CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4777, Applicant v. BRADLEY TEICHREB, Respondent

LRB File No. 161-13, November 26, 2013
Chairperson, Kenneth G. Love, Q.C; Members: Mr. Allan Parenteau and Mr. John McCormick

For	Applicant Union:	Ms. Juliana Saxberg
For	Respondent:	No one appearing

Reconsideration – Application for Summary Dismissal of Section 36.1, Duty of Fair representation application denied by Board after oral hearing – Applicant Union seeks reconsideration of Board decision.

Reconsideration – Board considers application for summary dismissal – Following consideration Board dismisses application for summary dismissal – Board finds that previous decision clear and did not operate in an inconsistent and unanticipated way, that is, has had an unintended effect on its particular application – Board determines that decision did not rely on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel – The Board also found that the decision was not tainted by a breach or natural justice nor was it precedential and amounted to a significant policy adjudication which the Board wished to refine, expand upon, or otherwise change.

Reconsideration – Board considers criteria for reconsideration – Finds Applicant does not raise issues which lead the Board to reconsider its decision.

Mootness – Board considers mootness of issue – Applicant subsequently withdrew his application under Section 36.1 – Board finds no live issue which requires reconsideration.

The Trade Union Act, ss. 5(i) and 42.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** In these proceedings, the Canadian Union of Public Employees, Local 4777, (the "Applicant") seeks reconsideration of a Board Order made June 13, 2013, which Order dismissed the Applicant's application to have the Respondent's application under Section 36.1 of *The Trade Union Act,* R.S.S. c.T-17 (the "*Act*") summarily dismissed on jurisdictional grounds. The Board, in its decision of June 13, 2013[1] found that it did have jurisdiction over the matter in dispute.

[2] The Applicant filed his application with the Board on January 17, 2013 (LRB File No. 008-13). At the commencement of the hearing of this matter on May 27, 2013, the Applicant Union raised four (4) preliminary objections which were:

1. The Union argued that the complaint made by the Applicant was not within the jurisdiction of the Board to consider under Section 36.1.
2. That the Applicant had failed to provide particulars which the Union had requested.
3. That the Applicant had not specified any remedy in his application.
4. That one (1) of the Union witnesses, due to a medical problem was unavailable to testify on the day of the hearing.

[3] The Chairperson of the Board sitting as a single panel, pursuant to Section 4(2.2) of the *Act* dismissed the Applicant Union's preliminary objections. Prior to the hearing of the substantive matter, the Respondent withdrew his application under Section 36.1 of the *Act.* The Applicant Union filed for reconsideration of the Board's decision on July 8, 2013. The application was considered by an *in camera* panel of the Board on November 5, 2013.

Decision:

[4] For the reasons that follow, the application for reconsideration is dismissed. The Applicant has failed to satisfy the Board that it should reconsider its decision.

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[1] LRB File No. 008-13, [2013] CanLII 34247 (SKLRB)

Positions of the Parties:

[5] The Applicant argued that the Board erred in its determination that it had jurisdiction to hear and determine the matter pursuant to Section 36.1 of the *Act.* It argued that the Board's decision should be reconsidered pursuant to factors 1, 2, 4, 5 & 6 as set out in *Remai Investment Corporation , operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail Wholesale and Department Store Union et al.*[2]

Relevant Statutory Provisions:

[6] The relevant provisions of the *Act*, are as follows:

> *5 The board may make orders:*
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> *…*
>
> *(j) amending an order of the board if:*
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> *(i) the employer and the trade union agree to the amendment; or*
> *(ii) in the opinion of the board, the amendment is necessary;*
>
> *. . .*
>
> *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's jurisprudence in respect of reconsideration applications 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 those grounds. In this case we are dealing with the first step of that procedure, that is, has the applicant made out a case for reconsideration.

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[2] [1993] S.L.R.B.D. No. 50 (QL), [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. : 132-93, at 107-108.

[8] 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.*[3]

> *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.*

[9] 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.*[4]

> *…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.*

[10] The criteria consistently reviewed and applied by the Board on an application for reconsideration are set out in *Remai Investment Corporation , supra.*[5]

> *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 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.*
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> *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.*

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[3] [2003] Sask. L.R.B.R. 454, LRB File No.: 003-02, at 456.
[4] [2003] Sask. L.R.B.R. 288, LRB File No.: 054-01, at 291.
[5] *Supra*, See Note #2

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:*
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> > *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,*
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> > *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.*
>
> *The fourth and sixth of these criteria reflect the concern of Council* [sic] *with an issue which is of less significance in smaller jurisdictions such as ours, the issue of consistency and coherent development with respect to the articulation of public policy. Where there are numerous panels struck to determine similar cases, the concern for maintaining a uniform approach on matters of principle understandably becomes acute. …*

> *The first and fifth criteria have been the basis of decisions of this Board, both formal and informal through the decision in Westfair Foods, supra, represents the most extensive discussion of these issues. …*
>
> *The second criterion in the list set* [sic] *out above in the quotation from the Overwaitea Foods decision seems to us to be an accurate statement of the standard which must be met if the applicant is to succeed on this application. The application rests upon an assertion that there is evidence which was not put before the Board at the original hearing which would alter their conclusions with regard to the allegations made by Ms. Ruff.*

[11] The Applicant argued that the decision should be reconsidered under criteria 1, 2, 4, 5 & 6. For the application to succeed, the Applicant must convince the Board that its application satisfies one or more of these criteria.

Criterion 1.

