

H *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 September of this year. These decisions will appear in the September/October 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 – Damages – Jurisdictional Dispute – LIUNA Local 506 sought damages from Exhibition Place following a finding in a jurisdictional dispute that the employer had improperly assigned work to the Carpenters in violation of an earlier settlement between Local 506 and Exhibition Place – The Board held that these were exceptional circumstances where damages were warranted in light of the employer's unreasonable or arbitrary work assignment that violated the collective agreement it had with Local 506 – Grievance allowed

BOARD OF GOVERNORS OF EXHIBITION PLACE; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506; OLRB File No. 0135-14-G; Dated September 28, 2016; Panel: Harry Freedman (22 pages)

Duty of Fair Representation – Grievance – Termination – The applicant complained of the quality of representation she received from OPSEU during an investigation by the hospital (and subsequent arbitration) into allegations that

she had harassed and bullied coworkers – The investigation ultimately led to the applicant's dismissal – The applicant requested the union's assistance to obtain documents created as part of the investigation – The hospital provided OPSEU with these documents on condition that they not reveal them to the applicant – OPSEU misrepresented to the applicant that they did not know the substance of the complaints against her and did not have access to the investigation documents – The investigation was handed over to a third party who produced a report, the contents of which led the hospital to dismiss the applicant from employment – At the arbitration of the applicant's grievances, the arbitrator awarded her compensation for wrongful dismissal but not reinstatement – The applicant complained that she was unhappy with the arbitration strategy of the OPSEU lawyer and the amount of her award – The Board ruled that OPSEU had not violated s. 74, except when the union misrepresented to the applicant that the employer had not provided it with the investigation documents – Declaration made

CHILDREN'S HOSPITAL OF EASTERN ONTARIO; RE: DENISE LABRECQUE AND DR. ISABELLE MONTGOMERY-PROULX, RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION; OLRB File No. 3142-13-U; Dated September 15, 2016; Panel: Lee Shouldice (69 pages)

Abandonment – Bargaining Rights – Collective Agreement – Construction Industry Grievance – Voluntary Recognition – When Local 46 filed a grievance against the employer Jackson for violating its collective agreement, the employer

claimed that the union had abandoned its bargaining rights and therefore it was not subject to any collective agreement with the union – A predecessor corporation had signed a VRA with Local 46 and during that company's operation, it had paid remittances and conducted relations with its employees according to the relevant collective agreements – That predecessor corporation filed for bankruptcy in 1992 but soon after restarted business in Jackson's current form and the newly incorporated company signed an agreement with Local 46 recognizing the collective agreements that had bound the predecessor corporation – Notwithstanding that agreement, the employer operated as if it were not bound by any collective agreement – In 2000, when the union challenged the assignment of work to non-union employees, the employer asserted it agreed to pay certain fees owing to the union in exchange for the union agreeing to abandon its bargaining rights – The employer continued to operate as if it were not bound by any collective agreement – This continued until 2014, when Local 46 filed the grievance that brought the parties before the Board – The Board restated the leading case law relating to the abandonment of bargaining rights: a union could abandon its bargaining rights unilaterally and this abandonment could either be express or inferred from the Union's conduct – The Board ruled that, for the ICI sector, Jackson was bound by the province-wide agreement negotiated between the designated employer and employee bargaining agencies – For Local 46 or the designated employee bargaining agency to abandon bargaining rights in the ICI sector, they must have been granted the authority to do so by all other affiliated bargaining agents – There was no evidence that this authority had been given and so bargaining rights could not have been abandoned and Jackson was bound by the ICI collective agreement – For bargaining rights in the non-ICI sectors where province-wide agreements do not exist, the Board found that the union had not expressly abandoned bargaining rights at the meeting in 2000 – Also, abandonment could not be inferred by the union's conduct: the fact that the union did not investigate the employer's failure to file remittances following the meeting did not mean that the union was aware of and condoned the employer's decision to operate contrary to the collective agreement – Matter continues

J. G. JACKSON & ASSOCIATES MECHANICAL CONTRACTORS LTD.; RE: UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 46; RE: ONTARIO PIPE TRADES COUNCIL OF THE UNITED ASSOCIATION OF

JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA; OLRB File No. 0337-14-G; Dated September 16, 2016; Panel : Owen V. Gray (28 pages)

