The Labour Relations Board
Saskatchewan

CONSTRUCTION WORKERS UNION, LOCAL 151, Applicant v. NICOLE WILSON and WESTWOOD ELECTRIC LTD., TERCON INDUSTRIAL WORKS LTD., PYRAMID CORPORATION, WILLBROS CONSTRUCTION SERVICES (CANADA) L.P. and CANONBIE CONTRACTING LTD ., Respondents

LRB File No. 049-13, May 28, 2013
Chairperson, Kenneth G. Love, Q.C.; Members: Mr. Hugh Wagner and Mr. Ken Ahl

For Applicant Union: Mr. Richard Steele and Mr. David de Groot
For Respondent Employer: Mr. Drew Plaxton

Reconsideration – Application for Summary Dismissal – Union seeks reconsideration of Board decision dismissing application for summary dismissal of application by Respondent Wilson alleging that Union is "Company Dominated Organization"

Reconsideration – Board considers application for summary dismissal *in camera* – Following consideration Board dismisses application for summary dismissal – Board provides no reasons for dismissal of summary dismissal application. Union requests reconsideration of Board's dismissal.

Reconsideration – Board considers criteria for reconsideration – Finds reconsideration not required – Board Order contained error in reference to Section 18(p) of *Act* – Board corrects Order pursuant to Section 19(4) of the *Act*.

Correction of Error in Board Order – Board issues corrected Order.

The Trade Union Act, ss. 26.5 and 42

REASONS FOR DECISION

Background

[1] **Kenneth G. Love Q.C., Chairperson:** In these proceedings, the Construction Workers Union, Local 151 (the "Union") seeks reconsideration of a Board Order made February 21, 2013, which Order dismissed the Union's application for summary dismissal.

[2] The Respondent Wilson ("Wilson") filed an application with the Board on January 14, 2013 (LRB File No.: 005-13). On February 21, 2013, the Union filed an application for summary dismissal with the Board (LRB File No.: 022-13). The Board considered this

application for summary dismissal *in camera* and issued an Order dismissing the application on February 21, 2013. No reasons were given for that dismissal.

Decision

[3] For the reasons that follow, the application for reconsideration need not be considered by the Board. If reconsideration had been necessary, the Board would have granted the reconsideration request. The Board will utilize its authority under Section 19(4) to correct the Order of the Board issued in this case, as well as companion Orders issued on LRB File Nos.: 019-13 & 028-13 to delete the reference therein to Section 18(p) of the *Act*. New corrected Orders will issue.

Positions of the Parties

[4] The Union argued that:

1. The Order of the Board dismissing the application for Summary Dismissal is tainted by a breach of natural justice;
2. The Order of the Board dismissing the application for Summary Dismissal has operated in an unanticipated way and has had an unintended effect on its particular application; and
3. The Order contains, or is a result of, the Board committing substantial errors of law.

[5] The Respondent, Wilson argued that the Board, having reached its decision *in camera* to dismiss the Union's application, was *functus officio* and had no authority to amend the Order as made. Ms. Wilson also argued that the threshold tests for reconsideration had not been met.

Relevant Statutory Provisions:

[6] The relevant provisions of *The Trade Union Act*, R.S.S. c.T-17 (the "*Act*"), are as follows:

> *5 The board may make orders:*
>
> *…*

> *(j) amending an order of the board if:*
>
> *(i) the employer and the trade union agree to the amendment; or*
> *(ii) in the opinion of the board, the amendment is necessary;*
>
> *. . .*
>
> *19(4) The board may at any time correct any clerical error in any order or decision made by the board or any officer or agent of the board.*
>
> *. . .*
>
> *42. The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.*

Analysis and Conclusion:

[7] The Board has recently reviewed the test it utilizes in respect of applications for summary dismissal. In its decision regarding applications made by various employers to summarily dismiss amendment and successorship applications made by various Unions,[1] ("*KBR Wabi*") the Board reviewed and revised the test to be applied by the Board on applications for summary dismissal.

