ISSN 1712–4506 (Online)

Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

March 2017

SCOPE NOTES

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

Certification – Failure to Comply – Settlement – The parties entered into Minutes of Settlement ("MOS") that resolved several status disputes and provided for a second representation vote on the condition there would be "no campaigning of any kind in the workplace" **–** The employer alleged two violations of the MOS and sought another vote as remedy: (1) prior to the vote, someone posted on the bulletin board in the workplace a letter from the union encouraging employees to vote in the union's favour; and (2) two well-known union supporters chanted "say yes, say yes" to at least one employee during the vote – The union argued the MOS was between it and the employer; individual employees could not violate the MOS – The Board found the individual employees were not parties to the settlement, nor was the union the bargaining agent of the employees with the capacity to bind them – The ban only applied with respect to the union and perhaps its agents – Union's motion that such campaigning did not disclose a *prima facie* breach of the MOS was successful

CAPSCANADA CORPORATION; RE: UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175; OLRB File No. 2357-16-R; Dated: February 6, 2017; Panel: Brian McLean, Alternate Chair (5 pages)

Practice and Procedure – Representation Vote – Sale of Business – A sale of business and intermingling occurred with the only remaining issue being whether OPSEU should be declared the bargaining agent for all the affected employees or whether the Board should conduct a representation vote to determine the bargaining agent – The merged facility, Community Living Central Highlands, consisted of 22 employees who were represented by CUPE and 102 employees represented by OPSEU – The Board noted that its discretion to order a representation vote under s. 69(6) is generally not exercised where there is a "large disparity" in the size of the intermingled groups – The Board further noted that even in the health services sector, which this is not, where votes had been mandatory, the *Public Sector Labour Relations Transition Act* recently adopted a Regulation (136/16) which creates a "bright line" test of 80%, at and beyond which no vote is to be taken – The Board finally notes that the purpose of the Board's practice (no vote where there is a "large disparity") is a recognition of the realities of holding a representation vote where the vast majority of a bargaining unit's employees are represented by a particular bargaining agent, particularly when during open periods, there is the opportunity for employees to be represented by a different bargaining agent or for them to terminate the bargaining rights of a union – Given that OPSEU represented more than 80% of the employees in the intermingled group, the Board declared OPSEU to be the bargaining agent – Declaration made

COMMUNITY LIVING CENTRAL HIGHLANDS; RE: CANADIAN UNION OF

PUBLIC EMPLOYEES AND ITS LOCAL 4603 AND ONTARIO PUBLIC SERVICE EMPLOYEES UNION AND ITS LOCAL 309; OLRB File No. 0925-16-R; Dated: February 6, 2017; Panel: Brian McLean (6 pages)

Bargaining Rights – Sale of Business – The union held bargaining rights with Domtar, a company granted a sustainable forest licence ("SFL") by the Ministry of Natural Resources and Forestry for Wabigoon Forest – A condition of Domtar's SFL was to make available a certain amount of softwood fibre from Wabigoon Forest to several companies, including Resolute, each year – After a commercial dispute, Domtar and Resolute reached an agreement that continued this commitment to provide softwood fibre from Domtar's SFL and an overlapping licence was issued by the Ministry to Resolute so it could legally harvest and transport the softwood fibre – The union argued this agreement constituted a sale of a part of Domtar's business to Resolute within the meaning of s. 69 of the Act as the right to harvest was transferred – The Board concluded the agreement was not a sale of business within the meaning of the Act - The overlapping licence fulfilled an existing commitment and no part of Domtar's business was transferred – *Accommodex Franchise Management* was instructive for its comment that the term "part of" must be considered in the particular factual context – There must be a coherent and severable part of the economic organization transferred so that the successor is performing a definable part of the economic functions formerly performed by the predecessor – Although conceptually possible for part of a business to transfer through a third party, in these circumstances the overlapping licence merely allowed Resolute to obtain what it already had a right to, albeit in a varied amount and with different means – Application dismissed

DOMTAR INC. AND RESOLUTE FP CANADA INC.; RE: UNIFOR, LOCAL 324; OLRB File No. 1338-15-R; Dated: February 24, 2017; Panel: Matthew R. Wilson, Vice-Chair (18 pages)

