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Our File Number/Numéro de dossier: 0843-11-U

October 18, 2011

TO THE PARTIES LISTED ON APPENDIX "A"

Dear Sir/Madam:

Windsor University Faculty Association, v. The University of Windsor

Attached is a copy of the Board's Decision dated October 18, 2011 in the above matter which is being sent to you by facsimile, regular mail, courier or e-mail.

Sincerely,

Peter Gallus
Registrar (Acting)

PG/ml
Enclosure

APPENDIX "A"

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ONTARIO LABOUR RELATIONS BOARD

0843-11-U Windsor University Faculty Association, Applicant v. **The University of Windsor**, Responding Party.

BEFORE: Patrick Kelly, Vice-Chair.

DECISION OF THE BOARD: October 18, 2011

1. This is an application filed under section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") alleging violations of sections 17, 70, 72, 76, and 86 of the Act.

2. In my decision dated September 22, 2011 I addressed, among other things, the responding party's ("the employer") motion to defer this complaint to the jurisdiction of an arbitrator. I invited the applicant (or "the union") to file submissions in response, and the employer to file reply submissions. They both have done so.

3. As I described in the earlier decision, the main thrust of the application is that the employer has undermined the union as the exclusive bargaining agent by unilaterally entering into, or attempting to enter into, six separate voluntary contract termination agreements ("VCTAs") with bargaining unit members. The employer takes the position, however, that its actions in respect of the VCTAs were sanctioned by the collective agreement, which expired on June 30, 2011. (The parties are currently in collective bargaining for a renewal agreement, and according to the union, at odds over the employer's proposed amendments of the current language of a provision in the collective agreement dealing with VCTAs, and also over new proposed provisions by the union on early retirement.) The employer referred to a number of collective agreement provisions in support of its position, some of which were reproduced in my earlier decision.

4. At paragraphs 11 and 12 of the September 22, 2011 decision I wrote:

> It seems to me that, if it turned out that the employer's conduct complained of by the union did not violate the collective agreement, the union's contention that the employer usurped, undermined, marginalized or interfered with the union's exclusive right to represent the members of the bargaining unit would almost certainly fail. It is difficult to imagine how, if the employer correctly, or even reasonably, interpreted the collective agreement as permitting it to enter directly with employees in discussions concerning voluntary contract termination and to conclude VCTAs with them without the involvement or consent of the union, the employer could be said to have diminished the union's capacity as the exclusive bargaining agent. All of which suggests that this is primarily and fundamentally, but not necessarily exclusively, a collective agreement dispute that ought to be determined by an arbitrator under the arbitration provisions contemplated by the Act and the parties' collective agreement.

Whether or not this is first and foremost a contractual dispute remains to be seen, as I have not had the benefit of any submissions by the union. In any event, as the employer points out, there are other factors to consider when the issue of deferral to arbitration is raised, such as:

- the extent, if any, to which the employer can be said to have totally repudiated the collective agreement;
- whether there are key provisions of the Act which require elaboration; and
- exceptional circumstances which render arbitration a less preferable option.

5. The union does not agree that the dispute is primarily one pertaining to the collective agreement, although it concedes there are contractual aspects to it. The union views the employer's conduct as a broader attack on the bargaining process and the statutory duties and obligations that employers owe under the Act, particularly as the conduct allegedly occurred in the context of the union's notice to bargain and the employer's awareness of an upcoming important bargaining issue related to retirement proposals/packages. This, the union claims, constitutes a total repudiation of it as the exclusive bargaining agent, and of the collective bargaining process.

6. The union further submits that the application before the Board requires the interpretation, application and/or elaboration of provisions which are central to the scheme of the Act. For example, it contends that the employer's actions in respect of the six VCTAs could constitute bad faith bargaining within the meaning of section 17 because it was allegedly aware of an important, upcoming issue in collective bargaining about retirement. Further by way of example, in relation to section 73 of the Act, the union says the six VCTAs can be seen as the employer's attempt to conclude collective agreements with the individuals involved and without the union's participation.

7. The union says that arbitration is not available as no grievance was filed and the time limits for submitting a grievance under the expired collective agreement have long since passed, thus making it unlikely that the merits of any such grievance would ever be adjudicated. Moreover, the union contends that an arbitration hearing would take too long to schedule and conclude, whereas the process before the Board is much more expeditious. Finally, the union submits, it is not feasible that an arbitrator would or could design remedies relative to the alleged unfair labour practice violations, and thus the arbitration hearing would not resolve the entire dispute, whereas a hearing before the Board would potentially have a much greater proactive impact on subsequent collective bargaining.

