ISSN 1712–4506 (Online)

Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

August 2017

SOLICITORS' OFFICE

Voy Stelmaszynski is retiring on August 31 and we are going to miss him. The Board bids farewell to Voy with gratitude for over 21 years of dedicated service and counsel. Voy guided us through a variety of legal issues, from case processing to more complex legal issues arising in the midst of a hearing, and most things in between. We all appreciated and benefited from his diplomatic approach to the problem at hand and, of course, his baking and his unflagging enthusiasm as the Board's social coordinator.

The Board welcomes **Aaron Hart** to the Solicitors' Office. Aaron joins the Board after seven years of practice at Koskie Minsky. He has appeared regularly before the Board and has also practised before other tribunals including the Human Rights Tribunal, in labour arbitrations and acted as counsel in collective bargaining. He served as an articling principal, was a member of the Executive Committee, OBA – Labour and Employment Section and has planned and developed continuing education programs and written newsletters. In addition to his law degree, Aaron has an undergraduate degree in Philosophy.

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in July 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 – The employer sought review of an order to pay requiring it to pay training and travel time to DR – The employer hired DR and required her to drive a company vehicle (and other employees) to third party training to qualify for field employment with the employer – The vehicle was later required to transport workers from the training to remote work sites – The Board held that DR was hired when she was directed to drive the vehicle to another city where third party training was to be conducted – The successful completion of the mandatory training was a further requirement for the job (even though offered by a third party) – Travelling time was performed in furtherance of the employer's business and in the course of DR's work; it was not commuting time – Finally, a change in the remuneration constituted a constructive dismissal – Application dismissed

2385259 ONTARIO LTD. O/A WILDERNESS ENVIRONMENTAL SERVICES; RE: DANICA ROUSSY, AND DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 3258-15-ES; Dated July 28, 2017; Panel: Roslyn McGilvery (16 pages)

Employment Standards – The Kashruth Council sought review of a compliance order requiring the Council as employer to pay overtime and other entitlements under the Act, having found that the work the *Mishgiachim* (religious food supervisors) performed was not managerial or supervisory in character – The agreed statements of facts revealed that (1) the *Mishgiachim* are not supervisory within the organization of the Council; (2) the *Mishgiachim* oversee the sites, equipment and food preparation (including cooking) at various facilities to ensure adherence to Kashruth requirements; and

(3) they oversee the chef, cooking and wait staff, bartenders and dishwashers – They have the authority to stop process and direct staff to meet religious standards, but not to hire, fire or discipline a client's workforce – The Board found the Council's interpretation of "supervisory" took the word out of its statutory context – The only supervision related to compliance with kosher law – Application dismissed

KASHRUTH COUNCIL OF CANADA / LE COUNSEIL CACHEROUT DU CANADA; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 0045-14-ES; Dated July 27, 2017; Panel: Brian McLean (17 pages)

Certification – *Crown Employees Collective Bargaining Act* – The Board was directed (by the Divisional Court) to determine if the December 2016 amendments to CECBA would have changed its conclusion in an earlier ruling and if the current legislative scheme was even appropriate to determine the issue – The Board held that the December amendments applied as of the date they came into force – There was no statutory language to ground retroactive effect – If the Board were to reconvene this matter, several issues of continuing status or characteristic would remain outstanding, so the December amendments would apply with immediate effect – Applying the amendments to the instant proceeding would result in the dismissal of the application – PSAC's *Charter* challenge in light of the immediate application of the amendments remains outstanding

THE CROWN IN RIGHT OF ONTARIO, AS REPRESENTED BY MANAGEMENT BOARD OF CABINET; RE: PUBLIC SERVICE ALLIANCE OF CANADA; OLRB File No. 0119-13-R; Dated July 31, 2017; Panel: Lee Shouldice, J.A. Rundle, D.A. Patterson (11 pages)