Certification – Evidence – Reconsideration –

The employer sought reconsideration of an earlier Board decision (following a Case Management Hearing) which denied the employer the right to rely on late-filed evidence relating to a construction site not originally identified in its response – When the parties exchanged documents in advance of a hearing on the merits, it became obvious that LIUNA was not only aware of the second site, but that LIUNA's representatives had attended at that site and observed the work being performed there around the time of the application date (the LIUNA representatives did not see any of the employer's employees there at the time and LIUNA did not mention that it was aware of the site at the CMH) – The employer argued that if it had known that LIUNA was aware of the site, the employer would never have conceded that there was any prejudice to LIUNA in the late-filed disclosure – The Board granted the employer's request for reconsideration, holding that LIUNA, through an unreasonable omission, led the Board to a misunderstanding of the facts as they were known to the parties (and to LIUNA in particular) when it precluded the employer from relying on the late-filed evidence – Reconsideration granted; matter continues with the employer being allowed to tender evidence concerning the second site

KENMORE DEVELOPMENTS WATERLOO INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE: KENMORE DEVELOPMENTS INC.; RE: THE KENMORE GROUP INC.; RE: KENMORE MANAGEMENT INC.; RE: KENMORE MANAGEMENT (2012) INC.; RE: KENMORE HOMES (K-W) INC.; RE: KENMORE HOMES (WATERLOO REGION) INC.; RE: KENMORE HOMES (LONDON REGION) INC.; RE: KENMORE HOMES (LONDON) INC.; RE: KENMORE HOLDINGS (NIAGARA) LIMITED; RE: KENMORE HOMES (NIAGARA FALLS) INC.; RE: KENMORE HOMES (NIAGARA) INC.; OLRB File No. 2892-15-R; Dated September 30, 2016, Panel: Michael McFadden (7 pages)

Jurisdictional Dispute – Lakeridge asked the Board to affirm that work given to Registered Practical Nurses was properly assigned and complied with the provisions of both the CUPE

and ONA collective agreements; and for a declaration that Lakeridge may continue to assign work to RNs and RPNs at its discretion, provided it did so in compliance with the relevant collective agreements – ONA countered that the work was originally the domain of RNs, and that with RPNs in the various hospital departments, RNs were removed from their own responsibilities when RPNs sought them for consultation, or transferred more critically ill patients to the nurses when the level of care required more acute oversight – CUPE (representing the RPNs) adopted the arguments of the employer – The Board reviewed the traditional criteria for determining jurisdictional disputes and found most of them to be neutral or inconclusive; only skill and training favoured ONA slightly, given the nurses' broader educational background – The Board saw no reason to interfere with Lakeridge's assignment of work – However, the Board declined to affirm that the work assignment did not violate either collective agreement, and likewise refused to declare that Lakeridge may continue to assign work to RNs and RPNs so long as it did not violate the respective collective agreements

LAKERIDGE HEALTH: RE; ONTARIO NURSES' ASSOCIATION: RE; CANADIAN UNION OF PUBLIC EMPLOYEES AND ITS LOCAL 1999; OLRB File Nos. 1498-13-JD and 2812-13-JD: Dated September 21, 2016, Panel: Patrick Kelly (38)

Certification – Status – Trade Union – In this application for certification, the employer challenged the status of the Society as a union, basing its challenge on procedural irregularities surrounding the Society when it was first recognized as a trade union – There had been no challenge to the union's status in the earlier application – Section 113 of the Act provides that if, in a previous decision, the Board has found an employee organization to be a union, "such finding is proof [of same] in any subsequent proceeding under the Act in the absence of evidence to the contrary" – Legal Aid led evidence relating to the 2005 affiliation agreement that they claimed would have caused the Board to refuse to recognize the Society if that evidence had been presented at the time – The Board held that any evidence presented to rebut the presumption of status must relate to status on the date of the present application and must involve events or circumstances that had occurred since the most recent Board decision affirming a union's status – The Board therefore held that the Society had status as a union – Matter proceeds

LEGAL AID ONTARIO; RE: THE SOCIETY OF ENERGY PROFESSIONALS, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 160; OLRB File No. 0472-16-R; Dated September 21, 2016; Panel: Brian McLean, J.A. Rundle and Thomas Collins (5 pages)

