NICOLE Y. WILSON, Applicant v. THE CONSTRUCTION WORKERS UNION (CLAC), LOCAL 151 and WESTWOOD ELECTRIC LTD., Respondents

LRB File No. 222-13 December 6, 2013
Chairperson, Kenneth G. Love, Q.C; Members: Mr. Greg Trew and Ms. Shawna Colpitts

For	Applicant Nicole Wilson:	Mr. Drew Plaxton
For	Respondent Union:	Mr. Richard Steele and Mr. David de Groot
For	Respondent Westwood Electric Ltd.	Mr. Larry Seiferling, Q.C.

Reconsideration – Application for Summary Dismissal of Company Dominated application allowed by Board after oral hearing – Applicant 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 of 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.

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

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: In these proceedings, Nicole Wilson, (the "Applicant") seeks reconsideration of a Board Order made July 31, 2013, which Order dismissed

the Applicant's application to have The Construction Workers Union, Local 151 (the "Union") declared to be a "company dominated organization" as defined in Section 2(e) of the *Act.* [1]

[2] The Applicant filed her 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). On July 31, 2013,[2] the Board granted an application by the Union and the Respondent, Westwood Electric Ltd. ("Westwood") summarily dismissing the Applicant's application in respect to her allegations that the Union was a "company dominated organization". The Applicant then brought this application for reconsideration of that dismissal decision.

Decision:

[3] 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.

Positions of the Parties:

[4] The Applicant argued that:

1. In its decision in *KBR Wabi Ltd. Re:*[3] the Board reformulated its test for summary dismissal. In doing so, the Applicant argued, the Board set a standard higher than the previous standard for review. The Applicant argued that the standard should be returned to the former standard.

2. The Applicant also argued that the Board had erred its interpretation of the law with respect to:

   (a) denying the Applicant status to bring her application that the Union was a "company dominated organization";

   (b) by restricting applications for determination of whether a union is a "company dominated organization" to the time when a union is seeking certification;

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[1] *The Trade Union Act, R.S.S. 1978 c. T-17.*
[2] LRB File No.: 005-13; [2013] CanLII 47053 (SK LRB).
[3] LRB File Nos.: 188-12, 191-12 to 201-12, decision dated May 10, 2013.

(c) denying that the Board had jurisdiction with respect to deduction and remittance of dues; and

(d) by refusing to deal with issues related to Collective Bargaining Agreement terms negotiated between the parties.

3. The Applicant argued that it was denied the opportunity to adduce evidence due to the application having been summarily dismissed.

4. The Applicant argued that the decision was tainted by a denial of natural justice.

5. The Applicant argued that the decision was precedential and amounted to a significant policy adjudication which the Board may wish to refine, expand or otherwise change.

6. The Applicant argued that the decision constituted a significant and unwarranted departure from previous jurisprudence of the Board, which departures are contrary to the intent and provisions of the *Act*.

[5] The Union argued that:

1. The application was made as an attempt to re-litigate the previous applications.

2. The application did not satisfy any of the criteria identified by the Board which would justify the Board reconsidering its decision.

3. That the Board made no errors of law which are required to be corrected or reviewed.

[6] Westwood argued that:

1. Westwood argued that the decision was correct insofar as it found that there was no evidence that Westwood dominated the Union.

2. The purpose of the criteria established by the Board for reconsiderations was to prevent a flood of applications which were unwarranted, were

attempts to appeal a decision of the Board, or to relitigate by a *de novo* proceeding.

3. That none of the criteria established by the Board were satisfied by this application, noting that criteria 4 & 6 had less significance in Saskatchewan due to it being a smaller jurisdiction.

4. That the Board should not reconsider its decision in KBR Wabi as an adjunct to this application for reconsideration.

Relevant Statutory Provisions:

[7] The relevant provisions of 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;*
>
> *. . .*
>
> *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:

[8] 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.

[9] 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.*[4]

> *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.*

[10] 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.*[5]

> *…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.*

[11] 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.[6]

> *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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4 [2003] Sask. L.R.B.R. 454, LRB File No.: 003-02, at 456.
5 [2003] Sask. L.R.B.R. 288, LRB File No.: 054-01, at 291.
6 [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. : 132-93, at 107-108.

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:*
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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,*
> >
> > *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 e 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.*

[12] The Applicant argued that the decision should be reconsidered under criteria 2, 3, 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 2.

