

*H*ighlights

Ontario Labour Relations Board

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May 2012

New Vice-Chair

The Board welcomes **Gail Misra** back to the Board as a full-time Vice-Chair. Since her departure from the Board in 2000, Gail was counsel with the Air Line Pilots Association, then a partner at CaleyWray. Gail has an LLB from Osgoode Hall Law School and an LLM in Alternative Dispute Resolution, also from Osgoode. She is a board member of the Institute for Canadian Citizenship and the Atkinson Charitable Foundation.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in April 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.

Adjournment – First Contract Arbitration – Practice and Procedure – Termination – Unfair Labour Practice – Subsequent to the PRCO filing an application under s. 43 a decertification application was filed – The Board found that while s. 43(2) clearly establishes that it is the Legislature's intention that applications for first contract arbitration be determined expeditiously, the language was directory not mandatory – Furthermore, although nothing in the statute clearly states that subsection 43(2) is subject to subsection 43(23.1), it is the only reasonable interpretation that the language of that subsection

can be given without reading it entirely out of the Act – Finally, the Board considered the words "dealing with or continuing to deal with" in s. 43(23.2) and found that ss 43(23.3) and 43(23.4), at the very least, establish that the Board cannot determine the outcome of an application for first contract arbitration until such time as the decertification application has been determined – Finally, the Board rejected PRCO's alternative request that the decertification and first contract arbitration applications be heard together – In the Board's view the section restricts the Board from proceeding with or dealing with the first contract arbitration which must mean that the Board is not to take any steps towards determining the outcome of the application for first contract arbitration until the decertification application has been dealt with – Matters continue

ALAMO PLUMBING & DRAIN SPECIALISTS INC.; RE PLUMBERS RESIDENTIAL COUNCIL, ONTARIO; File No. 3994-11-FC; 3995-11-U; 0971-10-U; 0040-12-R; Dated April 16, 2012; Panel: Diane Gee (5 pages)

Employment Standards – Remedies – City of Toronto's non-union compensation program provided for annual performance-based payments equal to 3% of earnings and market-rate COLA salary adjustments, both subject to City Council budgetary approval – City Council gave approval for the 2008 reporting year but cancelled the program for 2009 midway through the reporting year – The Employment Standards Officer found that because both lump-sum payments were linked to hour, production and efficiency, they were "wages" for the purposes of the Act, however issued an Order to Pay only for performance-based bonus earned in 2008 reporting year – Employees applied for review

seeking payments from 2009 as well as COLA payment from 2008 – The Board held that City Council budgetary approval was an insurmountable pre-condition to entitlement for payments under the program – The Board declined to award payment or pro-rated payment for 2009 as, unlike in 2008, the absence of budgetary approval meant that employees' entitlement had not yet vested – The Board found no fundamental change to terms and conditions of employment as the City had given proper notice of the change to employees – The Board declined to award payments for COLA as a proper reading of the non-union compensation plan indicated that budgetary approval from City Council was also required – Although abstractly characterized as "wages" under the Act, the non-union compensation program payments did not become "outstanding wages" until entitlement had properly vested – Applications for review dismissed

CITY OF TORONTO; RE RAMIN SARRAMI; File No. 1467-11-ES; 1468-11-ES; 1469-11-ES, 1470-11-ES; Dated April 11, 2012; Panel: Brian McLean (8 pages)

Duty Of Fair Representation – Remedies – A previous decision found the union had violated its duty of fair representation in arbitrarily dealing with the applicant's discharge grievance – The Board considered the appropriate remedy in light of an arbitrator's decision that determined the grievance at issue was not arbitrable because of the untimely reference to arbitration by the union – The employer argued that a referral to arbitration would be contrary to *Windsor Western* – The Board found however there had been no decision on the merits by the arbitrator (only a decision that he did not have jurisdiction to hear the grievance) – The Board, having found the reason the grievance was untimely was due to the union's breach of the duty of fair representation, determined that in order for the applicant to be restored to a position he would have been in but for the union's breach, the Board must be able to direct the grievance to be arbitrated on the merits – The Board ordered the intervenor to waive any objection to time limits and the union to take the grievance to arbitration for a determination on its merits – The Board denied the applicant's request to retain counsel of his choice to represent him at the union's expense at the arbitration hearing, finding the union's relationship with the applicant was not so strained that the arbitration could not proceed in the normal course – The Board remained seized to deal with the apportionment of any compensation awarded pursuant to the

arbitration award between the union and the employer

TOBIAS HOUSE ATTENDANT CARE INC.; RE ANONYMOUS APPLICANT & CAW-CANADA, AND ITS LOCAL 40; File No. 1731-10-U; Dated April 12, 2012; Panel: Patrick Kelly (9 pages)

