in the bargaining unit" applied for – Board concludes that *Brennan Paving* analysis is applicable – Where an employee is working in a bargaining unit pursuant to an existing collective agreement, he or she is not an employee in the bargaining unit applied for – Employees in dispute in this case are working pursuant to one or more existing collective agreements because the terms of those agreements obliged the employer to apply *all* of the terms and conditions of those agreements where it chooses to transfer employees – Employees were therefore already covered by a collective agreement and therefore not employees in the bargaining unit applied for by the Union – Application continues

R.W. TOMLINSON LTD.; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; OLRB File No. 1736-17-R; Dated August 20, 2019; Panel: John D. Lewis (34 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
Audrey Thomas Divisional Court No. 436/19	2508-18-U	Pending
The Captain's Boil Divisional Court No. 431/19	2837-18-ES	Pending
Kuehne + Nagel Ltd. Divisional Court No. 393/19	0433-18-R	Pending
Kuehne + Nagel Ltd. Divisional Court No. 392/19	1172-18-R	Pending
Todd Elliott Speck Divisional Court No. 371/19	1476-18-U	Pending
ASL Agrodrain Limited Divisional Court No. 19-DC-2492 **(Ottawa)**	1840-18-R	November 21, 2019
New Horizon Divisional Court No. 264/19	0193-18-U	Pending
Doug Hawkes Divisional Court No. 249/19	3058-16-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
Hector Yao Divisional Court No. 063/19	1841-18-ES	February 20, 2020
AB8 Group Limited Divisional Court No. 052/19	1620-16-R	Pending
Tomasz Turkiewicz Divisional Court No. 262/18, 601/18 & 789/18	2375-17-G 2375-17-G 2374-17-R	November 19, 2019
Kelly White Divisional Court No. 671/18	2032-17-ES	Pending
Amec Foster Wheeler Americas Limited Divisional Court No. 537/18	2743-16-R 3025-16-R	July 25, 2019
D. Andrew Thomson Divisional Court No. 238/18 **(Sudbury)**	1070-16-ES	Pending
Deloitte Restructuring Inc. Divisional Court No. 238/18	2986-16-R	November 18, 2019

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Alicia R. Allen Divisional Court No. 199/18	0255-17-UR	November 14, 2019
Matrix North American Construction Canada Divisional Court No. 051/18	0056-16-JD	May 22, 2019
Bricklayers (Prescott) Divisional Court No. 18/18	3440-14-U	December 18, 2019
China Visit Tour Inc. Divisional Court No. 716/17	1128-16-ES 1376-16-ES	Pending
Ramkey Construction Inc. Court of Appeal No. M49563	1269-15-R	September 12, 2019
Front Construction Industries Divisional Court No. 528/17	1745-16-G	Pending
Enercare Home Divisional Court No. 521/17	3150-11-R 3643-11-R 4053-11-R	October 21, 2019
Ganeh Energy Services Divisional Court No. 515/17	3150-11-R 3643-11-R 4053-11-R	October 21, 2019
LIUNA *(Pomerleau Inc.)* Divisional Court No. 257/17	3601–12–JD	Abandoned
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
Kognitive Marketing Inc. Divisional Court No. 51/15 **(London)**	0621–14–ES	Pending
Valoggia Linguistique Divisional Court No. 15–2096 **(Ottawa)**	3205–13–ES	Pending