Employment Standards – Settlement – The director, against whom the order was made, took the position that the matter had been settled on the basis of emails sent to the director by a Board mediator (LRO) proposing settlements for specific amounts, which "offers" were accepted 6 weeks later after the Board had set the matter down for a hearing – The Board noted the importance of settlements and the fact that the Board uses experienced mediators to resolve the vast majority of applications that come to the Board – The Board further noted that like the LRA, 1995 the ESA provides that Labour Relations Officers cannot be witnesses in any proceeding except with the consent of the Board – The Board's concern about protecting the integrity of the settlement process requires that conversations between a party and an LRO not be accepted as evidence except in rare circumstances, and the Board saw no reason to depart from that practice here – Because of that it made sense to the Board that "agreements", like those at issue must be in writing and signed by the parties – This would eliminate any possibility that parties would try to give evidence about what an LRO said and also eliminate the possibility of arguing the LRO is somehow acting as an agent for the parties – This view is consistent with the ESA's requirement that an agreement be in writing (s. 1(3)) and the fact that most parties appearing before the Board on ESA matters are small businesses and employees who are both generally unrepresented – Board found there was no settlement

ELLEN HELDEN A DIRECTOR OF 1312788 ONTARIO LIMITED OPERATING AS LAWYER SUPPORT SERVICES; RE: MARIA BAK; RE: KAIALISE MATTIOZZI; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 1983-16-ES; Dated February 7, 2017; Panel: Brian McLean (9 pages)

Certification – Timeliness The Union applied for bargaining rights for a group of employees that it had held in the past – In fact, the Union filed its application on the same day the votes were counted in a termination application for the same bargaining unit – The Employer argued the application was untimely and that the application should be considered based on the knowledge of the parties on the day of the application in question (*i.e.*, before the results of the vote had been determined, thus barring the Union from applying) – The Board has consistently held that an application brought on the same day as the results of a representation vote are announced should be treated as having been made when no bargaining rights exist as an impediment to the application – The normal practice is to postpone consideration of the application for certification until after the Board has issued its final decision in the other matter – Postponing the consideration does not change the date of application – The Board distinguished this case from *Bernel Masonry Inc*. where the applicant still had active bargaining rights at the time of application and was seeking to displace itself as a means of frustrating any attempt by other unions to file displacement applications during the open period – The Board held it was appropriate to postpone the application until after the determination of the termination application – As the termination application was successful, no party held bargaining rights when the application was made and so it was timely – Certificate issued

J.G. ROGER ELECTRIC (1981) LTD.; RE: INTERNATIONAL BROTHERHOOD OF

ELECTRICAL WORKERS, LOCAL 353; OLRB File No. 0852-16-R; Dated: February 10, 2017; Panel: David A. McKee, Vice-Chair (27 pages)

Interim Application – Interim Reinstatement The Union applied for interim reinstatement of one of its supporters, who was terminated several months after the representation vote but before a final certification decision had been made – The Union argued the Employer had been closely monitoring the Employee after the vote and was actively looking for opportunities to discipline him in order to build a case for termination – The Employer argued it had a reasonable basis for termination, pointing to six instances of formal discipline involving various breaches of company policy and insubordination – As a preliminary matter, the Board held several reply declarations submitted by the Union were inadmissible as they restated facts already found in previous declarations, contained information outside the first-hand knowledge of the declarants, and dealt with matters that could have been anticipated at the time when the initial declarations were submitted – A majority of the Board found the termination was unrelated to the Employee's exercise of his rights under the *Act* – There was no evidence to support the suggestion the Employer was putting additional effort into monitoring the Employee or that the discipline imposed was out of character for what another employee would receive for similar misconduct – The Employee had received clear instruction and coaching on the conduct, in particular relating to the use of a personal cellphone at work – The Employee's declaration was shown to be inaccurate in several instances, and so the evidence of the Employer was preferred – The termination occurred long after the vote took place and there was no evidence that the Employer rushed in its judgment – The Board did not find any significant gaps in the Employer's story – Application dismissed

HRG OTTAWA (HOGG ROBINSON GROUP); RE: UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW CANADA); OLRB File No. 2243-16-IO; Dated: February 10, 2017; Majority: Gita Anand, Vice-Chair and Board Member and Paul LeMay; Minority: Board Member Shannon McManus (18 pages)

Construction Industry Grievance The Union grieved the Employer's change to the work schedule from five eight-hour days to two separate and overlapping shifts of four ten-hour days – The Union argued the Collective Agreement did not permit the Employer to make the change, relying on language requiring the Employer to establish "regular hours" and to schedule hours "equally" throughout the week – The Union also raised the concern that the change increased the amount of straight-time coverage and decreased members' opportunities for overtime – The Board upheld the longstanding principle that an employer is entitled to schedule work as it sees fit, subject only to explicit language in the collective agreement that limits this right – The language relied on by the Union did not represent a clear restriction – Grievance dismissed