8. In its reply submissions, the employer submits that its conduct cannot be viewed as a total repudiation of the collective agreement, and further, that the alleged violations of the Act are secondary to the primary difference between the parties, which is the proper interpretation of the collective agreement. In any event, the employer denies that any provisions of the Act would benefit by further elaboration by the Board. For these reasons, the employer contends that

arbitration is the preferable forum to resolve the dispute. The issues in this case involve interplay between the collective agreement and the *Human Rights Code*, the interpretation of which is well within a labour arbitrator's jurisdiction. Furthermore, and significantly in my view, the employer states that any concern of the union with respect to the expediency of the arbitration process can be addressed by the Board ordering the parties to place their dispute before an arbitrator within a certain time frame.

9. Both parties have raised valid arguments on the question of deferral to arbitration. In my view, however, having regard to the principles set out in the seminal Board decision in *Valdi Inc.*, [1980] OLRB Rep. August 1254, the Board should defer this dispute to arbitration and retain jurisdiction. It bears noting the differences between this case and the facts in the *Valdi* decision, where the Board declined to follow its usual policy of deferral to arbitration. In *Valdi*, the parties had just recently concluded a first collective agreement. The dispute involved the termination of a probationary cashier who had, just prior to her termination, been elected to the role of union steward. The union alleged that Valdi Inc. terminated the cashier precisely because of her election to union office. Up until her discharge, her employer had not expressed any dissatisfaction with her performance, and in fact, the discharged employee had achieved high scores on price tests administered to all like employees. The Board expressed the concern that one of the challenges the union would face at arbitration was collective agreement language that permitted Valdi Inc. to discharge probationary employees with or without good and sufficient cause, and that made such terminations not subject to the grievance procedure. The Board was also concerned that there was no guarantee that an arbitrator would apply the "taint" test in assessing the discharge, whereas the Board would certainly do so. For these and other reasons, the Board found that deferral to arbitration was problematic and declined to defer.

10. The situation is quite different in this case. The parties have a mature bargaining relationship. They have been in that relationship for decades. They are currently engaged in collective bargaining for the purpose of renewing their collective agreement. The dispute over the VCTAs has not hindered the current round of bargaining (although it has led to a difference of opinion concerning whether the old collective agreement language should be amended or new provisions added). As the Board observed in *Sifto Canada Corp.*, [2011] O.L.R.D No. 2242 at paragraph34:

> Deferring this dispute to arbitration is consistent with the Board's practice of encouraging collective bargaining, as it is the rational next step on the continuum of that process, and consistent with the requirements of the Act that disputes regarding collective agreements go to arbitration (section 48 of the Act). These are parties with a mature bargaining relationship and they should, in the first instance, avail themselves of the primary mechanism for dispute resolution available to them.

11. I am persuaded that the dispute concerning the VCTAs is primarily contractual. The union has not satisfactorily answered how, if the employer is, as it claims, in compliance with the expired collective agreement - the terms and conditions of which continue to apply during the statutory "freeze" period- in its dealings with employees on the issue of VCTAs, it could be found at the same time to be in breach of the Act. The central question is whether or not the employer's actions violate the collective agreement. If they do, and an arbitrator so finds, it may be necessary to consider the union's concern that the employer's conduct constituted a broader attack on the union's status as the exclusive bargaining agent. An arbitrator, with expertise in collective agreement language and the application of the *Human Rights Code*, is in the best position to determine the central question concerning whether or not the employer is in breach of

the collective agreement. It remains to be seen the extent, if any, to which an arbitrator might deal with the union's broader concerns.

12. The employer's reply submissions suggest that the employer will not resist an expeditious referral of a grievance to arbitration (indeed, the employer says that the union is not even barred under the expired collective agreement from filing a policy grievance at this time) nor a hearing on the merits of such a grievance. Accordingly, it appears that there is no impediment to an arbitration hearing on the substance of a grievance in this matter. In any event, the Board is in a position to make the appropriate orders to ensure facilitation of the arbitration process. And by retaining jurisdiction, the Board remains in a position to deal with any issues that are not or cannot be addressed fully by the arbitrator.

13. Accordingly, the union is deemed to have filed a timely grievance challenging the employer's action in negotiating or attempting to negotiate VCTAs with employees without the union's involvement. I direct the parties to refer their dispute regarding the VCTAs to an arbitration board within 30 days of the date of this decision. If the parties are unable to refer their dispute to an arbitration board within 30 days due to the conduct of either party, the Board will entertain any written submissions in that regard.

14. The employer shall not raise any objection with the arbitration board to the timeliness of the filing or referral of any such grievance.

15. The Board retains jurisdiction over this application, pending the final outcome of the arbitration process.

16. This matter is hereby adjourned *sine die* pending the final outcome of the arbitration. It will be terminated after twelve months following the date of this decision, unless within that period one of the parties requests that it be processed.

"Patrick Kelly"
for the Board