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Ontario Labour Relations Board

HIGHLIGHTS

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SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in June of this year. These decisions will appear in the May/June 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 – Practice and Procedure – The issue before the Board was whether to exercise its discretion to accept a grievance referral under s. 133(4) – The union filed a grievance under the provisions of the Transmission Collective Agreement between EPSCA and the OPDC concerning an employee who was terminated – The union provided three arbitrators' names in an attempt to agree on one with the employer prior to proceeding to a three-person board of arbitration process under the collective agreement – The employer filed a grievance pursuant to s. 133 and the union asked the Board to exercise its discretion to refuse to accept the referral – The Board noted that once a grievance referral is filed with the Board it will in the normal course hear it – While it may exercise its discretion to refuse to accept a referral, this must be done judicially and for proper reasons – The Act operates to require the Board to hear a grievance referral unless a good reason is identified for it not to do so – Here the Board found that no board of arbitration had been constituted by the parties or appointed by the Ministry of Labour and accordingly there was no issue of a potential multiplicity of proceedings – Furthermore, there was nothing to suggest that the arbitration process under the collective agreement had any advantage over the arbitration process under s. 133 – Finally, the Board noted that while it more regularly dealt with collection issues, this was a discharge matter and the Board certainly has the expertise to address this type of grievance – As the union did not provide a good reason for the Board to refuse to accept the referral, the matter was referred to the Registrar for processing – Matter continues

HYDRO ONE INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; OLRB File No. 0537-17-G; Dated June 9, 2017; Panel: Lee Shouldice (9 pages)

Bargaining unit – Certification – The union applied for a bargaining unit of office employees (excluding those who worked out of their homes) working in Ottawa for a global travel management company managing corporate and government accounts – As of the application filing date, there were 81 employees working from the office and 84 employees working from their home – The employer took the position that the bargaining unit that the union has applied for was not appropriate – On review of the facts, the Board found, among other similarities, that the Ottawa Office and Home Office employees do the same work, arising from the same source or queue; have identical skills and qualifications; the same salary scales and benefits; report to the same supervisors and are subject to the same performance monitoring; bid for shifts, are scheduled alongside each other, and exchange shifts as between themselves – A majority of the

Board found the applicant's proposed bargaining unit was not appropriate for collective bargaining: the responding party would encounter serious labour relations harm, given that the fragmentation created by the more localized unit would create uncertainty as to who might be performing bargaining unit work at any given time and the responding party would also encounter serious bargaining difficulties – Matter continues

HRG OTTAWA (HOGG ROBINSON GROUP); RE: UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW CANADA); OLRB File No. 3298-15-R; Dated June 20, 2017; Panel: Gita Anand, P. LeMay, Shannon McManus (21 Pages)

Duty of Fair Representation – Intimidation and Coercion – *Prima facie* Motion – Mackay, a professor at Mohawk College, alleged that as a result of his union activities, OPSEU and its president sought to intimidate and coerce him, and that OPSEU breached its duty of fair representation – As background to the alleged event, Mackay, as part of his elected positions within OPSEU, had been actively and strongly disagreeing with how the OPSEU executive board was addressing sexual assault allegations at OPSEU's headquarters – Following a meeting with Mackay and McKerlie, the president of Mohawk College, and others, Mackay alleges that McKerlie asked to speak with him privately and told him "you need to watch your back" as "Smokey [Thomas] called me and asked me to fire you" – The Board reviewed its case law on duty of fair representation and noted that the duty is restricted to a union's representation of a bargaining unit employee with his/her employer and does not regulate or police matters internal to a trade union; further it must produce actual prejudice at the hands of the employer and does not regulate conduct resulting in merely speculative prejudice; and it does extend to more than the strict interaction between an employer and employee as the representational rights encompass the entire process of a union balancing an individual's employment interests with the collective whole – Here the Board noted that if Mr. Thomas made the comment, as alleged, that was certainly contrary to the union's representative role and almost certainly a violation of the Act, and that such comments would be antithetical to the role of a union – The Board noted, however, that the applicant had not alleged, or suffered, any actual prejudice at the hands of the employer as a result of the comments (he was not terminated nor threatened by the College) – The Board also noted that the purpose of its remedial authority is not to punish those who breach the Act, but to put the applicant in the same position they would have been in but for the breach – The Board concluded there was no labour relations purpose to inquire further, assuming the allegations, which were serious, to be true, since the Board had no reason to believe the College would act on the comment – Indeed the applicant asserted that after the alleged comments the College sought to protect him – Concerning intimidation and coercion, the Board found that the alleged comments, while unbecoming of a union president, did not constitute a threat or intimidating action against the applicant – The comments were made to McKerlie, in confidence and not to the applicant, who acknowledged that it was unlikely that Mr. Thomas intended the applicant to know about the comments – Unless the threat or intimidating comment is intended to reach the applicant, it cannot be said the comment was made to have him refrain from exercising a right under the Act – Applications dismissed