[8] The Board first enunciated a test to be utilized for summary dismissal applications in *Beverley Soles v. Canadian Union of Public Employees, Local 4777 and Parkland Health Region,*[2] (hereinafter "*Soles*"). However, as a result of an analysis of the test by Mr. Justice Popescul (as he was then) in *Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers, Local 1985 v. Saskatchewan Labour Relations Board*[3] ("*Tercon*"), the Board restated the test to be applied as follows:[4]

> *[79] Taking all of this into consideration, we adopt the following as the test to be applied by the Board on the exercise of its authority under s. 18(p) of the Act.*

---

[1] *KBR Wabi Ltd., KBR Canada Ltd. & KBR Industrial Canada Co. v. IBEW, Local 529 et al.*, LRB File Nos.: 188-12, 191-12, 192-12, 193-12, 198-12, 199-12, 200-12, & 201-12.
[2] [2006] Sask. L.R.B.R. 413, LRB File No.: 085-06.
[3] [2011] S.J. No 671, 2011 SKQB 380, 378 Sask. R. 82, 210 C.L.R.B.R. (2d) 35 at para. 108.
[4] *Supra* footnote 1 at paragraph 79 et seq.

> 1. *In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant proves everything alleged in his claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
>
> 2. *In making its determination, the Board may consider only the application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim.*

[9] The Board then went on to consider how the discrete powers given to it by Sections 18(p) and (q) should be utilized. At paragraphs [85] *et seq*, the Board says:

> *[85] As noted in paragraph [63] above, there have been some procedural issues surrounding the use of applications for summary dismissal. For the benefit of the Labour Relations community, we believe that it is important that, along with the restatement of the Soles test as outlined above, we provide guidance regarding how an application for summary dismissal should be made.*
>
> *[86] Given the procedure outlined above, it is clear that the Soles process is intended to be an in camera process, with the first hurdle being a determination that the matter is one which the Board thinks can conveniently be dealt with in camera. If the Board determines that the matter is not one which can conveniently be dealt with in camera, then the application for summary dismissal would require a viva voce hearing before a panel of the Board and the application under section 18(q) would be dismissed.*

[10] When the panel of the Board considered this matter *in camera*, it considered firstly, if the matter was one which should be or could be conveniently dealt with *in camera*. The panel determined that it was not a matter which should or could conveniently be dealt with *in camera*. It was, therefore dismissed.

[11] Unfortunately, when the Order dismissing the application was issued, the form of order used was the form previously (i.e.: prior to the Court of Queen's Bench decision in *Tercon*). That is, the form referenced both s. 18(p) and (q). Given the analysis by the Board in *KBR Wabi*, the reference to s. 18(p) was an error made by the Board in the issuance of that Order. It will be corrected utilizing the Board's authority to correct such errors contained within s. 19(4) of the *Act.*

[12] Accordingly, the application for summary dismissal was dismissed, only insofar as its eligibility to be considered *in camera*, is not dismissed on its merits. Accordingly, as was the expectation of the Board, the matter of the Board's authority under s. 18(p) remains alive and may be considered at the outset of the *viva voce* hearing.

[13] In light of our determination above, we need only consider the issue of reconsideration, in the event that our reasoning above should be in error. In the alternative, for the reasons which follow, we would have granted the Applicant's request that the matter be reconsidered by us in a hearing set for that purpose.

[14] The Board's jurisprudence in respect of reconsiderations is well established. First, an applicant must make out a case for reconsideration on one of the grounds set out by the Board. If the applicant makes out a case for reconsideration, then the Board undertakes a review of that decision on the ground as established.

