

*H*ighlights

Ontario Labour Relations Board

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April 2011

NOTICES TO COMMUNITY

Scheduling

Please read the attached Notice to the Community regarding changing scheduling practices.

Manager, Field Services (A)

Beginning April 4, 2011, Luiza Monteiro will step into the role of (Acting) Manager of Field Services for a 5.5 month developmental placement.

Website Interruption

Please note that the Board's website (www.olrb.gov.on.ca) will be unavailable on June 4, 5 and 6 while the government transfers its applications to a new data server.

Scope Notes

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

Certification – Interim Relief – Unfair Labour Practice

– The Board held a consultation into the discharge of one employee during an organizing drive – In its analysis of the relevant criteria, the Board determined that the employer's rationale for dismissing the employee six weeks after the alleged incident giving rise to the discipline was too remote and unpersuasive – More significantly, the Board looked at the irreparable harm to the

union, and the expressed fears of employees who would have to testify in the unfair labour practice complaint – If the conclusions reached by the employees regarding links between the campaign and the employee's discharge are not corrected, growing erosion of union support may not be stemmed – Reinstatement ordered

AUTHENTECH COMMUNICATIONS CANADA INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File No. 3794-10-M; Dated March 17, 2011; Panel: Jack J. Slaughter (12 pages)

Construction Industry – Discharge – Unfair Labour Practice

– The Union brought an application alleging that the discharge of three individuals on the date of application for certification contravened sections 72 and 76 of the Act as it was motivated, at least in part, by anti-union animus – Parkview took the position that one of the employees had been properly terminated at the end of his three month probationary period because he had difficulties performing some of the tasks equipment operators are required to perform – Parkview also presented evidence regarding its financial difficulties – Once the operations manager decided he would lay off two construction labourers in order to meet the need to reduce costs, he decided to terminate them the same day as the third individual, as he believed this would have less impact on the morale and productivity of the remaining workers – The applicant claimed that the operations manager's explanations were not credible, considering that there was no probationary period in place, and that the cost savings achieved were minimal compared to the financial difficulties the company faced – Furthermore, the employees were, contrary to past practice, laid off mid-week rather than at the

end of the week – Finally, the operations manager was aware that an organizing campaign was underway and that the applicant had met with the excavating crew the day before the termination took place – The Board determined that Parkview had met the burden of proof to demonstrate that its decision to terminate the employees in question was not contrary to the Act – While the timing of the termination is very suspicious, there was no evidence of anti-union behaviour or that Parkview had reacted to the organizing efforts of the applicant in any illegitimate way – Given the operations manager's uncontradicted testimony and the failure to cross-examine him on this point, the Board refused to draw the inference that because the operations manager was aware that there had been a union meeting the day before the terminations, he knew the employees had signed cards during the meeting – Parkview's evidence was complete, consistent and credible, and was not contradicted by the applicant – Finally, Parkview would have had no basis for knowing or even suspecting that the applicant was filing the application for certification the day the dismissals took place – That decision had been made by the applicant's co-ordinators the evening before and they had not informed any Parkview employee – Application dismissed

PARKVIEW HOMES, 149282 ONTARIO INC. AND 1490623 ONTARIO INC., PARKVIEW EXCAVATION SERVICES INC.; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; File Nos. 1468-08-R, 1727-08-U; Dated March 24, 2011, Panel: Harry Freedman (13 pages)

Employer – Health and Safety – Reprisal – The applicant alleged that the responding parties violated s. 50 of the OHSA when he was removed as a security guard at Humber College and dismissed from employment by Primary Response – The applicant contended that the closer monitoring he was placed under after he contacted the Ministry of Labour to complain about violations of the Act was a reprisal – Humber moved to have the application dismissed against it on the grounds that it was neither the employer of the applicant, nor a person acting on behalf of an employer – The Board was satisfied that Humber was a third party to the employment relationship – The applicant failed to provide evidence that Humber was acting on behalf of Primary Response when Humber's employee began monitoring the applicant, or when Humber allegedly advised Primary that it wanted the applicant removed from its facility – Before a person who is neither the nominal nor the actual employer can be subject to this kind of reprisal complaint, the person must have the authority to punish the employee or, at least, affect the

individual's employment – Motion by Humber allowed – Matter continues

PRIMARY RESPONSE INC. HUMBER COLLEGE INSTITUTE OF ADVANCED LEARNING AND TECHNOLOGY; RE GERARD F. DUNPHY; File No.0672-10-OH; Dated March 21, 2011; Panel Harry Freedman (4 pages)