[13] The Applicant argued that it was estopped from providing relevant evidence in support of its position that the Union was a "company dominated organization" because of the Board's ruling that the application should be summarily dismissed. The Union and Westwood argued that there could have been no evidence provided on the summary dismissal application because the matter was dealt with by way of oral arguments without any evidence.

[14] The arguments raised by counsel for the Applicant presumed that the Board would look at evidence in support of the application as a part of the summary dismissal process. 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. At paragragh [37] *et seq* of the Board's decision in this matter, the Board made a careful analysis of the pleadings of the Applicant to determine if an arguable case could be made out. The majority of the Board determined that these materials failed to disclose an arguable case. There was no need for evidence to be called in these circumstances.

[15] We agree with the counsel for the Union and the Respondent that the summary dismissal process does not contemplate that evidence will be called, therefore, the Applicant

cannot now suggest that there was "crucial evidence which was not adduced, for good and substantial reason". The application is dismissed as failing to meet this criterion.

Criterion 3.

[16] Criterion 3 is that the Board Order has operated in an unanticipated way or has had an unanticipated impact on this particular application. The short answer is that it has not operated in an unanticipated way or has had an unanticipated impact on this particular application. The Board intended to summarily dismiss the application for failing to disclose an arguable case and the Order achieved that result. The application is dismissed as failing to meet this criterion.

Criterion 4.

[17] This is the principal ground for the application for reconsideration. The Applicant alleges that the Board has misconstrued or misapplied questions of law related to the application. The Union and Westwood argue that this criterion is of less significance in Saskatchewan due to the fact that the structure of the Board is composed 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.

[18] We agree with the Union and Westwood in this regard. As noted by the Board in *Remai Investment Corporation, supra:*

> *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.*

[19] The *Act* [7] requires that panels of the Board must consist of three members, at least one of whom must be the Chairperson or a Vice-Chairperson. Therefore, in Saskatchewan, the only conflict can be between decisions made by panels composed of those

[7] *Supra,* See Note #1.

chaired by the Chairperson versus those composed of members chaired by a Vice-Chairperson. This limits considerably any conflicts that may arise.

[20] The Applicant brought forward no conflicting decision of law or policy which it argued the Board should clarify by reconsideration. The Applicant rather, argued that the Board had erred in its interpretation of the law or policy in the present case. The Board stands by its determinations of law and policy as set out in the decision. Absent the demonstration of an obvious error in its interpretation, there is no error which needs to be corrected by reconsideration. The proper approach, if the Applicant feels the Board has erred, is to seek judicial review of the decision, which the Applicant has already done. The application is dismissed as failing to meet this criterion.

Criterion 5.

[21] The Applicant also argues that by summarily dismissing her application, the Board has denied her a proper hearing under the rules of natural justice. With respect, we cannot agree with this characterization of the process followed by the Board.

[22] 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 argues that the Board's restatement of the test to be applied as set out in *KBR Wabi Ltd. Re:*[8] raised the bar for Applicants. They argued that the test required that the Applicant have a level of knowledge of the alleged breaches of the *Act*, which level of knowledge they were unable to achieve due to the nature of the allegations.

[23] The Applicant argued that *KBR Wabi* decision should itself, as an adjunct to these proceedings, be reconsidered and the previous standard adopted by the Board in *Beverley Soles v. Canadian Union of Public Employees, Local 4777 and Parkland Health Region.*[9] Again, with respect, we cannot agree. No application for reconsideration of the *KBR Wabi* was made by any of the parties to that decision. The Applicant was not a party to those proceedings.

[8] *Supra,* See Note #5
[9] [2006] Sask. L.R.B.R. 413, LRB File No. 085-06.

