

## ONTARIO LABOUR RELATIONS BOARD

**0019-10-R** John Moretti, Applicant v. Universal Workers Union, Labourers' International Union of North America Local 183, Responding Party v. **Moretti Carpentry Construction**, Intervenor.

**BEFORE:** Christopher J. Albertyn, Vice-Chair.

**APPEARANCES:** John Moretti for the applicant; Giuseppe Agostino, Bernardino Ferreira and Jack Santos for the responding party; John-Paul Alexandrowicz, David Ross, Marc Moretti and Stephanie Jeronimo for the intervenor.

**DECISION OF THE BOARD:** June 13, 2011

1. This is an application for termination of bargaining rights under s.63 of the *Labour Relations Act, 1995* (“the Act”).
2. The application filing date was April 6, 2010.
3. The issues in the case are the following. Was the applicant, Mr. John Moretti, performing bargaining unit work for most of his working day on April 6, 2010? If so, was Mr. John Moretti an employee in the bargaining unit, or managerial and so excluded under s.1(3)(b) of the Act? If Mr. John Moretti was an employee, was the termination application initiated by his employer, Moretti Carpentry Construction (“the Company”), as contemplated in s.63(16) of the Act?
4. The answers to these three questions are the following. Mr. John Moretti was performing bargaining unit work for most of the day on April 6, 2010. He was an employee and not managerial. The application was brought entirely by the applicant. There was no involvement by Moretti Carpentry Construction. Therefore s.63(16) is not engaged.
5. My reasons for these conclusions follow, after a brief description of the relevant facts.
6. Mr. John Moretti is the younger brother of the owner of Moretti Carpentry Construction, Mr. Marc Moretti. Mr. Marc Moretti established Moretti Carpentry Construction in 1997. He is the sole proprietor. He operates in the residential framing business of the construction industry, doing custom home framing. Mr. John Moretti, a carpenter and framer, has worked for Moretti Carpentry Construction since 2000. Although Moretti Carpentry Construction has had other employees, Mr. John Moretti has been its only long-term, regular employee.
7. Mr. Marc Moretti entered into a voluntary recognition agreement with the Union in 2005. Mr. John Moretti then became a member of the Union. He was re-initiated into the Union in September 2009, after a period of time during which contributions had not been made by Moretti Carpentry Construction to the Union.

**Bargaining unit work on the application filing date?**

8. On April 6, 2010, Mr. John Moretti worked with his brother, Marc, on a house at 100 Cheltenham. He worked for 5½ hours that day, starting at 10:00 a.m. There was some suggestion by the Union that carpentry work was complete at 100 Cheltenham by April 6, 2010 and that Mr. John Moretti could not have been doing carpentry work then. No evidence was presented to support this suggestion.

9. The evidence by Mr. John Moretti and Mr. Marc Moretti was convincingly that the work done was that of the bargaining unit. Once the structure was built, there was a change order. Included in the change order was a requirement to convert three regular doors into pocket doors. Mr. John Moretti did this work on the application filing date. Two of the three pocket doors were load bearing. Mr. John Moretti had to expand the headers that supported the load above. This involved taking out the old headers and putting in bigger headers in two of the three doors. This work falls within the work of the Union's bargaining unit. Mr. John Moretti therefore performed bargaining unit work for most of the day on the application filing date.

**Was Mr. John Moretti an employee?**

10. Mr. John Moretti has no authority to hire, discipline or fire employees. He has no authority to supervise the other employees. He does no estimating or costing. He enters into no contracts on behalf of Moretti Carpentry Construction. He has no contact with the clients or general contractors. He does not generate new business. He does not invoice clients of the Company. He has no authority to buy tools or materials for the Company, nor does he. He has no Company vehicle or other Company property. He has no Company credit card. All of these functions are Mr. Marc Moretti's.

11. The supervisor of the work is Mr. Marc Moretti, the proprietor of Moretti Carpentry Construction. He is mostly on the tools himself.

12. Mr. John Moretti owns his own tools. He works only as a carpenter on work assigned to him by his brother. He does not set his own hours. He works the hours required of him by his brother. He gets paid by the hour for the hours he works. He does not set his wage rate. He does not share in the profits. He has no financial stake in the business.

13. I conclude from the above that Mr. John Moretti was an employee of Moretti Carpentry Construction, not an owner, nor a supervisor or manager as contemplated in s.1(3)(b) of the Act.