Construction Industry – Delay – Related Employer – The unions' bargaining rights were derived from collective agreements signed in 1977 in respect of a business that two partners, A and Z, ran – A left the business in 1982 and operated a new one, Quinte, continuously from then until these applications – After reviewing *KNK* and *Somerville* the Board determined that too much time had elapsed for there to be any protection of bargaining rights that arguably arose in 1982 in a scenario where the employer had operated openly and consistently since that time with what is now a significant workforce – Accordingly the Board determined that it would not exercise its discretion in favour of the unions – Application dismissed

1779-08-R ZANETTE & ALMEIDA PLASTERING COMPANY LIMITED; File No. 1779-08-R; 2928-08-R; Dated April 17, 2012; Panel: Marilyn Silverman (12 pages)

Court Proceedings

Employment Standards – Judicial Review – Remedies – Judicial review of Board decision ([2011] OLRB Rep. May/June 389) finding that criteria to exempt directors from liability for employee wages under s. 80(4) of the *Employment Standards Act, 2000* was to be read conjunctively and not disjunctively – The applicant was a director of a Nova Scotia corporation that carried on business in Ontario and had employees in Ontario – When the corporation went bankrupt, an Employment Standards Officer issued an Order to pay against the applicant director, as the corporation had no assets for distribution – On review the Board held that in light of the Act's remedial objectives, s. 80(4) must be read conjunctively in order to prevent employers from circumventing the Act by incorporating outside Ontario – The applicant argued this conclusion was contrary to courts' prior application of s. 80(4), which it submitted was binding on the Board – The Divisional Court held the standard of review was reasonableness in light of the Board's expertise under its home statute and without considering the effect of the

prior court decisions, the Divisional Court found the Board's decision to be reasonable – With respect to the impact of the prior court decisions, the Divisional Court held that because the aspect of those decisions involving s. 80(4) was neither thorough nor focused on the issue of conjunctive versus disjunctive interpretation, the fact that the Board declined to follow those court decisions did not make what was a reasonable decision, otherwise unreasonable – This conclusion was bolstered by the Board's expertise interpreting its home statute – Judicial review dismissed

SANFORD PENSLE, A DIRECTOR OF KOREX DON VALLEY ULC; RE TED ADAMS AND OTHERS; COMMUNICATION, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 132, ONTARIO (MINISTRY OF LABOUR – DIRECTOR OF EMPLOYMENT STANDARDS) AND OLRB; OLRB File No. 0598-10-ES (Court File No. 328/11); Dated April 17, 2012; Panel: Whalen, Sachs and Herman, JJ. (6 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
Alliance Environmental Divisional Court No. 200/12	0854-10-R	Pending
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
Landmart Building Corp. Divisional Court No. DC 12-346JR Hamilton	2519-11-R	Pending
Total Mechanical Systems Divisional Court No. 17/12	4053-10-R	Pending
Aragon (Hockley) Development (Ontario) Corporation Divisional Court No. 595/11	2781-09-R	Pending
C.W. Smith Crane Services v. IUOE Local 793 Divisional Court No. 513/11	3894-09-G	Pending
Erie St. Clair Community Care Divisional Court No. 504/11	0144-09-PS	Pending
Swift Railroad Contractors Divisional Court No. 400/11	0039-06-U 0139-06-R	Pending
René Gagné v. Algoma University College Faculty Divisional Court No. 11-1764 Ottawa	0460-10-U	Pending
Greater Essex County District S.B. Divisional Court No. 403/11	1004-08-M	Pending
John McCredie v. OLRB et al Divisional Court No. 1890/11 London	1155-10-U	Pending
Classic POS Inc. Divisional Court No. 301/11	4059-10-ES	Pending
Ineke Sutherland o/a Designworks Divisional Court No. 238/11	4061-10-ES	Pending
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 213/11	0816-10-U 0817-10-U	Pending
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473-08-U	Pending
Richard Hotta (Proteus Craftworks) v. Mahamad Badiuzzaman, et al Divisional Court No. 613/10	1953-07-ES	September 25, 2012
Mr. Shah Islam v. J. Ennis Fabrics Divisional Court No. 506/10	1786-09-ES	June 4, 2012
Greater Essex Catholic District S.B. Divisional Court No. 462/10 Court of Appeal No. C54934	3122-04-G	Granted Oct. 7/11; C.A.: May 17, 2012
John McKenney v. Upper Canada District S.B. Divisional Court No. 10-DV-1652 Ottawa	2687-08-U	Dismissed Feb. 3/12; Seeking leave to appeal to C.A.
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 383/10	0290-08-U 0338-08-U	Pending
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Divisional Court No. 78/10 Court of Appeal No. C53992	3322-03-R 2118-04-R	Reserved
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574-04-R	Pending

Case name & Court File No.	Board File No.	Status
Blue Mountain Resorts v. MOL Divisional Court No. 373/09 Court of Appeal No. C54427	1048-07-HS 0255-08-HS	September 27, 2012
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 (M40967)	1776-04-R et al	Dismissed Jan. 12/12; seeking leave to C.A.
Dr. Peter A. Khaite v. OLRB et al Divisional Court No. 431/08	4045-06-U et al	Pending