Bargaining Unit – Certification – Employee – The UFCW sought to certify an "all employee" unit of the employer's workers, with specified exclusions – By letter accompanying the application, the union clarified that in its view temporary agency employees were not the employer's workers – During pre-vote discussions, the vote officer noted, among other things, that the applicant was not seeking to represent temporary agency personnel and the employer asserted that the agency employees were its employees for LRA purposes – At the vote, the applicant challenged every agency employee and, after the vote, the applicant made three further representations that it did not wish to represent the agency personnel or that the temporary employees should be excluded because they did not have "sufficient connection with the workplace" – In the last representation, the applicant sought to amend its bargaining unit description to reflect its original position that agency employees should be excluded – The Board refused to allow the amendment, finding that nowhere on the application or in its cover letter did the UFCW seek to exclude the temporary workers if they were employees of the employer – The Board found that the applicant's challenge to the agency workers was only that they were not employees, not that they should be excluded because, as employees, they did not share a community of interest with the permanent staff – To allow the amendment would give the applicant an opportunity to resile from its earlier agreement to an all-employee unit – Matter continues

PUDDY BROTHERS, A DIVISION OF MAPLE LODGE FARMS LTD.; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175; File Nos. 3395-10-R; 3396-10-U; Dated March 24, 2011; Panel: Diane L. Gee (7 pages)

Court Proceedings

Intervenor – Judicial Review – Standing – Two intervenors brought motions for standing on a judicial review application brought by Blue Mountain to challenge the Board's interpretation of "person" in s. 51(1) of OHSA – The Board

found that “person” was not restricted to “worker” – Conservation Ontario argued the Board’s interpretation could pose a direct and significant risk to its day-to-day operations – The Association of Chiefs of Police suggested that the Board’s view, if upheld, will negatively affect the cost of providing police services throughout Ontario – The Motions Judge ruled that Conservation Ontario will provide a broader context from which the court can evaluate the purpose of the legislation and interpret the impugned provision, but the Chiefs of Police were attempting to introduce a new ground for review of the Board’s decision that will unnecessarily delay the application for judicial review – Orders accordingly