MOHAWK COLLEGE; RE: KEVIN MACKAY; RE: WARREN "SMOKEY" THOMAS/THE ONTARIO PUBLIC SERVICE EMPLOYEES UNION (OPSEU); OLRB File No. 2972-16-U; Dated June 9, 2017; Panel: Brian McLean (16 pages)

COURT PROCEEDINGS

Health and Safety – Judicial Review – Reprisal – The Board dismissed the applicant's complaint that he was terminated as a reprisal because he asserted rights under the OHSA, finding instead that he was dismissed for insubordination and a refusal to follow employer rules – The Court found the standard of review was reasonableness, that the Board cited the applicable legal principles for an application under s. 50 (there must be a nexus between the employee's invocation of the OHSA and the alleged reprisal), and that it gave detailed and careful reasons to explain its findings of credibility and findings of fact – The Court noted that the applicant disagreed with the Board's findings of fact and sought to supplement the evidence with affidavit evidence that was not before the Board – The Court stated it was not its role, on judicial review, to reweigh the evidence or make its own findings of fact, rather the court's task is to determine whether the Board reached a reasonable decision, based on the facts and applicable law – The Court found the Board's decision to be within the range of reasonable outcomes, reached after a fair hearing process – Application dismissed

BYEONGHEON LEE V ONTARIO LOTTERY AND GAMING AND RIDEAU CARLETON RACEWAY; 2017 ONSC 3745 (Court File No. 16-2219); Dated June 16, 2017; Panel: Aston, Swinton, Mitrow JJ. (3 Pages)

Duty of Fair Representation – Judicial Review – The applicant was dismissed from his employment during his probationary period and the union decided not to take the grievance to arbitration – The Board dismissed the applicant's duty of fair representation complaint – The court found the standard of review was reasonableness, that the board applied well-recognized legal principles respecting the duty of fair representation, consider the evidence before it and made findings of credibility, preferring the evidence of the union witness to that of the applicant – The court found the Board's conclusion was reasonable based on the documents and testimony before it – The Court also made it clear that it is not the role of the Court on judicial review to reweigh the evidence – Application dismissed

BYEONGHEON LEE V PUBLIC SERVICE ALLIANCE CANADA/UNION OF NATIONAL EMPLOYEES AND ONTARIO LOTTERY AND GAMING; 2017 ONSC 3749 (Court File No. 16-2220); Dated June 16, 2017; Panel: Aston, Swinton, Mitrow JJ. (2 Pages)

Duty of Fair Representation – Judicial Review – The applicant did not appear – Application dismissed

CECIL COORAY V ONTARIO PUBLIC SERVICE EMPLOYEES UNION; Court File No. 324/16; Dated June 29, 2017; Panel: Swinton, Nordheimer, Sproat JJ. (1 page)

Duty of Fair Representation – Judicial Review – The applicant was terminated by her employer, the union grieved and after five days of hearing, the arbitrator dismissed the grievance and upheld the termination – The applicant filed a complaint at the Board about the union's representation of her at arbitration and its refusal to judicially review the arbitrator's decision – The Board dismissed the complaint – The court held that the Board's decision was reasonable and that there was no basis, on the record before the court, that could possibly justify the court interfering with the decision of the Board given that the accepted standard of review was reasonableness – Application dismissed

MING TANG V MAPLE LEAF POULTRY, UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 1000A; 2017 ONSC 3869 (Court File No. 452/16); Dated June 22, 2017; Panel: Nordheimer, M. Edwards, D. Edwards JJ. (3 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	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
Ming Tang Divisional Court No. 452/16	3607–14–U	Dismissed on June 22, 2017
Anishinabek Police Service Divisional Court No. 455/16	0319–13–R & 1629–13–R	September 11, 2017
Cecil Cooray Divisional Court No. 324/16	1594–15–U	Dismissed on June 29, 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	September 15, 2017
Lee Byeongheon #2 Divisional Court No. 16–2219 **(Ottawa)**	0095–15–UR	Dismissed on June 15, 2017
Lee Byeongheon #1 Divisional **Court** No. 16–2220 **(Ottawa)**	0015–15–U	Dismissed on June 15, 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	Pending
Qingrong Qiu Divisional Court No. 669/15	2714–13–ES	Pending
Kognitive Marketing Inc. Divisional **Court** No. 51/15 **(London)**	0621–14–ES	Week of November 27, 2017
Valoggia Linguistique Divisional Court No. 15–2096 (**Ottawa)**	3205–13–ES	Pending