**Did the Employer initiate the application?**

14. In the period prior to the application, there were three other employees, one long-term, like Mr. John Moretti, the other two short-term and relatively unqualified (one of them a brother-in-law to John and Marc). The other long-term employee had told Mr. Marc Moretti that he wanted to leave to study to become a firefighter. Framing work was the means to his saving enough money to be able to go to school. His desire to return to school coincided with the end of a large project. The business did not have sufficient other work available to continue to hire him and the other two employees. Towards the end of the project, Mr. Marc Moretti decided to layoff these employees and keep Mr. John Moretti. He gave them notice of this intention and, on April 1, 2010, they were laid-off. This left Mr. John Moretti as the only Company's employee.

15. Union counsel suggests I should draw an inference that the layoff and the notice of it were both to assist Mr. John Moretti to bring the application. There is no evidence to support this. There is no evidence that the notice to the other employees of their layoff was anything other than to give them as much warning as possible. The layoff was genuine, occasioned by a loss of work by the Employer; the notice was generous to those affected. Mr. Marc Moretti had work for one other person besides himself so he decided to keep his brother and to lay-off the others.

16. Mr. John Moretti decided a long time before he brought the termination application that he wanted to do so. He felt he didn't need a union to represent him and that he could readily make his own employment arrangements with his brother. He researched how to do so. He found Labour Watch on the internet. It is a website designed, in part, to assist unionized employees to terminate the bargaining rights of the union that represents them. The site gave Mr. John Moretti a detailed explanation of what he had to do to terminate the Union's bargaining rights. He learnt of the open period and of bringing an application before the Board. He also contacted Labour Watch. He was given advice that guided him through the process. He waited for an opportune time to bring the application within the open period, which occurred once the other employees had been laid-off.

17. While, over the period of Mr. John Moretti's employment by Moretti Carpentry Construction, the two brothers discussed the Company's relationship with the Union, the decision to terminate bargaining rights was that of the applicant. Mr. John Moretti states he did not discuss his plan to terminate the bargaining rights of the Union with his brother. Mr. Marc Moretti confirms this. There is no circumstantial evidence that puts their evidence in serious doubt.

18. Mr. John Moretti decided to bring the application on April 6, 2010. He had previously obtained the necessary forms from the Board and he had completed them. It was raining that day and he and Marc could not start work. While waiting for the rain to stop, he saw it as a convenient opportunity to file the application. He informed Marc he had to do something and he left. He went to the Board and filed the application. He returned to the worksite and served a copy on his brother. He then worked from 10:00 a.m. for the rest of the day.

19. The Union asks me to draw a series of inferences from the relationship between the brothers, from their mutuality, that Mr. Marc Moretti must have been involved in the formulation of the decision to bring the termination application. The evidence does not support those inferences. On the contrary, Mr. John Moretti struck me as an independent minded person who decided that he himself did not want the Union to represent him any longer. He researched the matter himself and, with the help of Labour Watch, he sought to accomplish his objective. I find that his brother, Mr. Marc Moretti, played no role in the decision.

### **Disposition**

20. Employer counsel and Union counsel referred to a number of cases: *Ellis Glass and Mirror Ltd.*, [2008] O.L.R.D. No. 2855; *Romano Custom Home Framing*, [2007] O.L.R.D. No. 4515; *S & S Glass & Aluminum*, (1993) Ltd., [2002] O.L.R.D. No. 1303; *Lunardo Plumbing Inc.*, [2011] O.L.R.D. No. 1601; *Tenaquip Ltd.*, [1997] OLRB Rep. July/August 742; *Bytown Electrical Services Ltd.*, [1996] OLRB Rep. September/October 721; *Delta-Rae Homes, a Division of 1138319 Ontario Inc.*, [2007] O.L.R.D. No. 1637; *A-1 Superior Paving and Concrete Works Company Inc.*, [2010] O.L.R.D. No. 117; *Ellis Glass and Mirror Ltd.*, [2006] O.L.R.D. No. 3007; *Communications, Energy and Paperworkers Union of Canada*, [1995] O.L.R.D. No.

216. These cases set out the principles to be applied in cases of this sort. The determination is, of course, fact specific. On the facts of this case there has been no employer initiation.

21. In the result, there is no basis to the Union's s.63(16) complaint. The ballot box has been sealed. The Registrar is directed to open the ballot box and to determine the outcome of the ballot.

22. I am seized.

“Christopher J. Albertyn”  
for the Board