ROBERTS ONSITE INC.; RE: INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 804; OLRB File No. 1559-15-G; Dated: February 3, 2017; Panel: Michael McFadden, Vice-Chair (13 pages)

Damages – Employment Standards – Reprisal – The applicant appealed the decision of the ESO in which the ESO declined to order damages for lost wages resulting from a reprisal by the employer – The employer granted the applicant, a busboy at its restaurant, three months of parental leave but never offered him an opportunity to return to work upon the conclusion of his leave – The employer argued the applicant could not have been on a parental leave since his leave began prior to the birth of his child and its refusal to allow him to return to work did not amount to a reprisal as the decision was not motivated by malice; the restaurant was fully staffed and there were simply no positions available to the applicant when he sought to return – The applicant argued the employer conferred a greater right or benefit when it granted the requested leave despite knowing the child was not yet born and the employer engaged in a reprisal when it could not provide a credible explanation as to why it failed to offer him a position – The Board found the applicant was on a parental leave and the employer's refusal to allow him to return to work amounted to a reprisal – The employer failed to reinstate the applicant and offered no valid reason why it failed to do so – The Applicant was entitled to damages for loss of income from May 2014, when his leave ended, to May 2015, when his health deteriorated making it impossible for him to continue looking for work – The applicant's efforts to locate alternate employment were haphazard – But the employer was partially responsible for the failure to engage in comprehensive mitigation efforts as it offered the applicant false hope he would be able to return to his position at a later date – The damages owing for loss of wages was discounted by 33% - Application allowed

TEMPERENCECO INC. O/A CHASE HOSPITALITY GROUP; RE: KANCHON SHAIKH; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 2192-15-ES; Dated: February 21, 2017; Panel: Adam Beatty, Vice-Chair (14 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
Peter David Sinisa Sesek Divisional Court No. 93/16	0297-15-ES	Pending
Women's College Hospital 24/17 Divisional Court No. 24/17	0830-15-M	Pending
Innovative Civil Constructors Divisional Court No. 611/16	0142-16-R	Pending
Yuchao Ma Divisional Court No. 543/16	2438-15-U	Pending
Ming Tang Divisional Court No. 452/16	3607-14-U	June 22, 2017
Anishinabek Police Service Divisional Court No. 455/16	0319-13-R & 1629-13-R	Pending
Cecil Cooray Divisional Court No. 324/16	1594-15-U	June 29, 2017
946900 Ontario Limited Divisional Court No. 239/16	3321-14-ES	Pending
S & T Electrical Contractors Divisional Court No. 406/16	1598-14-U	Pending
Carpenters (*Riverside*) Divisional Court No. 363/16	0630-16-R	Pending
Lee Byeongheon #2 Divisional Court No. 16-2219 **(Ottawa)**	0095-15-UR	Pending
Lee Byeongheon #1 Divisional **Court** No. 16-2220 **(Ottawa)**	0015-15-U	Pending
College Employer Council Court of Appeal No. M47343	0625-16-R	Dismissed December 21, 2016 Seeking leave to C.A.
Labourers' International Union of North America, Local 183 *(Alliance Site Construction Ltd.)* Divisional Court No. 133/16	3192-14-JD	Pending
R. J. Potomski Divisional Court No. 12/16 **(London)**	1615-15-UR 2437-15-UR 2466-15-UR	Pending
Serpa Automobile (2012) Corporation (o/a Serpa BMW) Divisional Court No. 095-16	0668-15-ES	Pending

David Houle Divisional Court No. 1021-16 **(Sudbury)**	0292-15-U	Pending
Qingrong Qiu Divisional Court No. 669/15	2714-13-ES	Pending
Airside Security Access Inc. Divisional Court No. 670/15	1496-15-ES	April 13, 2017
Kognitive Marketing Inc. Divisional **Court** No. 51/15 **(London)**	0621-14-ES	April 7, 2017
W.H.D. Acoustics Inc. (Hannam) Court of Appeal No. M47477	3151-14-G 3716-14-R	Seeking leave to C.A.
Universal Workers Union, Labourers' International Union of North America, Local 183 ***(Maystar)*** Court of Appeal No. M47007	1938-12-R	Seeking leave to CA
Valoggia Linguistique Divisional Court No. 15-2096 (**Ottawa)**	3205-13-ES	Pending