***Education Act* – Health and Safety – Work Refusal** – OECTA appealed the decision of a Ministry of Labour health and safety inspector denying a teacher's right to refuse work – The Teacher twice exercised her right to refuse unsafe work because of the same kindergarten student under her care – The Student had a violent history, including once poking another student in the eye with a stick, and accordingly an Educational Assistant or an Early Childhood Educator were to accompany him in the classroom at all times – A safety plan to evacuate the classroom was developed after several disruptive incidents where the Student assaulted the Teacher and other students apparently without warning – The incidents continued, including one where the Teacher was required to go to the hospital after the Student scratched her eye and almost caused vision damage – The first work refusal occurred after the Teacher anticipated an escalation of violent behaviour, and the classroom was evacuated with the EA left inside to calm the Student who was agitated and acting violently – The second work refusal occurred after the Student returned to the classroom when the Teacher believed the principal had previously agreed to permanently remove him from her classroom – The Inspector arrived upon the second work refusal and determined there was no reason to refuse work – The Board observed that Regulation 857 of the *Occupational Health and Safety Act* does not allow a teacher to refuse unsafe work where the life, health or safety of a pupil is in imminent jeopardy, which may require the teacher to place their own life, health or safety in danger in order to protect their students – The Board concluded the first work refusal was not permitted as the Student was in imminent jeopardy of harming himself, and the presence of the EA did not detract from the responsibility of the Teacher – The Board observed that section 43(3)(b.1) of the OHSA permits a work refusal when the worker has reason to believe that workplace violence is likely to endanger herself – The Board recognized the reasoning in *Douglas v. Canadian Corps of Commissionaires* that this concern must be genuine and evaluated from the perspective and circumstances of the worker including all the factors weighing upon them at the time – The Board determined the Teacher had a genuine and honest concern based on the history of the Student and the fact he was a demonstrated safety risk – The Board observed the safety measures in place were earnest but not foolproof, and the Student was returned to the Teacher's classroom without consultation and against her expectations – The Board affirmed the statutory interpretation in *Re Canadian Auto Workers*, as requiring only a "reasonable anticipation of some future danger", and determined this standard applies in the context of violent pupils so long as no student is in imminent danger – The Board concluded the TCDSB violated the OHSA, but found no appropriate remedy was available and that the issue was moot in any case

TORONTO CATHOLIC DISTRICT SCHOOL BOARD; A DIRECTOR UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT; RE: TORONTO ELEMENTARY CATHOLIC TEACHERS / ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION; OLRB File No. 3442-14-HS; Dated June 12, 2017; Panel: Brian McLean (17 pages)

Certification – Employee – Status – The applicant sought to exclude dispatchers as "office and clerical" employees from an otherwise all-employee bargaining unit description – The Board considered the dispatchers' duties and responsibilities *vis a vis* other workers, then undertook a community of interest analysis, examining the nature of the work performed, conditions of employment, skills, administration, geographic circumstances and functional coherence and interdependence – The Board found that the dispatchers shared no community of interest with the warehouse employees nor the more traditional office and clerical staff – Focusing therefore on their responsibilities, the Board found their primary duties involved scheduling and coordinating service employees, thus they formed their own group of clerical staff and should be excluded – Certificate issued

UNITED THERMO GROUP LIMITED; RE: UNIFOR; OLRB File No. 2923-16-R; Dated July 25, 2017; Panel: Adam Beatty, Lori Bolton, Jawara Gairey (18 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
Across Canada Divisional Court No. 244/17	3673–14–R	Pending
LIUNA *(Pomerleau Inc.)* Divisional Court No. 257/17	3601–12–JD	Pending
TTC Divisional Court No. 262/17	1995–16–HS	Pending
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
Women's College Hospital 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
Anishinabek Police Service Divisional Court No. 455/16	0319–13–R & 1629–13–R	September 11, 2017
946900 Ontario Limited Divisional Court No. 239/16	3321–14–ES	October 2, 2017
Carpenters (*Riverside*) Divisional Court No. 363/16	0630–16–R	October 10, 2017
Labourers' International Union of North America, Local 183 *(Alliance Site Construction Ltd.)* Divisional Court No. 133/16	3192–14–JD	October 26, 2017
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	Week of October 10, 2017
Qingrong Qiu Divisional Court No. 669/15	2714–13–ES	October 5, 2017
Kognitive Marketing Inc. Divisional **Court** No. 51/15 **(London)**	0621–14–ES	November 8, 2017
Valoggia Linguistique Divisional Court No. 15–2096 (**Ottawa)**	3205–13–ES	Pending