[24] In *KBR Wabi*, *supra*, the Board took great trouble to review its previous jurisprudence as well as the comments of Mr. Justice Popescul (as he was then) in his decision on judicial review[10] of the Board's decision in *Tercon.*[11] At paragraphs 108 - 110 he says:

> *[108] The power to summarily dismiss and the power to decide matters without oral hearing are two distinct powers that are not necessarily dependent on one another. It appears that the panel in Re Soles mistakenly confused the concepts of summary dismissal and deciding matters without granting an oral hearing. The former relates to dismissing summarily due to "no arguable case" or "lack of evidence", whereas the latter permits the board to decide matters without an "oral hearing" (i.e. the SLRB may choose to accept only written submissions on an issue). Consequently, I question whether this second prong of the Re Soles test is necessary and constitutes an accurate interpretation of the enabling legislation. Once the SLRB finds that an application does not "establish an arguable case", is it necessary to go the additional step and decide whether it is an "appropriate case to summarily dismiss the applicant's application without oral hearing" – or has that already been decided when determining the first prong? However, given that the parties have not had an opportunity to squarely address this issue and given that the outcome of this case does not turn on this point, whether or not the second prong of the test set out in Re Soles is necessary can be decided at another time. In any event, the Chair Love Panel determined that the second prong of the test had also been satisfied even though taking this step, in my view, was unnecessary. The bottom line is that the result is not affected.*
>
> *[109] Also, Re Soles suggests that the material that must be assessed when deciding whether the application discloses an "arguable case"is "... the application and/or written submission", however considering written submissions as part of the assessment process is troubling. To do so would lead to a commingling of "pleadings" with "arguments" that could cause confusion and uncertainty. Having the "submissions" of counsel, be it written or oral, morph into a pleading upon which parties rely to define the issues would be an unjustifiable distraction that could lead to unfairness. A more conceptually appropriate approach, at this stage, might be to restrict the assessment analysis to considering the applications, the particulars, documents referred to therein and other documentation of this kind. Here, however, the nature and scope of what was considered is without significance because the Chair Love Panel interpreted the "written submissions filed" to be the "particulars". At para. 166, he states that the SLRB will base its assessment on "... the application and/or written submissions filed (in this case the particulars) ...".*
>
> *[110] Accordingly, notwithstanding the misgivings that I have in relation to the precise way the summary dismissal test was stated, even though the parties expressly agreed that it was the "correct test", it was stated sufficiently such that any misstatements respecting the test do not affect the outcome of this decision.*

[25] The Board is satisfied with the restatement of the test to be applied on summary dismissal and sees no reason to reconsider its decision in KBR Wabi as a part of this litigation.

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[10] [2011] S.J. No 671, 2011 SKQB 380, 378 Sask. R. 82, 210 C.L.R.B.R. (2d) 35 at para. 108.
[11] [2011] CanLII 8881 (SKLRB).

[26] The Union and Westwood also argued that this application also was an attempt by the Applicant to re-litigate the issues raised in the "company dominated organization" application. In that regard, the Union noted a comment by Mr. Justice Zarzeczny on attempts by IBEW, who is the sponsor of the Applicant in this case, to re-litigate issues already determined by this Board. At paragraph [17] of his decision in *International Brotherhood of Electrical Workers, Local 529 et al v. Construction Workers Union (CLAC) Local 151 et al,*[12] he says:

> *When one examines the materials filed upon the current application before the court one is left with no other conclusion but that this application reflects a skillful attempt at re-framing and re-characterizing the issues which have now been considered by the Board and this Court upon judicial review in the J. VD. #1 and #2 and Tercon cases. The Applicant continues to seek intervention to raise issues and positions that have been extensively considered and conclusively decided by the Board and this Court. The applicant simply seems not prepared to accept the results in those decisions.*

[27] This comment was considered and applied by the majority in the case under consideration. The issue of company dominance of various employers by the Union has been the subject of numerous Board decisions and decisions of the Court of Queen's Bench. As noted by Mr. Justice Zarzeczny, the applicant simply seems not prepared to accept the results in those decisions.

[28] The Applicant was permitted full opportunity to respond to the application for summary dismissal and made full argument before the Board regarding the matter. The decision went against the Applicant. There was, in our opinion, no breach of the rules of natural justice concerning this application or the decision arising out of it. The application is dismissed as failing to meet this criterion.

Criterion 6.

[29] 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.

[12] [2013] SKQB 273, decision dated July 15, 2013.

[30] This Board has consistently found that applications which 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. The application is dismissed as failing to meet this criterion.

Decision:

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

Dissent

Member, Shawna Colpitts, dissents for the following reasons:

[32] I respectfully dissent from the majority decision in the matter of this reconsideration consistent with my prior dissent in the original decision.[13]

DATED at Regina, Saskatchewan, this **6th** day of **December, 2013.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

[13] LRB File No.: 005-13; [2013] CanLII 47053 (SK LRB).