Discharge - Health and Safety – The applicant claimed she had been discharged for raising health and safety issues regarding air quality, work load and the structure of the joint health and safety committee – The employer asserted that the termination was a result of a restructuring that rendered the applicant's position redundant – The employer argued also that it only needed to prove that it was more likely than not that its actions were not motivated by the worker's reliance on the OHSA to relieve it of any liability – The Board disagreed, holding that a mere taint of retaliation for exercising rights is sufficient to cast doubt on the employer's rationale for removing the employee from the workplace – The Board found that the applicant's exercise of OHSA rights and insistence on compliance with the legislation clearly contributed to the reasons for dismissal – Application granted; damages awarded

SOCIETY OF ST. VINCENT DE PAUL STORES (OTTAWA) INCORPORATED; RE: LEAH PODOBNIK; OLRB File No. 3211-15-UR: Dated September 27, 2016, Panel: Thomas Kuttner, QC (22 pages)

COURT PROCEEDINGS

Bar – Bargaining Rights – Certification – Judicial Review – Voluntary Recognition – Judicial review of a Board decision in which the Board determined that the Carpenters' District Council (CDC) had obtained bargaining rights for all employees of Maystar through a VRA, and that agreement was a bar to LIUNA's application for certification – Six years earlier, with an application for certification pending, CDC had contacted the Board to inform it that a settlement agreement had been reached and the union would be withdrawing its application – Two months later, CDC and Maystar signed a VRA that did not mention being part of the settlement agreement – LIUNA attacked this VRA as illegal employer support for the CDC, prohibited under s. 53 of the Act – The Board held that while the VRA may have been flawed, considering the context in which it was made, the VRA was clearly part of the settlement reached to resolve the CDC's certification application – The Board had made

the express finding that VRA did not constitute employer support – The Divisional Court affirmed the Board’s decision and held that LIUNA had failed to establish that it was unreasonable

UNIVERSAL WORKERS UNION V. MAYSTAR GENERAL CONTRACTORS INC.; 2016 ONSC 5691 (Court File No. 368/15); Dated September 12 2016; Panel: Nordheimer J., Thorburn J., L.A. Pattillo J. (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
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	Pending
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 Divisional Court No. 308/16	0625-16-R	December 9, 2016
Ajay Misra Divisional Court No. 176/16	1849-15-U	October 27, 2016
Labourers' International Union of North America, Local 183 (Alliance Site Construction Ltd.) Divisional Court No. 133/16	3192-14-JD	Pending
Public Service Alliance of Canada Divisional Court No. 115/16	0119-13-R	December 19 & 20, 2016
R. J. Potomski Divisional Court No. 12/16 (London)	1615-15-UR 2437-15-UR 2466-15-UR	November 21, 2016
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	Pending

Cotton Inc. Divisional Court No. 554/15	3254-13-U 3255-13-R	Dismissed May 30, 2016 Seeking leave to CA
Kognitive Marketing Inc. Divisional Court No. 51/15 (London)	0621-14-ES	Pending
W.H.D. Acoustics Inc. Divisional Court No. 52/15 (London)	3151-14-G 3716-14-R	Pending
IBEW Electrical Power Council of Ontario (Crossby Dewar Inc.) Divisional Court No. 501/15	1697-11-G 1698-11-G	Pending
Labourers' International Union of North America, Local 1059 (McKay-Cocker) Divisional Court No. 384/15	0883-14-R	June 17, 2016 Reserved
Universal Workers Union, Labourers' International Union of North America, Local 183 (Maystar) Divisional Court No. 368-15	1938-12-R	Dismissed LIUNA Seeking leave to CA
Carlene Bailey Divisional Court No. 173/15	0480-13-U	December 21, 2016
Valoggia Linguistique Divisional Court No. 15-2096 (Ottawa)	3205-13-ES	Pending
Toran Carpentry Inc. Divisional Court No. 49/15; Court of Appeal No. M46308	0229-13-R	Dismissed March 8, 2016, LIUNA seeking leave to CA
Dean Warren Divisional Court No. M-45870 SCC 37019	2336-13-U	Allowed Leave to CA dismissed March 30, 2016 NHL seeking leave to SCC