BLUE MOUNTAIN RESORTS LIMITED; RE RICHARD DEN BOK, THE MINISTRY OF LABOUR AND THE OLRB; Board File No. 1048-07-HS; 0255-08-HS (Court File No. 373/09); Dated March 28, 2011; Panel: Justice Lederer (5 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
Humber River Regional Hospital v. SEIU Divisional Court No. 101/11	1092-09-R 1132-09-R 1133-09-R	Pending
UNITE HERE Divisional Court No. 81/11	3333-10-M et al	Withdrawn
UNITE HERE Divisional Court No. 80/11	3333-10-M et al	Withdrawn
SNC-Lavalin Divisional Court No. 78/11	1405-03-R	Pending
Promark-Telecon Inc. v. Universal Workers Union, L. 183 Divisional Court No. 600/10	0745-09-R 0754-00-R 0765-09-R 0782-09-R	Pending
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473-08-U	Pending
Roni Excavating Limited, et al v. IUOE, Local 793 Divisional Court No. 580/10	1991-10-R	June 13, 2011
Richard Hotta (Proteus Craftworks) v. Mahamad Badiuzzaman, et al Divisional Court No. 613/10	1953-07-ES	Pending
Pharma Plus Drugmarts Divisional Court No. 551/10	0579-08-R 0580-08-R 1662-09-R	June 30, 2011
SNC-Lavalin Divisional Court No. 482/10	2442-07-R 2936-07-R	Pending
Mr. Shah Islam v. J. Ennis Fabrics Divisional Court No. 506/10	1786-09-ES	Pending
Elzbieta Olszewska Divisional Court No. 494/10	0870-09-U	May 9, 2011
Greater Essex Catholic District S.B. Divisional Court No. 462/10	3122-04-G	June 2, & 3, 2011
Rainbow Concrete (Mark Corner) Divisional Court No. 437/10	2904-09-U 2905-09-FC 3292-09-M	Sept. 12 & 13, 2011
Ontario Power Generation Divisional Court No. 322/10	0264-09-G	April 18, 2011
John McKenney v. Upper Canada District S.B. Ottawa Divisional Court No. 10-DV-1652	2687-08-U	Pending
Rainbow Concrete Divisional Court No. 856-10	3292-09-M	Sept. 12 & 13, 2011
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 383/10	0290-08-U 0338-08-U	Pending
Rainbow Concrete Divisional Court No. 850-10	2904-09-U 2905-09-FC	Sept. 12 & 13, 2011
Mr. Todor Pandeliev v. OLRB Ottawa Divisional Court No. 10-DC-1594	3279-08-ES	April 7, 2011
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Divisional Court No. 78/10	3322-03-R 2118-04-R	Granted – Feb. 18, 2011 Seeking leave to appeal to C.A.

Case name & Court File No.	Board File No.	Status
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574-04-R	Pending
Blue Mountain Resorts v. MOL Divisional Court No. 373/09	1048-07-HS 0255-08-HS	April 20, 2011
Roy Murad v. Les Aliments Mia Foods Divisional Court No. 291/09	1999-07-ES	Pending
Greater Essex County District School Board v. IBEW, Local 773 et al Divisional Court No. 212/09	1776-04-R et al	Adjourned <i>sine die</i>
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 431/08	4045-06-U et al	Pending
Comfort Hospitality Inc. o/a Days Inn v. Director Employment Standards et al Divisional Court No. 344/08	2573-07-ES	Pending
L.I.U.N.A. v. Barclay Construction et al Divisional Court No. 310/08	0837-06-R	Pending

NOTICE TO THE COMMUNITY

SCHEDULING OF CONTINUATION DATES

In an effort to provide a more efficient and expeditious manner of setting continuation hearing dates for the parties and to assist in a more timely disposition of cases, the following practice is adopted by the Board on a trial basis:

Parties must come prepared to set continuation dates on the last scheduled day of their case whether the panel is seized or not. Where the panel is seized, it will be in a position to set continuation dates before the conclusion of the hearing. Where the panel is not seized, it will provide the parties' agreed dates to the Registrar's office which will, where possible, attempt to schedule continuation dates on the agreed upon dates.

Since the Board will be attempting to set continuation dates faster, on dates specifically agreed upon by the parties, it may be more reluctant to adjourn those agreed upon dates unless provided with timely notice and some reasonable justification for the adjournment.

In the exceptional circumstance where additional dates are not set or provided on the last scheduled day of a hearing:

- a) If the panel is seized and the parties have not set continuation dates at the last scheduled hearing day, the Registrar will, in the normal course, write the parties within three working days and offer dates the panel has available. The parties will be given three working days to consult and respond to the offered dates with their mutually available dates. Failing a timely response or if there is no agreement on dates, the Registrar may set continuation dates without further consultation. The reason for the short response time is that, since the Board is holding several dates for the parties' consideration, the dates are not available for scheduling other cases for other parties.
- b) If the panel is not seized and the parties have not provided agreed dates at the last scheduled hearing day, the parties will be expected to consult and provide agreed dates to the Registrar's office within three working days of the last hearing date. Failing a timely submission or if there is no agreement on dates or the agreed dates are not available to the Board, the Registrar may set the continuation dates without further consultation.

April, 2011