[15] The Board has consistently applied the same stringent test in determining whether or not a reconsideration application should be allowed. As set out by the Board in *Grain Services Union v. Saskatchewan Wheat Pool et al.*[5]

> *A request for reconsideration is not an appeal or a hearing de novo, nor is it an opportunity to reargue a case, raise new arguments or present new evidence, but rather, it generally allows important policy issues to be addressed, such as evidence to be presented that was not previously available, or errors to be corrected.*

[16] The reason why such a stringent test is applied by the Board was set out in *City of North Battleford v. Canadian Union of Public Employees, Local 287.*[6]

> *…the policy behind such a restrictive approach to reconsideration is to accord a serious measure of certainty and finality to the decisions of the Board, while affording "a fulsome degree of flexibility to respond to exigencies of fact and circumstance which may militate against the continued governance of determinations earlier made.*

[17] The criteria consistently reviewed and applied by the Board on an application for reconsideration are set out in *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et a*l.[7]

> *Though the Board has the power under Section 5(i) to reopen decisions it has arrived at, this power must be exercised sparingly, in our view, and in a way which will not undermine the coherence and stability of the relationships which the Board*

---

[5] [2003] Sask. L.R.B.R. 454, LRB File No.: 003-02, at 456.
[6] [2003] Sask. L.R.B.R. 288, LRB File No.: 054-01, at 291.
[7] [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. : 132-93, at 107-108.

seeks to foster. In a comment on an application for reconsideration of a decision of the British Columbia Labour Relations Board in Corporation of the District of Burnaby v. Canadian Union of Public Employees, [1974] 1 Can. L.B.R. 128, at 130, the Board asserted that "speed and finality of decisions are especially imperative in labour relations. Of no area of law is it truer to say that justice delayed is justice denied.

In the three jurisdictions we have alluded to above - Canada, British Columbia and Ontario - the recognition of the need to balance the claim for reconsideration against the value of finality and stability in decision-making is reflected in the procedures adopted by labour relations tribunals. In all of them, the procedure followed in connection with an application for reconsideration departs from the procedure employed for other kinds of applications. In all three cases, the applicant is required to establish grounds for reconsideration before a decision is made whether a rehearing or some other disposition of the matter is appropriate.

We have concluded that such a two-step approach is appropriate in cases of this kind. We do not agree with counsel for the Employer that we were mistaken in requiring that an applicant who seeks reconsideration of a decision of the Board must persuade us that there are solid grounds for embarking upon that course.

Counsel for the Employer argued that we should adopt the alternative of entertaining a full rehearing of the case, rather than establishing this intermediate stage. He predicted that this would not have the effect of an uncontrolled increase in the number of such applications. It is difficult to see, however, why allowing an automatic trial de novo to a disappointed applicant would not expose the Board to a growing number of applications to rehear cases in which the contest is serious or the stakes high.

In other jurisdictions, particularly in British Columbia, there has been extensive discussion of the criteria which labour relations boards might use to determine whether an applicant has been able to establish that there are grounds which justify the reopening of a decision. In their decision in the case of Overwaitea Foods v. United Food and Commercial Workers, No. C86/90, the British Columbia Industrial Relations Council set out the following criteria:

> *In [Western Cash Register v. International Brotherhood of Electrical Workers, [1978] 2 CLRBR 532], the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRB No. 61/79, [1979] 3 Can LRBR 153), added a fifth and sixth ground:*
>
> > *1. If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
> >
> > *2. if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
> >
> > *3. if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*

> *4. if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,*
>
> *5. if the original decision is tainted by a breach of natural justice; or,*
>
> *6. if the original decision is precedential and amounts to a significant policy adjudication which the Counsel may wish to refine, expand upon, or otherwise change.*

[18] The Applicant argued that the Order had unintended consequences, which is criteria No. 3 above. As noted above, the intention of the Board was that the application not be dealt with as an *in camera* matter, but rather as a matter to be heard in a hearing called for that purpose. That intention was clouded by the Order being issued having reference to both s. 18(p) and (q).

[19] Accordingly, in the circumstances of this case, we would have granted the application and undertaken a review of the decision.

DATED at Regina, Saskatchewan, this **28th** day of **May, 2013.**

LABOUR RELATIONS BOARD

Kenneth G. Love
Chairperson