[12] The Applicant cannot succeed on this ground unless there was no oral hearing and the matter was decided by the Board *in camera*. This was not the case. A hearing was held on May 27, 2013, at which hearing, the Union was provided full opportunity to make such arguments as it saw fit.

[13] The arguments raised by counsel for the Applicant presume that the Board would look at evidence in support of the application as a part of the summary dismissal process which it initiated at the outset of the hearing. That is not the case. In a summary dismissal procedure, the Board is looking to see, based upon the materials filed by the applicant, whether those materials establish an arguable case. The application is dismissed as failing to meet this criterion.

Criterion 2.

[14] Criterion 2 is similar to Criterion No. 1 except in this criterion, a hearing has been held, but the Applicant alleges that certain crucial evidence was not adduced for good and sufficient reason. Again, the summary dismissal procedure does not contemplate that evidence will be called since it relies upon the application filed, any particulars furnished pursuant to demand and any document referred to in the application. This test for summary dismissal was

restated by the Board in *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 529 et al. v. KBR Wabi Ltd. et al.*[6]

[15] The application is dismissed as failing to meet this criterion.

<u>Criterion 4.</u>

[16] This is the principal ground for the application for reconsideration, which is the Board erred in assuming jurisdiction over the complaint of Mr. Teichreb. The Applicant alleges that the Board has misconstrued or misapplied its jurisdiction under the *Act* and questions of law related to the application. The Board has held, however, that this criterion is of less significance in Saskatchewan due to the fact that the structure of the Board comprises of only the Chairperson and one Vice-Chairperson such that disharmony in decisions is less likely to apply and require the Board to reconsider and confirm certain policy adjudications over others, or to ensure a consistent application of the law in all cases.

[17] As noted by the Board in *Remai Investment Corporation, supra*:[7]

> *The fourth and sixth of these criteria reflect the concern of Council* [sic] *with an issue which is of less significance in smaller jurisdictions such as ours, the issue of consistency and coherent development with respect to the articulation of public policy. Where there are numerous panels struck to determine similar cases, the concern for maintaining a uniform approach on matters of principle understandably becomes acute. …*

[18] The Applicant argued that the decision was a departure from the Board's established jurisprudence with respect to Section 36.1 and was in conflict with decisions of the Saskatchewan Court of Queen's Bench and the Saskatchewan Court of Appeal. The Board stands by its determinations of law and policy as set out in the decision. In its decision, the Board considered the cases cited by the Applicant Union and dismissed those arguments. The Applicant Union now seeks to appeal the Board's ruling this that regard. This is not the purpose of a reconsideration. As noted by the Board in *Grain Services Union, supra:*[8]

> *A request for reconsideration is not an appeal or a hearing <u>de novo</u>, 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*

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[6] LRB File Nos. 188-12, 191-12 to 193-12, 198-12 to 201-12.
[7] *Supra*, see note #2.
[8] *Supra*, see note #3.

> *evidence to be presented that was not previously available, or errors to be corrected.*

[19] The application is dismissed as failing to meet this criterion.

Criterion 5.

[20] The Applicant Union argues that by summarily dismissing its preliminary objections and summary dimissal application, that the Board denied it a proper hearing under the rules of natural justice. With respect, we cannot agree with this characterization of the process followed by the Board.

[21] Summary dismissal of an application is an extraordinary remedy, something which is not routinely granted unless the application fails to meet the arguable case standard. The Applicant Union had full opportunity to provide argument to the Board, but failed to convince the Board that an arguable case had not been made out by the Respondent.

[22] The application is dismissed as failing to meet this criterion.

Criterion 6.

[23] The Applicant finally argues that the decision constitutes a significant policy adjudication which the Board may wish to refine, expand upon, or otherwise change. We see nothing in the decision as being a significant adjudication which we would wish to refine, expand upon or otherwise change.

[24] This Board has consistently found that applications that alleged that various employers dominated the Union were not well founded and have consistently dismissed those allegations due to the failure of the applicants to show an arguable case. Those decisions have been judicially reviewed and upheld by the Saskatchewan Court of Queen's Bench.

[25] The application is dismissed as failing to meet this criterion.

Is the Applicant's application Moot?

[26] On September 23, 2013, the Applicant withdrew his application under Section 36.1. Nevertheless, the Union proceeded to file arguments with respect to its application for reconsideration. The Respondent made no Reply to those arguments nor did it make submissions to the Board with respect to the application for reconsideration. As a result of this withdrawal of the application, does this render the application by the Applicant Union moot?

[27] The Board dealt with a question of mootness in *Lisoway v. Canadian Union of Public Employees, Local 3078*.[9] In that case, the Board declined to deal with an issue which had been rendered moot. In that decision, the Board quoted from the Supreme Court of Canada decision in *Borowski v. A.G. Canada,*[10] which decision provided the following guidance regarding moot issues:

> *The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision.*

[28] In this case, the determination of this issue will not resolve any issue between the parties and will have no practical effect. The Applicant Union argues that the Board's decision is precedential and is in error and should, therefore, not be permitted to stand. Again, we disagree. Since we have determined that there are no grounds on which the matter may be reconsidered, the decision will stand. In the circumstances, we would declare the question to be moot.

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[9] [2005] CanLII 63084, LRB File No. 047-04.
[10] [1989] CanLII 123 (S.C.C.), [1989] 1 S.C.R. 342 (S.C.C.).

Decision:

[29] For these reasons, the application for reconsideration is dismissed. An Order dismissing the application will accompany these reasons.

DATED at Regina, Saskatchewan, this **26th** day of **November, 2013.**

LABOUR RELATIONS BOARD

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Kenneth G. Love, Q.C.
Chairperson